The ongoing struggle of multinational groups of companies under the EC Insolvency Regulation.

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1. The Eurofood decision

The Insolvency Regulation, enacted in 2002, does not contain specific rules concerning the reorganization or insolvency of multinational groups of companies. If insolvency proceedings are opened against a company that is in some way related to another company the former company is considered to be a separate debtor in accordance with the rule that every legal person is a single debtor under the application of the Insolvency Regulation. Therefore, the system requires that any legal person in any Member State must be considered separately with regard to the question of where the “centre of main interests” is located, even if sole-shareholder or majority shareholder relationships exist between some of them and in addition there are strong economic, financial or personal (union) ties between them. The “centre of main interest” (COMI) of a debtor company determines the international jurisdiction of the courts of the Member States that are empowered to open insolvency proceedings. COMI “should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties”, as Recital 13 puts it, but in the absence of proof to the contrary

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1 For a consolidated version of the Insolvency Regulation and its Annexes, as per August 2008, see www.bobwessels.nl, weblog: 2008-09-doc9.
Article 3(1) of the Insolvency Regulation (InsReg) assumes that the registered office of a company or legal person is the centre of main interests. The Regulation “presumes, unless proved to the contrary, that the debtor’s centre of main interests is the place of his registered office. This place normally corresponds to the debtor’s head office.”

In the much reported case of Eurofood, in determining the COMI of a debtor company, the European Court of Justice (ECJ) held that it followed that the presumption in favour of the registered office of that company could be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation existed which was different from that which locating it at that registered office was deemed to reflect. The ECJ made it clear that, where a company carries on its business in the territory of the Member State where its registered office is situated, “the mere fact that its economic choices are or can be controlled by a parent company in another Member State” is not enough to rebut the presumption laid down by that Regulation. Moss and Smith interpret the quoted words in the Virgós/Schmit Report, nr. 75 (“that the debtor’s centre of main interests is the place of his registered office. This place normally corresponds to the debtor’s head office.”) to mean that any evidence designed to show that the COMI is in a Member State other than that in which the registered office is located, must demonstrate that the head office functions were carried out in that other State. They submit that it is more appropriate to focus on where the head office functions are carried out rather than on the location of the head office, suggesting that the place in which “head office functions” are carried out will be the place where activities such as strategic, executive and administrative decisions regarding accounting, IT, corporate marketing, branding etc., are performed.

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2 Virgós / Schmit Report (1996), nr. 75. The Report is generally accepted as an authoritative source of interpretation of the Insolvency Regulation.
2. Head office functions approach spreads over Europe

In several European court cases the “head office functions” approach has been followed to determine COMI. See the following examples from Germany, England, France and the Netherlands.

Hettlage AG & Co KG, the debtor, was a company registered in Austria and was a 100% subsidiary of Hettlage KgaA, registered in Germany. The District Court Munich held: (i) that the German court of the registered office of the parent company had international jurisdiction to open main insolvency proceedings against subsidiaries abroad, if the actual location of economic interests (“tatsächliche Verwaltungsort der Wirtschaftlichen Interessen”) and therefore the centre of the debtor’s main interests in the meaning of Article 3(1) was at the registered office of the parent company, (ii) the centre of main interests of a subsidiary abroad would be presumed to be the place of the domestic company if the latter delivered services such as purchasing, sales, marketing, personnel and accounting as part of the operational business, (iii) by concentrating these tasks at the place of the registered office of the parent company (“Konzernsitz”, in Munich, Germany) the presumption of Article 3(1), second sentence, that the registered office of a company shall be presumed to be the centre of main interests in the absence of proof to the contrary (Innsbruck, Austria) was rebutted.

