THE INSOLVENCY OF MULTINATIONAL GROUPS OF COMPANIES: WHICH COURT IS COMPETENT, WHICH LAW APPLICABLE?

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INTRODUCTION

In the year of 2000 the new Council Regulation (EC) 1346/2000 of 29 May 2000 on insolvency proceedings (hereinafter referred to as the ‘European Insolvency Regulation’) was adopted. The European Insolvency Regulation is applicable in all the Member States of the European Union, except Denmark.1

P. Wautelet claims that the centre of the main interests (hereinafter referred to as the ‘COMI’) is the key provision of the European Insolvency Regulation.2 The same opinion is shared by the Court of Justice of the European Union (hereinafter referred to as the ‘CJEU’) which stated in one of its decisions that: ‘The concept of the centre of main interests is peculiar to the Regulation. Therefore, it has an autonomous meaning and must therefore be interpreted in a uniform way, independently of national legislation.’3

The concept of the COMI is not something specific only to the insolvency law of the European Union. This concept is also known in the United States of America as well as in the Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law (hereinafter referred to as the ‘UNCITRAL Model Law’).4

However, the application of the European Insolvency Regulation is criticized widely. Especially courts’ from the different Member States of the European Union ways of interpretation of the COMI receive much criticism from legal scholars. P. Wautelet describes the application of the European Insolvency Regulation as ‘a concert of discordant voices’.5 So the courts of the Member States of the European Union do not always respect the opinion of the CJEU that the COMI shall be ‘interpreted in a uniform way, independently of national legislation’.6

It should be stated that ‘corporate groups are a legal phenomenon to be encountered Europe-wide’.7 There are many reasons why companies’ groups are being formed. H. Hirte excludes such ‘driving factors that may encourage or discourage the formation of companies’ groups in the different European countries8: ‘to separate risks by creating separate legal entities’,9 taxation laws and ‘laws regulating specific industries, e.g. banking or insurance’.10 It could be added that sometimes corporate groups form naturally by spreading business locations all over the country or business locations are extended across the border. In this research the subject-matter is insolvency of multinational groups of companies and insolvency of national groups of companies is set aside.

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2 Patrick Wautelet, ‘Some Considerations on the Centre of the Main Interests as Jurisdictional Test under the European Insolvency Regulation’ in Georges Affaki (ed), Cross Border Insolvency and Conflict of Jurisdiction: a US-EU Experience (Bruylant 2007) 84.
5 Wautelet (n 2) 77.
6 Eurofood IFSC (n 3) [31].
8 ibid.
9 ibid.
10 ibid.
In the event of the insolvency of the multinational group of company usually the main problem occurs: the company law of the European Union does not recognize corporate group as one legal entity. In other words, ‘corporate groups lack legal personality’\(^{11}\).

In addition, one should take into account that the European Insolvency Regulation itself does not have specific rules for parent-subsidiary relations.\(^2\) But it should not be forgotten that in the case of the insolvency of one affiliated company of corporate group, other affiliated companies of corporate group or even the whole group of companies are affected in many ways. H. Hirte even strengthens this approach by stating that ‘companies’ group insolvency often involves or implies the insolvency of all members of the group’\(^{13}\). So, ‘linking between affiliated group companies in their separate insolvencies may be necessary’\(^{14}\).

The main objective of this research is to analyze theoretical and practical background of the insolvency of multinational groups of companies (which court is competent, which law applicable).

To pursue mentioned objective of this research following steps will be taken:

1. To submit the model of the European Insolvency Regulation and to present the basic rules of concurrent jurisdictions in the European Insolvency Regulation;
2. To analyze the aims of adopting the European Insolvency Regulation;
3. To disclose the meaning of the COMI in the European Insolvency Regulation and to present the case law of the CJEU regarding the European Insolvency Regulation;
4. To introduce the theoretical and practical legal background of the insolvency of the multinational groups of companies;
5. To present the possible model of dealing with the insolvency of the multinational group of companies in the European Union.

\(^{11}\) ibid 214.
\(^{12}\) Wautelet (n 2) 89.
\(^{13}\) Hirte (n 7) 216.
\(^{14}\) Mevorach, ‘Appropriate Treatment of Corporate Groups in Insolvency: A Universal View’ (n 4) 179.
1. THE EUROPEAN INSOLVENCY REGULATION

The main objectives of this Chapter are, firstly, to explain the model of the European Insolvency Regulation and to talk over the basic rules of concurrent jurisdictions in the European Insolvency Regulation, and secondly, to analyze the aims of adopting the European Insolvency Regulation (improving the efficiency and effectiveness of insolvency proceedings and preventing forum-shopping will be analyzed).

1.1. THE MODEL OF THE EUROPEAN INSOLVENCY REGULATION

R. Goode correctly remarks that a multinational group of companies ‘may operate in different countries either through local subsidiaries or through branches or offices’\(^{15}\). The European Union company law does not recognize group of companies as one legal entity. This is not a problem when multinational group of companies operates through branches or offices, because the branches or offices of the multinational group of companies do not have separate legal personality and are not considered to be separate legal entities. The problem arises when a multinational group of companies pursues its activity through local subsidiaries, because each subsidiary is a separate legal entity which has a separate legal personality.

