Interedil
Case C-396/09 *Interedil Srl v Fallimento Interedil Srl* [2011] ECR I-09915 20th October 2011
EU: Italy and the United Kingdom
European Court of Justice by Reference for a preliminary ruling

Key Words
Transfer of registered office; location of registered office; centre of main interests (COMI); recognition of process; jurisdiction.

Summary of Facts of the Case

The *Interedil* case follows on from the *Eurofood* and *Daisytek* cases and answers a few questions that the *Eurofood* case left unanswered, which were referred to the CJEU and are listed at the end of this summary of facts, in particular question (ii) and (iii) below (Sheldon 2.41).

Interedil Srl was a company incorporated in Italy with its registered office in Monopoli. On 18 July 2001, it transferred its registered office to the United Kingdom and removed itself from the Italian register of companies [para 10]. On 28 October 2003, Intesa (a financial institution) petitioned the Tribunale di Bari in Italy to open bankruptcy proceedings ('fallimento') against Interedil [para 12]. Interedil argued that the Italian court lacked jurisdiction as a result of the transfer of its registered office to the United Kingdom and that only the UK courts had jurisdiction to open insolvency proceedings. It requested a ruling on the preliminary issue of jurisdiction from the Italian Supreme Court of Cassation in December 2003 [para 13].

On 24 May 2004 and prior to the Italian Supreme Court making its decision, the Tribunale di Bari established that the undertaking in question was insolvent and ordered that Interedil be wound up, claiming that Interedil's contention that the Italian courts did not have jurisdiction was manifestly unfounded [para 14]. Interedil then appealed the order to wind up before the Italian Supreme Court, which found that the Italian court of first instance (Bari) had jurisdiction on 20 May 2005. The court relied on the reasoning that the presumption of registered office could be rebutted in this case as a result of the immovable property located in Italy, the existence of a lease agreement, and a contract concluded with a banking institution, as well as the fact that the registrar of companies had not been notified of Interedil's transfer of registered office [para 16].

Following the Italian Supreme Court's judgment in favour of the jurisdiction of the Tribunale di Bari, the judgment in *Eurofood* was reached by the ECJ on 2nd May 2006. As a result, the Tribunal di Bari

This project (no. 800807) is funded by the European Union's Justice Programme (2014-2020).

decided to stay the insolvency proceedings in order to refer the question of jurisdiction to the CJEU in light of the effect that the Eurofood judgement might have [para 17]. Accordingly, it referred the matter to the CJEU for a preliminary ruling on four matters:

(i) Is COMI to be interpreted according to Community law or national law; if the former, what is its definition and what factors are decisive in identifying it?

(ii) Can the 'registered office presumption' be rebutted if it is established that the company carries on genuine business activity in another Member State, or is it necessary to establish that the company has not carried on any business activity in the country in which it has its registered office?

(iii) Are immovable property, a lease agreement concluded by the debtor company with another company in respect of two hotel complexes, and a contract with a banking institution in another Member State sufficient to rebut the 'registered office presumption' and sufficient for the company to be regarded as having an "establishment" in that Member State?

(iv) If the ruling on jurisdiction by the Supreme Court is based on an interpretation of Article 3 of the Regulation that is at variance with that of the ECJ/CJEU, is the application of that provision (as interpreted by the Court of Justice) precluded by Article 382 of the [Italian] Code of Civil Procedure, which provides that rulings on jurisdiction by the Supreme Court are final and binding?'

Richard Sheldon (ed), Cross-Border Insolvency (3rd edn, Bloomsbury Professional 2011) paras 2.37-2.118)

Cooperation and/ or Coordination Issue

The cooperation issue in this case, like in *Eurofood* and *Daisytek*, revolved around the question of jurisdiction to open main insolvency proceedings and the establishment of COMI. The cooperation issue that was clarified in this case was the question of what is sufficient to rebut the presumption that the registered office is the COMI of a debtor.

The case also dealt with how a conflict between domestic rules of procedure and a ruling of the European Courts should be resolved, indicating a cooperation issue between the national courts and the CJEU.

Resolution

The CJEU found that COMI must be interpreted in accordance with European Union law. The Court went on to explain the interpretation of COMI in the following terms:

First, COMI must be determined by attaching greater importance to the place of the company's central administration, established by objective factors that are ascertainable by third parties. Where the company management/supervisory bodies and registered office are in the same place as where the management decisions of the company are taken (in a manner that is ascertainable by third parties), the 'registered office presumption' cannot be rebutted. Where a company's central administration is not in the same place as its registered office, the presence of company assets and the existence of contracts for the financial exploitation of those assets in a another Member State cannot be regarded as sufficient to rebut the 'registered office presumption' unless it is possible to establish that the company's actual centre of management and supervision and of

the management of its interests is located in that other Member State (in a manner that is ascertainable by third parties) [para 53].