Early 2008 another German court followed the same path. The PIN Group AG S.A. (“PIN Parent”), is a holding company of the whole PIN group, which is one of the strongest competitors of Deutsche Post, dealing with private postal delivery and its amenities. PIN Parent was recorded in the Registre de Commerce et des Sociétés of Luxembourg, which is also its statutory seat. PIN Parent was responsible for the planning and constituting of the group policy, especially concerning the Management & Accounting) strategy of the group. Until December 2007, all functional entities were based in Luxembourg. Near the end of December 2007 the shareholders appointed a CEO (Chief Executive Officer) and a CRO (Chief Restructuring Officer), who both had their business domicile in Germany. These functions

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are new to PIN Parent. Also two other members of the board of directors (“Verwaltungsrat”) were appointed. Between the end of December 2007 and the end of January 2008 all statutory books, all personnel files and other substantial documents were transferred to an office in Cologne, which were sublet from the CRO. Now, with top management based in Cologne, the board of directors launched an executive committee (“Lenkungsausschuß”), which held its meetings regularly and exclusively in Cologne. In addition: finance/controlling functions and human resources all were transferred to Cologne, leaving a small, unimportant department and a registry to forward mail in Luxembourg. The District Court of Cologne considered it had international jurisdiction, determining that COMI is in Germany because all head office functions (management, control, marketing, communications etc.) were performed in Germany, which – thus the court - all was well ascertainable for creditors, employees of other companies of the concern or other contractual partners.

An example from England is the Collins & Aikman case. The Collins & Aikman Corporation Group consists of one company incorporated in Luxembourg, six in England, one in Spain, one in Austria, four in Germany, two in Sweden, three in Italy, one in Belgium, four in The Netherlands and one in the Czech Republic. The Collins & Aikman Group had its headquarters in Michigan, USA, and was a leading global supplier of automotive component systems and modules to the world’s largest vehicle manufacturers, a combined workforce of approximately 23,000 employees and a network of more than 100 technical centres, sales offices and manufacturing sites in 17 countries throughout the world. In Europe it operated 24 facilities in the countries mentioned with around 4,500 staff. The US operations of the Group went into Chapter 11 proceedings in the United States in May 2005. The High Court in London considered recital 13 to the Insolvency Regulation and several English court decisions regarding the issue of the centre of main interests and stated that in order to rebut the presumption that the relevant place is the place of incorporation, “…. it will be necessary to show that “the head office functions” are carried out in a member state other than the state in which the registered office is situated.” The evidence from the companies (probably no other evidence was taken into account) was that the main administrative functions relating to the European operations had since 17 May 2005 been carried out from England including cash-coordination, pooling bank accounts from

London, HR, IT, engineering and design and sales. The submission and evidence was that the registered office of each of the companies was in England and there was no material which would rebut the presumption that England and Wales was the centre of main interests of each of the companies. The court was satisfied on the evidence that the centre of main interests for each of the companies, apart from the English companies, were not related to the location of their respective registered offices.8 In June 2008, the High Court of Justice decided regarding Lennox Holdings PLC and two Spanish subsidiaries and considered within the context of the Eurofood decision: “What I should concentrate on is the head office functions of the two Spanish companies. It is, I should say, clear that the two Spanish companies do carry on business in the member state where their registered offices is situated and consequently the ‘mere fact,’ that its economic choices are or can be controlled by a parent company is not enough to rebut the presumption. That is not what is relied on in the present case. It is not control by a parent company that is relied on in the present case. It is control of the companies themselves by their boards of directors.” The relevant facts of the case at hand related to strategic, operational and management being conducted from England, with the court concluding: “[t]hus the financing of the company, its major decisions and the administration of the company itself is conducted in this country and through English suppliers, English directors and with English funding.” Without any doubt the most stretched interpretation COMI until now.