So the ‘crucial question is how to resolve clashes among legal systems when the case crosses national borders, including issues of jurisdiction, choice of law, recognition and enforcement’\(^{16}\). If the European Union company law does not recognize group of companies as one legal entity, in case of insolvency each subsidiary ‘has to be the subject of separate insolvency proceedings’\(^{17}\).

It is important to emphasize that ‘an international insolvency is typically characterised by one or more of the following features: the debtor’s business is conducted in different countries; the creditors are situated in different countries; the assets are located in different countries; there are parallel proceedings in different countries.’\(^{18}\) If the assets of the multinational group of companies are located in different countries at the time of insolvency, the question arises: whether the assets of the multinational group of companies shall be administered by one court under single law or whether the assets of the multinational group of companies shall be administered by the different courts of each state in which each asset is situated? To answer to the question there is a need to present theoretical legal background concerning this issue.

It is commonly agreed that there are two ‘normative models which have inspired, to a different extent, the laws of the Member States’\(^{19}\) of the European Union concerning insolvency. In the legal theory universalist approach and territorialist approach could be found.

Universalist approach is ‘encompassing the concept both of single law and of a single jurisdiction covering all assets’\(^{20}\). J. L. Westbrook describes this approach as ‘administration

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\(^{17}\) Goode (n 15) 619.

\(^{18}\) ibid 618-619.


\(^{20}\) Goode (n 15) 621.
of multinational insolvencies by a leading court applying a single bankruptcy law”. Territorialist approach is the one “in which the jurisdiction of the courts of a given state is confined to those portions of the company and its assets that lie within the territory of that state”. The main idea of territorialist approach is that “national systems would each deal with any stake of business located within their borders as a separate estate”.

In reality to apply these two pure approaches is impossible. On the one hand, R. Goode claims that:

[I]t is generally accepted that to route everything to a single form, however theoretically desirable in terms of avoiding concurrent insolvency proceedings, is not realistic, for assets are always subject to the sovereign control of the states in which they are situated and in no jurisdiction are courts willing to give up all control over local assets where they are local creditors.

On the other hand:

[I]t is accepted that to allow a multiplicity of disconnected territorial proceedings, each confined to local assets, is inimical to the goal of maximising returns to creditors and is a serious obstacle to any plan for reorganisation, which requires an integrated approach.

Furthermore, territorialist approach “prevents a fair distribution of assets to creditors as it relies on arbitrary location of assets in the different jurisdictions”.

So which approach is commonly recognized in most of the countries? It is interesting to note that “no country adopts a wholly universalist approach” in their legal systems. And wholly universalist approach creates in itself “difficulty in putting such a regime into practice in the near future”.

R. Goode claims that “the laws of some states adopt a principle of territoriality by which insolvency proceedings opened there are confined to local assets”. This approach clearly enables for multinational group of companies to transfer its assets from one territory to another in order to avoid loosing them. In other words, forum-shopping situations are likely to arise. But “more commonly, states adopt the principle of universality for their own proceedings but do not feel obliged to accept it for proceedings opened elsewhere”. C. G. Paulus adds that “the universality principle is gaining more and more ground internationally due to its greater efficiency prospect”.

22 Goode (n 15) 621.
23 Mevorach, Insolvency within Multinational Enterprise Groups (n 16) 71.
24 Goode (n 15) 622-623.
25 ibid 623.
26 Mevorach, Insolvency within Multinational Enterprise Groups (n 16) 72.
27 Goode (n 15) 623.
28 Mevorach, Insolvency within Multinational Enterprise Groups (n 16) 68.
29 Goode (n 15) 623.
30 ibid.
So in reality universalist and territorialist approaches are converged and from this convergence the co-operative territorialist approach and the modified universalist approach are developed. ‘The co-operative territorialist approach leaves each state with full territorial sovereignty and depends on various kinds of co-operation among states’, while

[T]he modified universalist approach takes as its starting point the principles of unity and universality, including a single set of internationally agreed priority rules, with overall control being vested in the court of the debtor’s home country and courts of other states acting in an ancillary role to provide assistance to the foreign court while at the same time ensuring that if assets are surrendered to the main jurisdiction local creditors will be fairly treated.

Furthermore, under modified universalist approach ‘international insolvency cases should be dealt with from an international perspective, embracing the view that assets should be collected and distributed on a worldwide basis’. The modified universalist approach could be defined as more commonly recognized in many countries than co-operative territorialist approach: the ‘modified universality has found favour and is being endorsed by the UNCITRAL Model Law’.