Second, where the registered office is transferred before a request to open insolvency proceedings is lodged, the company's COMI is presumed to be the place of its new registered office. On this matter, the ECJ also referred to its decision in *Staubitz-Schreiber,* wherein it was found that the transfer of COMI after lodging insolvency proceedings but prior to opening them does not affect the jurisdiction of the court where the request was lodged [Sheldon 2.44].

On the interpretation of an 'establishment', the ECJ stated 'the presence of a structure consisting of a minimum level of organisation and a degree of stability necessary for the purpose of pursuing an economic activity' was necessary. It outlined that the presence alone of goods or bank accounts in isolation were insufficient to find 'an establishment' and therefore to open territorial proceedings per the EIR [para 64].

Finally, on the question of whether the Italian Supreme Court finding of jurisdiction was binding on the Tribunale di Bari, the CJEU held that European Union law precludes a national court from being bound by the ruling of a higher national court, where ruling of that higher court is at variance with an interpretation of European Union law by the Court of Justice [para 39]. To an extent, this appears also to be reflected in the judgment in *Eurofood*, wherein it was stated at para 31 that COMI therefore should be "interpreted in a uniform way, independently of national legislation". It should be noted, however, that national law is not irrelevant; it dictates the conditions and formalities required for opening insolvency proceedings (*Eurofood*, para 51).

Richard Sheldon (ed), Cross-Border Insolvency (3rd edn, Bloomsbury Professional 2011) paras 2.37-2.118)

Applicability to Preventive Restructuring

Given that many restructuring frameworks are included in Annex A of the EIR Recast, the COMI questions dealt with in this case could equally be useful in a cross-border restructuring situation. *Interedil*, together with *Eurofood,* has provided some clarity as to the interpretation of COMI, which should be useful in future cases. As is clear from the previous discussion, COMI is presumed to be the country in which the registered office is located; however, if a registered office has been moved within three months prior to the request to open insolvency or restructuring proceedings, that presumption can be rebutted. This is a change from the EIR 2000, which contained no such exception. It is argued that this will therefore limit capricious COMI shifts to access more favourable proceedings or outcomes. Tactical COMI shifts also appeared to be on the minds of those drafting the PRD, as it contains an exception to the general rule that the stay of individual enforcement actions can be extended to a maximum of 12 months. Should the procedure in question be excluded from Annex A of the EIR and should COMI have been transferred 3 months before the request for the opening of proceedings, the total duration of the stay will be 4 months without the ability to extend (PRD, Article 6(8)).

Applicability of Existing Rules and Guidelines

Under the EIR Recast

Since the introduction of the EIR Recast, some aspects that were key in the *Interedil* case have been refined. First, COMI has been defined by the EIR Recast as "the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties" (Article 3). As was the case with the original EIR, COMI is "presumed to be place of the registered office (…) in the absence of proof to the contrary" (EIR Recast, Article 3(1)); however the Recast expressly excludes situations where the registered office has been moved to a different Member State within the 3 months prior to the request to open insolvency proceedings. If one considers the situation in *Interedil*, arguably, it is virtually impossible that a court would have viewed Italy to be the centre of main interests in this case, as there was no evidence of a central management / operation being run from Italy. Thus, what *Interedil* can highlight from a co-operation perspective is actually the idea of co-operation by non-action. The company felt that jurisdiction would have rested with the courts in England and Wales; thus, had proper co-operation taken place in this case, the Italian courts would not have opened any proceedings or deferred to primary proceedings in the UK and opened secondary proceedings, if necessary and relevant under the circumstances.

Arguably, a case such as *Interedil* also arose in view of its timing and as a result, is highly unlikely to arise again. If one remembers the reason why the case arose, it was because all of the Italian hearings (bar the decision to refer the matter to the CJEU) occurred before *Eurofood*, which is considered the seminal case on the operation of COMI and on recognition of competing processes and therefore initial co-operation. In light of *Eurofood*, the court in Bari became concerned regarding the correctness of the previous judgments and referred the matter to the CJEU for a preliminary ruling. Had the situation arisen after the decision in *Eurofood*, it is questionable if the Italian Supreme Court would have ruled the same way, in other words ruled that Italian courts had jurisdiction.

Relevant rules and guidelines

Like Daisytek, the ALI-III Principles provide some guidance in relation to the matter of COMI under Principle 13.1, which states that the jurisdiction can be determined where the debtor's COMI is in the territory or if the debtor has an establishment there. Like the EIR Recast, the Principles also define COMI by the application of objective factors that can be ascertained by third parties (13.3(I).