In France, in February 2005, the Commercial Court of Nanterre noted that the courts of Member States had applied the concept of “headquarters functions” in determining COMI. It considered that, in the context of a group of companies, the concept of “head-office functions” should be used to determine the location of the company’s COMI.9 A fine example also is to be found in the case of Eurotunnel, where the Paris Commercial Court adopted a similar approach. Eurotunnel PLC is a holding company under English law, with registered office in England. Together with Eurotunnel SA, a French company, it is one of holding companies of the

Eurotunnel Group, with subsidiaries in Spain, Germany, Belgium and the Netherlands. Because of ongoing financial difficulties representatives of seventeen companies, including Eurotunnel PLC filed a request on 11 July 2006 for the opening of “sauvegarde”-proceedings. The court referred to the Eurofood judgment and applied on good grounds an autonomous – unrelated to national laws – interpretation. The court then considered that several facts and circumstances proved that the COMI of the various companies was in France, including (i) strategic and operative management of the group of companies is discharged by a joint council, based in Paris, comprising only French citizens, (ii) managing finances and accounting takes place in France, (iii) the majority of the activities, employees and assets are located in France, and (iv) all negotiation on debt restructuring took place in Paris.

Mid 2008 for the Belvédère group, a French company including six subsidiaries with registered seats in Poland, a similar decision with regard to the COMI of the Polish companies was given.

Finally, a recent case from the Netherlands, relating to a Dutch holding-company, with subsidiaries in Belgium and Germany. The District Court in Roermond, November 2008, rebutrs the presumption, laid down in Article 3(1) InsReg. The non-Dutch companies are part of the Henzo-concern which is directed (“geleid en aangestuurd”) from Holland, more specifically Henzo Internationale Group BV located in Roermond, which is also reflected in the consolidated accounts of 2006. The Court considers, that these companies are sales-companies with 4 to 8 employees working on selling-orders and directly reporting to their sales-managers, working in NL. The orders are handled in NL, including delivery of customers. The production activities never have taken place in Belgium and in Germany only till 2003. Since then the are performed in NL and China, directed from NL. The Court furthermore decides: “In Belgium the subsidiary only has a postal address after its showroom has been closed, whilst in Germany the sub was located in an office building which has been vacated. In fact in Belgium there is only a postal

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address at the place of its statutory seat. In the line of these developments the employees work from their home addresses and have laptops and cell phones. Furthermore direction (“aansturing”) of the employees is done by the board in Holland, comprised of O, the managing board member of the Belgium company, and J, the managing board member from the German companies.” For these reasons the Court held that COMI of all companies is in the Netherlands.12

3. Head office functions approach: justified by the Insolvency Regulation?

The “head office” approach will have several benefits, including fewer procedural costs and a transparent method of tracing assets, due to the availability of all the group’s documents, and improving the possibility of selling (parts of) the business which economically form one business, but are legally broken down into several legal entities.13 However, it is my opinion that the head office functions theory does not flow from the (interpretation of) the text, the history and the system of the Regulation.14 The validity of the interpretation is put into question, whilst the quoted words from the Virgós / Schmit Report only explain the logic of the choice for the presumption of Art. 3(1), second sentence InsReg and do not present an independent criterion for determining COMI (Art. 3(1), first sentence InsReg. The suggested meaning of the place “where the head functions are carried out” furthermore goes beyond the context of the COMI, being Recital 13: COMI as connecting factor is the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties (underlining added; Wess.). The theory (“head office functions”, “parental control doctrine”, “mind of management approach”), with emphasis on typical issues of group structure and

12 District Court of Roermond 17 November 2008, JOR 2009/55.
14 The validity of this interpretation has been questioned, whilst the quoted words from the Virgós / Schmit Report only explain the logic of the choice for the presumption and do not present an independent criterion for determining COMI, while the suggested meaning of the place “where the head functions are carried out” go beyond the context of the COMI, being Recital 13: COMI as connecting factor is the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties. See Bob Wessels, footnote 3 above, 183ff.
organisation, departs from the rationale laid down in Virgós / Schmit Report (1996), nr. 75, that third parties must always be able, in every system of insolvency, to calculate their risks. The COMI can hardly be ascertained by third parties without investigating the group structure. By emphasizing the importance of the “interior” of the ties based on corporate and contract law and the managerial and operational structure of a group (to which the debtor belongs), third parties will not be able to do this calculation. From the Virgós / Schmit Report and Recital 13 flows that the “contact with creditors approach” is decisive.15 This would form only a starting point as it remains to be seen (i) whether all creditors are equal or a division should be made between “large” and “small” creditors, “trade” creditors or “insiders”, i.e. creditors with knowledge of certain (“internal”) facts, (ii) whether the COMI norm itself addresses the creditor’s view in every individual case or is to be seen as a more abstract norm which directs itself to the perspective of the deciding judge, and (iii) whether COMI can be applied only by deciding based on the circumstances at the moment a court has to decide on COMI or whether it has to be applied by taking into account relevant facts and circumstances which date (much further) back.