The European Insolvency Regulation ‘is clearly in favour of a modified universalist approach, albeit with rather more territorial elements than may have been envisaged by the proponents of that approach’. M. Virgos and F. Garcimartin claim that the European Insolvency Regulation

[I]s based on a universal model in the sense that it permits the opening of insolvency proceedings in the State where the debtor has his centre of the main interests and gives this process universal scope, both in terms of the estate of the debtor and the body of creditors, on a worldwide basis. In principle, all assets, wherever they are situated, become subject to these proceedings; and all creditors of the debtor, irrespective of their nationality, domicile, residence or registered office, can participate in them. Furthermore, for conflict of laws purposes, the Insolvency Regulation is based upon the application of a single law, the law of the State of opening, to both the procedural and the substantive aspects of the insolvency.

In addition, ‘some leeway is also given to the concept of territoriality to accommodate the legitimate expectations of local creditors in relation to local assets’. The CJEU confirmed the approach shared by the scholars in its case law. The reference for a preliminary ruling in the *MG Probud Gdynia* case was made in proceedings initiated by the Polish liquidator who was responsible for the winding up of a company named *MG Probud Gdynia*. *MG Probud Gdynia* was ‘an undertaking in the building sector whose registered

33 Goode (n 15) 623-624.
34 Mevorach, *Insolvency within Multinational Enterprise Groups* (n 16) 69.
36 Goode (n 15) 624.
37 Virgos Soriano and Garcimartin (n 19) 15-16.
38 Goode (n 15) 624.
office was in Poland but which engaged in construction work in Germany through the activities of a branch. After opening of the insolvency proceedings in Poland the German court ‘ordered attachment of that undertaking’s assets held by banks (...) and of various claims of the undertaking against German parties with whom it had entered into contracts’.

The CJEU stated in its judgement:

‘[M]ain proceedings’ produce universal effects in that the proceedings apply to the debtor’s assets situated in all the Member States in which the Regulation applies. Although, subsequently, proceedings under Article 3(2) may be opened by the competent court of the Member State where the debtor has an establishment, those proceedings, described as ‘secondary proceedings’, produce effects which are restricted to the assets of the debtor situated in the territory of the latter State.

And it was added that ‘only the opening of secondary insolvency proceedings is capable of restricting the universal effect of the main insolvency proceedings’.

Furthermore, the CJEU delivered an opinion that:

Because of the universal effect which all main insolvency proceedings must be accorded, the insolvency proceedings opened in Poland encompass all of MG Probud’s assets, including those situated in Germany, and Polish law determines not only the opening of insolvency proceedings but also their course and closure. On that basis, Polish law is required to govern the treatment of assets situated in other Member States and the effects of the insolvency proceedings on the measures to which those assets are liable to be subject.

The MG Probud Gdynia case is not the only case in which the CJEU defined the universal effect of the main proceedings set in the European Insolvency Regulation. The CJEU stated in the Staubitz-Schreiber case:

The universal scope of the main insolvency proceedings, the opening, where appropriate, of secondary proceedings and the possibility for the temporary administrator appointed by the court first seised to request measures to secure and preserve any of the debtor’s assets situated in another Member State constitute, moreover, important guarantees for creditors, which ensure the widest possible coverage of the debtor’s assets, particularly where he has moved the centre of his main interests after the request to open proceedings but before the proceedings are opened.

The modified universalist approach was chosen in the European Insolvency Regulation, because it is deemed that this approach lays down possibility to protect creditors within the European Union better than it would be done under the co-operative territorialist approach. It is clear that one of the most difficult issues in international insolvency is the treatment of

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40 ibid [17].
41 ibid [22].
42 ibid [24].
43 ibid [43].
multinational groups of companies. As it was mentioned before, the European Union company law does not recognize a group of companies as one legal entity. So such situations ‘that some companies within the group are insolvent while others are in a healthy financial state’ may arise. Of course, ‘in many cases the interests of the various groups of creditors will best be served by modified universalist approach to the multinational group of companies ‘as a whole’.

R. Goode states:

Where all members of the group are within the European Union and are managed from one place which constitutes the common COMI, the EC Insolvency Regulation ensures that even though there are separate proceedings for each insolvent company these will be governed by the same law and will be susceptible to the appointment of a common office holder or joint administrators.

This model contribute to mitigate the economic and legal differences which emerges from legal position that group of companies is not one single entity and economic reality – that companies within the group of companies are governed or controlled by the same owners.

1.2. THE BASIC RULES OF CONCURRENT JURISDICTIONS IN THE EUROPEAN INSOLVENCY REGULATION

The main objective of this part of the research is to analyze the basic rules of concurrent jurisdictions in the European Insolvency Regulation. Due to the limited size of this paper, the basic rules of concurrent jurisdictions are not going to be explained in the deep manner, but brief analysis will be presented.

1.2.1. The main and territorial insolvency proceedings

The Article 3 of the European Insolvency Regulation distinguishes the two different types of insolvency proceedings: the main insolvency proceedings (Article 3(1) of the European Insolvency Regulation) and the territorial insolvency proceedings (Article 3(2) of the European Insolvency Regulation).

The main insolvency proceedings may be opened by the court of the Member State of the European Union ‘within the territory of which the centre of a debtor's main interests is situated’. In the Article 3(1) of the European Insolvency Regulation the presumption that the COMI in the case of a company or legal person is the place of its registered office is established. This presumption is rebuttable.