4. Treatment of Multinational Groups of Companies: Solutions presented

The treatment of multinational groups of companies in international insolvency is a hotly debated topic. What seems to be the mainstream in literature? Firstly, it is in agreement that there is a widely spread lack of solutions of an integrated concept of group insolvency.16 Secondly, it is in agreement too that “one subsidiary in not the other”.17 Within (multinational) groups of

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15 See Bob Wessels, footnote 3 above, 186. Sometimes also referred to as “business activity” approach, see J. Marshall / M. Herrod, The EC Regulation on Insolvency Proceedings: Mutual trust across Europe or a forum shopper’s charter, in: Global Insolvency & Restructuring Yearbook 2005/2006, 21. In favour of this approach is e.g. Klaus Pannen, Die „Scheinauslandgesellschaft“ im Spannungsfeld zwischen dem ausländischen Gesellschaftsstatut und dem inländischen Insolvenzstatut, in: Haftung und Insolvenz, Festschrift Gero Fischer, München, 2008, 403ff (refering to other German proponents, such as Bähr, Riedemann and Vallender).


17 See Patrick Wautelet, Some Considerations on the center of the Main Interests as Jurisdictional Test under the European Insolvency Regulation, in: Georges Affaki (ed.), Faillite internationale et conflit de juridictions: regards
companies there is an enormous variety of possibilities in the way these groups are organised, managed, financed and operated. These differences should play a role when considering new principles or rules to apply in the cross border insolvency context. Within Europe, related to the Insolvency Regulation, several suggestions have been made to solve the problems related to reorganization or insolvency of multinational corporate groups, which all have their pros and cons.

The first suggestion, made in literature, is to leave matters just as they are. The ECJ in Eurofood did not condemn the interpretation as followed by “a vast majority” of European courts in particular in the context of groups of companies and the ECJ leaves it to the national courts to further develop criteria meeting the COMI-test of “objective and ascertainable by third parties.” The treatment of multinational groups of companies is preferably left to “national case law (under the control of the ECJ, to avoid excesses) to continue to keep the Regulation up to date.” From this suggestion the method to be followed is that each individual (subsidiary) should be looked at separately and any appreciation of a company’s autonomy must be weighed against creditors’ expectations, although it is fully admitted that the Regulation was not meant to create the possibility to guarantee “one stop European filing.”

Another opinion was published in connection with the radical different approaches the courts in Ireland and Italy took when interpreting and applying COMI in the Eurofood case. An amendment to the Regulation should made and according to this opinion such amendment should provide a proper definition, which is necessary as a matter of priority, because no question is

18 For an overall view, also describing UNCITRAL’s present work regarding “enterprise groups”, see Janis Sarra, Maidum’s Challenge, Legal and Governance Issues in Dealing With Cross-Border Business Enterprise Group Insolvencies, 17 International Insolvency Review 2008, 73.
20 Michel Menjucq and Reinhard Dammann, supra (a French judge and a practitioner working in Paris respectively).
21 Patrick Wautelet (practitioner and Liége law faculty lecturer), supra, at 104.
likely to create more international conflict between member states than the COMI question.22 How sensitive the answer to the question is indeed is demonstrated by two well-known commentators, who fully agree on nine points for improvement of the Regulation, but do not succeed in offering a joint proposal for a uniform text for the definition of COMI. The suggested definition for companies and other legal persons from Gabriel Moss, a London barrister and QC, is the following: “The centre of a debtor’s main interests for the purposes of Article 3(1) shall mean, in the case of companies and legal persons, the place of the registered office, except that, where the head office functions of the debtor are carried out in another Member State and that other Member State is ascertainable to prospective creditors as the place where such head office functions are carried out, it shall mean the Member State where such head office functions are carried out.” The proposal of Christoph Paulus (Humboldt University, Berlin) is: “The centre of a debtor’s main interests’ for the purposes of Article 3(1) shall mean, in the case of companies and legal persons, the place of the registered office, or, if shown to be in a different Member State, the place where the debtor conducts the administration of his interests on a regular basis and which is therefore ascertainable by third parties, except for cases where the debtor is part of a group of companies or legal persons which operate as an economic unit ("an economic unit case"). In an economic unit case, the centre of a debtor’s main interests for the purposes of Article 3(1) shall mean the place where the head office functions of the debtor are carried out, provided that place is ascertainable by prospective creditors as the place where such head office functions are carried out.”