The territorial insolvency proceedings are divided ‘into secondary proceedings, which are those brought after the opening of main proceedings in another Member State prior to the

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45 pp 4-6 of this LLM paper.
46 Goode (n 15) 625.
47 ibid.
48 ibid.
49 ibid 625-626.
50 European Insolvency Regulation, art 3(1).
51 The explanation of the COMI and the presumption that the COMI in the case of a company or legal person is the place of its registered office is given in Chapter II of this LLM paper.
opening of the main proceedings, which the Virgos-Schmit Report conveniently labels ‘independent proceedings’\(^{52}\). ‘Once main insolvency proceedings have been opened in a Member State, any territorial proceedings opened or due to open subsequently in other Member States are treated as ‘secondary’ proceedings.’\(^{53}\)

The difference between the secondary insolvency proceedings and the independent proceedings is the one that the secondary insolvency ‘proceedings must be winding-up proceedings’\(^{54}\) and the independent insolvency proceedings ‘may be any collective insolvency proceedings’\(^{55}\). It is important to mention that according to the European Insolvency Regulation the courts of the Member States of the European Union have jurisdiction to open territorial insolvency proceedings ‘against that debtor only if he possesses an establishment within the territory of that other Member State’\(^{56}\) of the European Union. The definition of establishment is given in the Article 2 of the European Insolvency Regulation: ‘establishment shall mean any place of operations where the debtor carries out a non-transitory economic activity with human means and goods’\(^{57}\). As M. Virgos and F. Garcimartin correctly notice, ‘the definition provided by the Regulation is, thus a relatively open definition, based on the combination of two elements: (a) a place of business or operations, (b) with a certain degree of organization and permanence in time’\(^{58}\).

It should be also mentioned that the fact that the concept of establishment is defined in the European Insolvency Regulation means that ‘the concept of establishment is an autonomous concept’\(^{59}\) and furthermore ‘it tells us that this definition is independent not only from definitions contained in national law, but also from any contained in other Community texts, and in particular, from the definition of the term ‘establishment’ which the ECJ has been applying in its interpretation’\(^{60}\) of the law of the European Union.

As it was explained before\(^{61}\), the European Insolvency Regulation is based on the modified universalist approach with some aspects of territoriality. This is reflected in the Article 3 of the European Insolvency Regulation and can be clarified by the distinction of the main insolvency proceedings and the territorial insolvency proceedings. R. Goode states that ‘the distinction between main proceedings and territorial proceedings is significant in at least two ways’\(^{62}\).

First of all, ‘main proceedings extent to all the debtor’s assets except to the extent to which assets situated in another member State are available to local creditors in territorial proceedings, these being confined to local assets’\(^{63}\). In contrary, the territorial insolvency proceedings have effect to the assets of the debtor situated in the territory of that Member State of the European Union where territorial insolvency proceedings are opened. In the case

\(^{52}\) Goode (n 15) 573.
\(^{53}\) Virgos Soriano and Garcimartin (n 19) 157.
\(^{54}\) European Insolvency Regulation, art 3(3).
\(^{55}\) Goode (n 15) 573.
\(^{56}\) European Insolvency Regulation, art 3(2).
\(^{57}\) ibid, art 2.
\(^{58}\) Virgos Soriano and Garcimartin (n 19) 160.
\(^{59}\) ibid 159.
\(^{60}\) ibid.
\(^{61}\) pp 6-10 of this LLM paper.
\(^{62}\) Goode (n 15) 573.
\(^{63}\) ibid.
law of the CJEU (e.g. the *Eurofood* case or the *MG Probud Gdynia* case) the same opinion is shared:

‘[M]ain proceedings’ produce universal effects in that the proceedings apply to the debtor’s assets situated in all the Member States in which the Regulation applies. Although, subsequently, proceedings under Article 3(2) may be opened by the competent court of the Member State where the debtor has an establishment, those proceedings, described as ‘secondary proceedings’, produce effects which are restricted to the assets of the debtor situated in the territory of the latter State.\(^{64}\)

The second important element is:

Main proceedings have primacy within the European Union and the liquidator in those proceedings has overall control and is entitled to have his position recognised and given effect in all Member States, whereas territorial proceedings and the liquidator who administers them fulfil a subordinate function.\(^{65}\)

In the *MG Probud Gdynia* case the CJEU confirmed the overall control vested to the liquidator in the main insolvency proceedings (in this case the main insolvency proceedings were opened in Poland):

Liquidator appointed by the Polish court may, in accordance with Article 18 of the Regulation, exercise all the powers conferred on him by Polish law in the other Member States and, in particular, remove the debtor’s assets from the territory of the Member State in which they are situated.\(^{66}\)

In conclusion, the fact, that the European Insolvency Regulation is based on the modified universalist approach with some aspects of territoriality, determines the distinction between the main insolvency proceedings and the territorial insolvency proceedings as defined in the Article 3 of the European Insolvency Regulation.