A third proposal originates from München law professor Horst Eidenmüller.23 It is based on an economic analysis of applicable legislation and takes into account Articles 43 and 48 EC Treaty, allowing firms “…. to choose a corporate form of their liking, regardless of the location of the actual head office (real seat) of the company.”24 Based on his theoretical point of view Eidenmüller adopts a model of “constrained forum choice”, i.e. a free choice of bankruptcy forum in combination with the company law applicable to the company. This approach is not

24 Id, at 446.
only aimed at overcoming the problem of treatment of insolvency of corporate groups, but reflects a general attempt to prevent forum shopping and to improve the certainty for creditors with regard to applicable law. With regard to companies and legal persons Eidenmüller suggests the following text for Article 3(1): “The courts of the Member State within the territory of which the registered office of a company or legal person is situated shall have jurisdiction to open insolvency proceedings. If a company or legal person does not have a registered office, the courts of the Member State according to which laws the company or legal person is organized shall have such jurisdiction.” The proposal has the benefit of clarity for creditors and will probably have the effect that the holding company in a pyramidically structured group of companies will make clear choices of applicable law. On the other hand, it does not solve the issue of treatment of group insolvencies if choices are made for different laws, as this will create again different fora.

Is it possible to regard a subsidiary company as an “establishment” (in the Member State in which the subsidiary has its registered office), in the meaning of Article 2(h) InsReg of the parent company? This question has led to a fourth proposal. The history of the Regulation reveals that the majority of member states did not agree with the use, in the Regulation, of the interpretation of the term “establishment” as provided by the European Court of Justice with reference to Article 5(5) of the 1968 Brussels Convention (now: Brussels Regulation 2002). Article 5 provides that the courts of a member state have jurisdiction to determine disputes arising out of the operations of a branch, agency or other establishment situated within that state. Article 5(5) Brussels Regulation on Civil Judgments and Jurisdiction 2002 contains the same provision. In 1978 the ECJ held that the concept of “establishment” implies a place of business which has the appearance of permanency so that third parties do not have to deal directly with the parent body. Consequently, subsidiary companies of a parent company have been held to be establishments of such a parent company. However, the majority of Member States

25 See Solveig Lieder, Grenzüberschreitende Unternehmenssanierung im Lichte der EuInsVo, Walter de Gruyter, 2007, at 237. Eidenmüller’s concept is followed by Titia M. Bos, Forumshopping in een Europese insolventie, in: B.E. Reinhartz et al. (eds.), Derden in het privaatrecht, Den Haag: Boom, 2008, 183ff, be it as a second best option, as she prefers a better, more uniform definition of international jurisdiction either by the European legislation or through uniforming case law of the ECJ.


preferred an independent concept to be developed for insolvency matters which would take into account the fact that the definition of “establishment” for the Insolvency Regulation would be similar to that developed for said Article 5(5) but, under such definition, separate subsidiary companies would not be considered to be establishments of the parent, as such a broad definition would interfere with general jurisdictional rules under which all companies are considered to be separate entities. 28 Dutch authors have submitted that, in certain exceptional circumstances, i.e. “in the case the subsidiary is fully controlled by the parent,” it may be possible, when applying the presumption of Article 3(1) InsReg, to replace the registered office of the subsidiary (being the centre of main interests) with the registered office of the parent company. The same authors suggest that, in more exceptional circumstances, the subsidiary in the state of the registered office could be classified as an establishment (ex Article 2(h) InsReg) of the parent. 29 Recent studies demonstrate however that the question in legal literature generally is responded to negatively. Mainly two reasons have been mentioned – apart from the fact that the history of the term establishment does not seem to support the interpretation given – namely, the mere own legal personality of the subsidiary and the fact that the Insolvency Regulation deliberately has chosen not to include rules for group of companies. Although it is recognized that the idea of the subsidiary to be regarded as establishment allows for cooperation for a joint reorganisation of the holding and one or more subsidiaries, it has been submitted that history, text and system of the Insolvency Regulation (an establishment only allows for liquidation proceedings, see Art. 3(3) InsReg) do not support the proposal, which therefore does not find much support. 31 In an English case, the court refused to give credence to a creditor’s submission that business premises of a Swedish company’s UK subsidiary company could qualify as an “establishment” for the

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28 Virgós / Schmit Report (1996), nr. 70; Gabriel Moss and Tom Smith, supra, 8.31.
30 Timo Torz, Gerichtsstände im Internationalen Insolvenzrecht zur Eröffnung von Particularinsolvenzverfahren. Studien zum vergleichenden und internationalen Recht – Comparative and International Law Studies, Band 113, Peter Lang, Frankfurt am Main, 2005.
purposes of Article 3(2) InsReg, where the Swedish parent company itself has no “establishment” in England.32

A fifth view in literature relates to Article 4 InsReg. In an insolvency of a group of companies it is unclear, according to Hirte,33 whether the opening of main proceedings over more than one debtor is covered by Article 4(2)(a) (the lex concursus determines “against which debtors insolvency proceedings may be brought on account of their capacity”).34 Article 4 should be amended to state that a recognition also takes place if a court opens insolvency proceeding over different members of a group. Hirte is of the opinion that the interests of the subsidiary’s creditors are better served within the framework of one single insolvency, admitting that creditors are helped by Articles 32, 39 and 40 InsReg. A last element in this proposal is the mandatory appointment of a “national law expert” and the possibility to use the creditors’ language.35

A sixth proposal has been made by Van Galen, a Dutch insolvency practitioner.36 The proposal does not amend the text of Article 3(1) InsReg, but creates a system which has its starting point within the model of the Regulation and from there extends itself with substantial topics. It is based on the principle that if a subsidiary and its ultimate parent company both enter into insolvency proceedings “the liquidator of the parent company be given powers similar to those that the liquidator in main proceedings has vis-à-vis secondary proceedings.” This leads Van

32 See High Court of Justice 16 October 2002, [2002] EWHC 2377, [2003] B.C.C. 856 (Telia v. Hillcourt). It is noted, however, that the French Circulaire of 2006, providing guidance to the application of the Regulation in France, seems to allow the view that a company, with registered seat in France, but with COMI in one of the other member states, can be regarded as “establishment”, see François Mélin, Le règlement communautaire du 29 mai 2000 relatif aux procédures d’insolvabilité, Bruylant, Bruxelles, 2008, at 167.
34 Article 621-2(2) French Commercial Code for instance allows the court to extend the procedure once it is opened to one or more persons when their assets were intermingled with those of the debtor or the existence of the company is a mere sham.
35 It seems that the suggested amendment would fit better in Article 16, whilst Article 4 deals with applicable law. The reference to Article 32 is confusing as that provision presumes the existence of secondary proceedings, which Hirte aims to avoid.
Galen to suggest that the parent company’s liquidator should have powers of coordination with respect to the subsidiary’s proceedings as well as the power to effect the coordinated sale of the assets of the companies in question, including the power to bring forward a group reorganisation plan. The result would lead, as Van Galen submits, to amend for instance Article 29 (right of the liquidator in the main proceedings to request opening of main proceedings regarding subsidiaries), Article 31 (mutual rights regarding communication and cooperation should be centered by the liquidator in the main proceedings), Article 33 (stronger position of the main liquidator regarding staying of the liquidation process in proceedings concerning the subsidiaries) and Article 34 (the right to propose a company reorganisation plan). Van Galen’s proposal has been criticized by Deyda. Apart from questions related to political feasibility and the reluctance of some member states against the idea of “group” insolvency, the substance of the proposal is rejected by this author. The group-definition (based on majority of shareholder participation) results in applying the proposed system also in cases in which there will be no organisational and economical unity, thus Deyda. Were such an economic oneness does exist, Deyda believes the continuation of the business of a group can be to the detriment to the interests of the creditors. He does not favour amending the Regulation, on the contrary, he submits that non-binding agreements between the various liquidators should guarantee the necessary flexibility, that every individual case deserves.