1.2.2. The law applicable to the insolvency proceedings

One of the questions imposed by this research is: which law is applicable to the insolvency proceedings? The answer to this question is given in the European Insolvency Regulation itself.

There is clear provision in the European Insolvency Regulation regarding law applicable to the insolvency proceedings. The Article 4(1) of the European Insolvency Regulation states: ‘save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened’\(^{67}\).

According to M. Virgos and F. Garcimartin, ‘this is a very broad and general description which includes both the opening, conduct and closure of the insolvency proceedings as well as their effects, both procedural and substantive, on the rights and obligations of all the

\(^{64}\) *Eurofood IFSC* (n 3) [28]; *MG Probud Gdynia* (n 39) [22].

\(^{65}\) Goode (n 15) 573.

\(^{66}\) *MG Probud Gdynia* (n 39) [41].

\(^{67}\) European Insolvency Regulation, art 4(1).
concerned parties. The CJEU in the MG Probud Gdynia case strengthened this approach by declaring that the law applicable to insolvency proceedings "determines not only the opening of insolvency proceedings but also their course and closure".

In the Article 4(2) of the European Insolvency Regulation the "list of specific matters which are subject to the law of the State of opening" is provided. The purpose of this list is "to facilitate the interpretation of the general rule" set in the Article 4(1) of the European Insolvency Regulation and at the same time "to resolve any problems of characterisation or doubts which may arise with regard to its application".

It is worth mentioning that the law applicable to the insolvency proceedings will not be always the only law the court of the Member State of the European Union has to apply. If the country where the COMI of the company is situated is other than the country where the company is established, certain issues of applicable law come to the front. In other words, law applicable to the company itself (lex societatis) and law applicable to the insolvency proceedings (lex concursus) differ. In such situations it is "necessary to delimit the respective scope of application of the lex concursus and the lex societatis". For example, company maintains its "original status (i.e. the lex societatis remains the same) even if the centre of main interest lies within the forum for the purposes of commencing insolvency proceedings".

The exclusions from the Article 4 of the European Insolvency Regulation shall not be forgotten. These exclusions are set in the Articles 5-15 of the European Insolvency Regulation and are "designed to ensure that the lex concursus gives due respect to various important rights". M. Virgos and F. Garcimartin explain the existence of the exceptions:

"[O]n the one hand, they enable the preservation of rights or interests specially protected by the laws of Member States from the uncertainties or inconsistencies in policy that may result from the application of a foreign lex concursus; and on the other hand, they respond to the need to reduce the overall complexity of the insolvency proceedings."

In conclusion, the law applicable to the insolvency proceedings is the law of the Member State of the European Union within the territory of which such proceedings are opened (with some exceptions).

1.2.3. The recognition of the insolvency proceedings and its effect

The principle of recognition of the insolvency proceedings in the Member States of the European Union is stated in the Article 16 of the European Insolvency Regulation. In the
Recital 22 of the European Insolvency Regulation the basis of recognition of the insolvency proceedings and its effect are indicated: ‘This Regulation should provide for immediate recognition of judgments concerning the opening, conduct and closure of insolvency proceedings which come within its scope and of judgments handed down in direct connection with such insolvency proceedings’.

The concept of immediate (automatic) recognition is also referred in this Recital: ‘Automatic recognition should therefore mean that the effects attributed to the proceedings by the law of the State in which the proceedings were opened extend to all other Member States’.

The other important principle of the recognition of insolvency proceedings and its effect is the one of mutual trust. As explained in the mentioned Recital, the principle of mutual trust ‘is also the basis on which any dispute should be resolved where the courts of two Member States both claim competence to open the main insolvency proceedings. The decision of the first court to open proceedings should be recognised in the other Member States without those Member States having the power to scrutinise the court’s decision’.

R. Goode explains the principle of recognition and respect through four main aspects:

1. ‘save in exceptional circumstances it is improper for a court in one Member State to enquire into the basis on which the court of another Member State assumed jurisdiction to open insolvency proceedings’;
2. ‘the rule of recognition applies not only where the court of the first state has assumed jurisdiction but also where it has declined it’;
3. ‘a judgement of a court opening proceedings must be given the same effect in the courts of other Member States as it has in the state in which the proceedings are opened’;
4. ‘judgements handed down by the court whose judgement opening the insolvency proceedings is recognised in accordance with Article 16 and which concern the course and closure of insolvency proceedings, and compositions approved by that court, must also be recognised in other Member States without further formalities’.

The CJEU in the MG Probud Gdynia case stated that there are only two exceptions to the principle of recognition: ‘grounds for refusal are to be reduced to the minimum necessary, there are only two such grounds’. The CJEU explains that ‘first, under Article 25(3) of the Regulation, the Member States are not obliged to recognise or enforce a judgment concerning the course and closure of insolvency proceedings which might result in a limitation of personal freedom or postal secrecy’.

This rule shall also apply where, on account of his capacity, insolvency proceedings cannot be brought against the debtor in other Member States.