Finally, a reference is made to McCormack’s suggestion, that under the present vagueness of the COMI-standard a solution should be sought on the basis of the state of incorporation, though using another insolvency paradigm, namely “territoriality”: “Co-operation between individual

37 “The creditors of the group companies involved in the plan should be divided into separate classes for the purpose of voting on the plan. The court supervising the parent company's main proceedings should have the power to apply “cram-down” provisions, provided (i) the creditors concerned receive more than they would have received if the company in question had been wound up, and (ii) those creditors are not treated unfairly vis-à-vis the other creditors, taking into account the relative strength of their respective positions,” see Van Galen, Tijdschrift voor Insolventie-recht 2004/2, 13, at 66. When an actual situation occurs that the assets of a group cannot be unravelled Van Galen suggests the introduction of a system for substantive consolidation.

courts and countries administering assets on a territorial basis may be the only sensible way forward”.39

5. Treatment as if secondary proceedings were opened

Finally, one other notable alternative has been developed and applied by courts in Europe. As the model of the Insolvency Regulation is based on the possibility of having secondary proceedings running parallel to main proceedings, whilst these secondary proceedings ultimately act as supportive proceedings for the main insolvency proceedings, in legal practice a seventh solution has been developed. To overcome problems of differences in ranking of claims under various jurisdictions (e.g. under German, Austrian and Italian law a loan of a parent company to a subsidiary in subordinated to all other creditors, in contrast with French, Dutch and UK law; the existence of superprivileges for certain creditors, as in France for employees, unlike the position in other countries, e.g. limited privilege (UK) or no privileges at all (Germany)) some courts have treated creditors in Europe “as if” in their respective jurisdiction indeed secondary insolvency proceeding had been opened. Such “virtual contractual secondary proceedings”40 therefore result in the treatment of such creditors as they could expect under their national law. In the MG Rover case,41 the court opened main proceedings against the Rover Group and its subsidiaries in Germany, France, the Netherlands, Belgium, Luxembourg, Spain, Ireland, Italy and Portugal. The court accepted the promise made by the main liquidator of Rover SAS (the French company) which ensured that the French employees would enjoy the same privileges in the main proceedings as they would have received as secondary liquidation proceedings in France would have been opened. An explicit clarification by the Birmingham court of the powers of the liquidator by way of a supplemental Order sought to address the practical difficulties occasioned by the international jurisdiction provision: “I hope that by this means courts in other


40 Menjucq and Dammann, supra, at 154.

Member States may come to appreciate that the principal objective of the administration is to rescue the relevant national sales companies as a going concern.” Eight supplemental Orders were issued describing the objective of the English main insolvency proceedings and the responsibilities and powers of the administrators, including their power to make payments to the employees of eight EU registered subsidiaries to enable the employees to receive the same monies as they would have received if secondary proceedings were commenced, provided that the administrator thought that such payments were likely to assist the purpose of the administration. Subsequently the pressure on the employees of national sales companies to commence secondary proceedings or to ignore the primary proceedings was, to a great extent, dissipated.42 Also in the Collins & Aikman case this approach was followed.43 The approach several European courts have taken has been characterized as “a form of “procedural consolidation” which allows for different insolvency procedures but unites them in a single forum, thus avoiding at least some transaction costs and discrepancies; in a way, this represents a “step toward” a group insolvency.”44