2. Recognition of the proceedings referred to in Article 3(1) shall not preclude the opening of the proceedings referred to in Article 3(2) by a court in another Member State. The latter proceedings shall be secondary insolvency proceedings within the meaning of Chapter III.’

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78 European Insolvency Regulation, recital 22.
79 ibid.
80 ibid.
81 Goode (n 15) 578-579.
82 ibid 579.
83 ibid 580.
84 ibid.
85 MG Probud Gdynia (n 39) [31].
86 ibid [32].
The second ground of refusal is public policy:

Any Member State may refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.\(^{87}\)

To conclude, any judgment of the competent court of the Member State of the European Union opening insolvency proceedings shall be recognized in all the other Member States of the European Union. The other Member States of the European Union may not recognize the judgement only if such recognition might result in a limitation of personal freedom or postal secrecy, or if it would be contrary to the public policy of that Member State of the European Union.

\section*{1.3. THE AIMS OF ADOPTING THE EUROPEAN INSOLVENCY REGULATION}

In this part of the research the main objectives of adopting the European Insolvency Regulation such as improving the efficiency and effectiveness of insolvency proceedings and preventing forum-shopping will be discussed.

\subsection*{1.3.1. Improving the efficiency and effectiveness of insolvency proceedings}

The objective of improving the efficiency and effectiveness of the insolvency proceedings of the European Insolvency Regulation is described in the Recital 8 of the European Insolvency Regulation. It is stated in the Recital:

In order to achieve the aim of improving the efficiency and effectiveness of insolvency proceedings having cross-border effects, it is necessary, and appropriate, that the provisions on jurisdiction, recognition and applicable law in this area should be contained in a Community law measure which is binding and directly applicable in Member States.\(^{88}\)

In the private international law theory ‘the fundamental legal issues which arise in a multi-state legal problem’\(^{89}\) in the case of insolvency could be found. These legal issues are: ‘choice of forum, the recognition and effect accorded foreign insolvency proceedings and choice of law’\(^{90}\). Although the European Insolvency Regulation could not be described as typical private international law instrument, but at the same time it is clear from the Recital 8 of the European Insolvency Regulation that it deals with concurrent jurisdictions (‘choice of forum’\(^{91}\)), the recognition of jurisdiction (the recognition and effect accorded foreign insolvency proceedings\(^{92}\)) and applicable law to insolvency proceedings (‘choice of law’\(^{93}\)).

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\(^{87}\) European Insolvency Regulation, art 26.
\(^{88}\) ibid, recital 8.
\(^{90}\) ibid.
\(^{91}\) ibid.
\(^{92}\) ibid.
\(^{93}\) ibid.
According to M. Virgos and F. Garcimartin, the European Insolvency Regulation ‘does not unify insolvency law in Europe, but is content with standardizing the conflict of laws rules which determine the national law applicable to the insolvency proceedings and the effects thereof’.

In pursuance to improve the efficiency and effectiveness of insolvency proceedings the way of harmonizing the conflict of laws was chosen and substantive harmonization was set aside. Although, B. Wessels claims that ‘several provisions of the Regulation are characterized as substantive rules and are therefore now accepted throughout Europe as unified rules concerning the topics to which they relate’. The provisions in which ‘substantive rules’ are set are the following: Article 7(2), Article 20, Articles 29-35, Article 39 and Article 40.

One of the explanations why the way of harmonizing the conflict of laws was chosen is given in the Recital 11 of the European Insolvency Regulation:

This Regulation acknowledges the fact that as a result of widely differing substantive laws it is not practical to introduce insolvency proceedings with universal scope in the entire Community. The application without exception of the law of the State of opening of proceedings would, against this background, frequently lead to difficulties.

If one would analyze the insolvency laws of the various Member States of the European Union, ‘widely differing laws on security interests’ could be found or ‘preferential rights enjoyed by some creditors in the insolvency proceedings are, in some cases, completely different’.

Another explanation why substantive harmonization was not a possibility could be given. The European Insolvency Regulation in the year of 2000 was adopted when the Treaty establishing the European Community was in force. The European Insolvency Regulation was adopted according to the procedure embedded in the Article 67(1) of the Treaty establishing the European Community: the Council of Ministers had to act unanimously on a proposal from the European Commission or on the initiative of a Member State and after consulting the European Parliament. In this case the proposal was submitted to the Council of Ministers on the initiative of the Federal Republic of Germany and the Republic of Finland. The requirement of unanimity in adopting the European Insolvency Regulation meant that any Member State of the European Union had veto right, so the decision had to be acceptable for each of the Member States. Undoubtedly, if the way of substantive

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94 Virgos Soriano and Garcimartin (n 19) 70.
96 Reservation of title.
97 Return and imputation.
98 Right to request the opening of proceedings; Advance payment of costs and expenses; Duty to cooperate and communicate information; Exercise of creditors' rights; Stay of liquidation; Measures ending secondary insolvency proceedings; Assets remaining in the secondary proceedings.
99 Right to lodge claims.
100 Duty to inform creditors.
101 Wessels (n 95) 527.
102 European Insolvency Regulation, recital 11.
103 ibid.
104 ibid.
harmonization would be chosen (e.g. the European Commission would propose such way), Member States could easily block the adoption of such Regulation at all. So in pursuance to improve the efficiency and effectiveness of the insolvency proceedings it was clear that the Union law measure of harmonization of conflict of laws would be the best way to achieve this goal.

It is important to note, that as soon as different national insolvency laws prevail, the forum-shopping will be alive as well. So a question arises: is it possible to achieve the substantive harmonization of insolvency laws in today’s legal and political reality? In the Chapter on Judicial Cooperation in Civil Matters of the Treaty of Lisbon the ordinary legislative procedure for adoption of measures on European level is embedded.\textsuperscript{106} It means that the Council of Ministers by qualified majority voting and jointly with the European Parliament may adopt measures. On the one hand, it could seem that if majority of the Member States of the European Union agrees (none of the Member States of the European Union has a veto right), the substantive harmonization could be achieved. On the other hand it is very doubtful that the Member States of the European Union would dare to surrender their national insolvency laws and allow substantive harmonization to happen.

To sum up, it is clear that the harmonization of conflict of laws rules is currently the only acceptable and possible way to improve the efficiency and effectiveness of insolvency proceedings within the European Union.

\subsection*{1.3.2. Preventing forum–shopping}

The second important aim of adopting the European Insolvency Regulation is to prevent forum-shopping. It is expressly written in the Recital 4 of the European Insolvency Regulation: ‘It is necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping).’\textsuperscript{107} So as it is clear from mentioned provision, preventing forum-shopping serves one of the aims of the European Union – proper functioning of the internal market, as defined in the Treaty of Lisbon.\textsuperscript{108}

It is interesting to note that the European Insolvency Regulation does not expressly set forth the definition of forum-shopping in the Article 2 of the European Insolvency Regulation. However, the concept of forum-shopping could be derived from the Recital 4 of the European Insolvency Regulation: forum-shopping is an activity of an undertaking of transferring its assets or judicial proceedings from one Member State to another in order to obtain a more favourable legal position.

It could be stated that the definition which could be derived from the wording of the European Insolvency Regulation is just partly correct. There is no doubt that the transfer of judicial proceedings from one Member State of the European Union to another in order to obtain a more favourable legal position is forum-shopping. But transfer of assets from one Member State of the European Union to another in order to obtain a more favourable legal

\textsuperscript{107} European Insolvency Regulation, recital 4.
position could not be defined as forum-shopping considering the legal and economic reality within the European Union. The only way to justify such situation to be regarded as forum-shopping is to specify why such transfer of assets is of impermissible nature. To specify this there is a need to take into consideration the aim of prohibition of forum-shopping. It was said before that in order to ensure the proper functioning of the internal market it is necessary to avoid forum-shopping. So the activity of transferring assets from one Member State of the European Union to another in order to obtain a more favourable legal position is not perverse itself, but if the result of such activity is distortion of the proper functioning of the internal market it should be avoided.

On the one hand, the lack of the definition of forum-shopping in the European Insolvency Regulation may lead to different application of the European Insolvency Regulation by the courts of the Member States of the European Union. But on the other hand, the regulator is not able to foresee every possible situation which could arise, so defining forum-shopping in the European Insolvency Regulation is rather impossible. So it is left for the courts of the Member States of the European Union to assess each concrete situation whether it could be regarded as forum-shopping in pursuance to prevent it.

It is obvious that the COMI can be used in forum-shopping and at the same time, the COMI can be used to prevent forum-shopping. On the one hand using of the COMI in forum-shopping can be beneficial to the multinational groups of companies and on the other hand, the courts of the Member States of the European Union can use the concept of the COMI in order to prevent forum-shopping.

Analyzing one of the aims of adopting the European Insolvency Regulation – preventing forum-shopping, the questions arise: for whom forum-shopping could be problematic and why forum-shopping should be prevented? First of all, the main idea of insolvency laws of different countries is to protect creditors or shareholders of a company. In legal literature there is an approach that some insolvency laws could be designed to protect ‘community interest’\(^\text{109}\). It is doubtful whether it would be possible for forum-shopping to occur without the approval of the shareholders (or at least the majority of them). So it is clear, that forum-shopping could be problematic for creditors or any other third parties which have a right to lodge a claim to certain assets of a company in case of insolvency\(^\text{110}\). If the COMI of a company switches to other Member State of the European Union as a result of forum-shopping, creditors or any other third parties which have a right to lodge a claim to certain assets of a company in case of insolvency, could loose the protection enjoyed in the Member State before forum-shopping occurred.

This could be illustrated by one of the cases before the CJEU. In the \textit{Staubitz-Schreiber} case the forum-shopping situation occurred when the applicant moved the COMI from Germany to Spain. The CJEU stated that forum-shopping is in conflict with the interests of the creditors: (1) forum-shopping is contrary to the objective\(^\text{111}\) ‘of efficient and effective cross-border proceedings, as it would oblige creditors to be in continual pursuit of the debtor wherever he chose to establish himself more or less permanently and would often mean in


\(^{110}\) Of course, it is also possible, that forum-shopping could occur with the consent of creditors or even creditors could initiate forum-shopping if it would be beneficial for them.