6. Where to go from here?

The foregoing demonstrates the variety of possibilities for a preferred treatment of multinational groups of companies under the Insolvency Regulation. The lack of provisions concerning multinational groups of companies has been classified as an omission. However, not all critics take into account the fact that cross-border insolvency within Europe was discussed for over

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42 See High Court of Justice Birmingham 11 May 2005 (MG Rover II; MG Rover Espana S.A. and seven other companies (Supplemental Orders MG Rover)), NZI 2005, 515. High Court of Justice Birmingham 30 May 2006 (2377/2006), NZI 2006, 416, provides its argumentation that indeed special payments to prevent the opening of secondary proceedings were permissible under domestic English insolvency law. The Dutch District Court †s-Hertogenbosch 31 October 2005, LJN: AU5330 (Collins & Aikman Automotive Trim B.V.) considered: “From Essent Network as a State monopolist with a public function it may in all fairness be expected that she does not force Appell [the liquidator in the main proceedings; Wess.] to take such a possibly damaging step if this in itself does not give Essent Network an advantage. She should act voluntarily as if these secondary proceedings, offering no advantage to her nor the estate, already were in place.”


44 Heribert Hirte, supra, at 218. See also Mevorach, supra (2007), at 189, in favour of “the use of COMI in order to achieve “procedural consolidation”, although stating that the concept needs “clear rules.”
forty years before the Regulation finally enacted. The discussions concerned complex problems. At the time, the decision to postpone “group insolvencies” to a later date may have been considered both politically and practically prudent. Furthermore, the Regulation reflects thinking of the 1980s and 1990s, when the phenomenon of groups of companies was not as current as in the first decade of the 21st century and, moreover, in European domestic insolvency laws reorganisation or rescue of companies was not the prevailing option. In addition, very little thought has been given to the position of ‘corporate insolvency law’ and its relation to corporate law, e.g. the ‘punishing’ effect of insolvency law and the function of corporate governance or subjects such as (cross-border) director’s liability. Presently, the EU Insolvency Regulation has its roots in judicial cooperation in civil matters in order to progressively establish an area of freedom, security and justice (Article 61(c) EC Treaty). “Groupings of corporations” is not, in itself, a particularly relevant subject-matter for the EU’s ideal of judicial cooperation and cross-border recognition of legal proceedings. For this reason the aforementioned criticism lacks appropriate context. The solution may be found in Art. 43ff EC Treaty, the basis of so many (European) company law instruments.45 For instance, one could think of a Directive only relating to reorganization and insolvency of multinational corporate groups. Such a Directive might consider to include specific rules for forming – substantially or procedurally – an estate with (certain) corporate sisters or brothers, the protection of minority shareholders, specific rules for protecting creditors, the position of the share in a full subsidiary if both the latter and its parent collapse and governance rules for corporate management. Finally, it remains for further debate whether in Europe certain rules relating the treatment of insolvency of multinational groups of companies should be developed independently from the present debate on a global level, as presently takes place within UNCITRAL. The time certain (combinations of) solutions will take will be considerable. In the meanwhile courts and practitioners may take advantage of a proposal to develop Principles for Rescue of Multi-National Enterprise Groups.46 It is submitted that proposals will be developed with some speed, because what seems to be developing in


46 Presented by the Committee on International Jurisdiction and Coordination (Chair: Hon. Ralph Mabey) of the International Insolvency Institute (III) during the 8th Annual International Insolvency Conference, Berlin, 9-10 June, 2008.
Europe seems an easy “migration” of COMI (like in the case of Schefenacker), or a shift of COMI in some four weeks (see the PIN case, with careful planning and execution), where the head office functions approach serves as an invitation for what the Regulation aims to avoid, i.e. forum shopping.

47 See Bob Wessels, Corporate migration or COMI manipulation, in: Ondernemingsrecht 2008-1, 34ff.