\(^{111}\) European Insolvency Regulation, recitals 2, 8.
practice that the proceedings would be prolonged’; (2) avoiding forum-shopping ‘ensures greater judicial certainty for creditors who have assessed the risks to be assumed in the event of the debtor’s insolvency with regard to the place where the centre of his main interests was situated when they entered into a legal relationship with him’; (3) various features of the insolvency proceedings constitutes ‘important guarantees for creditors, which ensure the widest possible coverage of the debtor’s assets, particularly where he has moved the centre of his main interests after the request to open proceedings but before the proceedings are opened.’ Scholars share the same opinion: ‘creditors would be unable to foresee the insolvency law regime that becomes applicable.’

It is worth mentioning that one of the elements of the concept of the COMI itself in the European Insolvency Regulation is protection of creditors. In the Recital 13 of the European Insolvency Regulation it is stated that ‘the centre of main interests’ 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. The provisions of the European Insolvency Regulation do not explain who these third parties are, but it is logical that creditors of a company in question should be considered as third parties, who have the right to ascertain where the COMI of a company is situated. In conclusion, the provisions of the European Insolvency Regulation are construed in a way to protect the creditors of a company from forum-shopping situation which could be in conflict with their interests.

The other aspect of why forum-shopping should be prevented is the one mentioned before – community interest. It was said that from the wording of the European Insolvency Regulation it is clear that preventing forum-shopping serves one of the aim of the European Union itself – proper functioning of the internal market, as defined in the Treaty of Lisbon.

It is worth mentioning that some authors envisage that preventing forum-shopping (and the concept of the COMI) is in conflict with the Treaty of Lisbon itself, in particular with the freedom of establishment. W. G. Ringe states that ‘all provisions that somehow impede the free choice of establishment of an individual or a company in another Member State could potentially infringe the freedom of establishment.’ So it is obvious that there is an opinion in legal literature that the European Insolvency Regulation’s provisions breach one of the fundamental freedoms – freedom of establishment – embedded in the Treaty of Lisbon. The particular provision in the European Insolvency Regulation which could ‘potentially infringe’ freedom of establishment is the one which prohibits forum-shopping. According

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112 Staubitz-Schreiber (n 44) [26].
113 ibid [27].
114 ibid [28].
115 Ringe (n 109) 602.
116 European Insolvency Regulation, recital 13.
117 See pp 23-25 of this LLM paper.
118 European Insolvency Regulation, recital 4.
119 TEU, art 3(2).
121 Ringe (n 109) 609.
122 The Treaty of Lisbon embeds four main fundamental freedoms on which the whole European Union and its legal acts are based: free movement of goods, capital, services and people.
123 European Insolvency Regulation, recital 4: ‘It is necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping).’
to W. G. Ringe, ‘every obstacle that makes it less attractive to seek establishment in another Member State may violate the freedom of establishment’. In other words, the scholar claims that preventing forum-shopping as one of the aims of adopting the European Insolvency Regulation, could be regarded as obstacle to the freedom of establishment, because moving to another Member State for a company becomes less attractive (in this particular case, it is even prohibited). And W. G. Ringe continues:

A company registered in England can – due to CJEU case law – benefit from the possibility to effectuate its entire business in Germany and thereby still be subject to English company law; however, a secondary law instrument – the Regulation – disallows the same pattern for insolvency law.

The best way to understand the concept of the freedom of establishment is through the case law of the CJEU. In the Centros case, the CJEU stated that:

A Member State is entitled to take measures designed to prevent certain of its nationals from attempting, undercover of the rights created by the Treaty, improperly to circumvent their national legislation or to prevent individuals from improperly or fraudulently taking advantage of provisions of Community law.

And the CJEU continued:

However, although, in such circumstances, the national courts may, case by case, take account - on the basis of objective evidence - of abuse or fraudulent conduct on the part of the persons concerned in order, where appropriate, to deny them the benefit of the provisions of Community law on which they seek to rely, they must nevertheless assess such conduct in the light of the objectives pursued by those provisions.

In addition:

The fact that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States cannot, in itself, constitute an abuse of the right of establishment. The right to form a company in accordance with the law of a Member State and to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty.

From the Centros case it is clear that the CJEU leaves a little possibility for the Member States of the European Union to decide that the freedom of establishment is being abused. In order to determine that the freedom of establishment is abused, the court of the Member State of the European Union has to rely on objective evidence that certain conduct could be regarded as abusive or fraudulent and each time such estimation shall be made in the light of the objectives pursued by the Treaty provisions. So it is important that the court of the Member State of the European Union cannot set a presumption in advance that certain

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124 Ringe (n 109) 610.
125 ibid 613.
127 ibid [25].
128 ibid [27].
conduct is regarded as forum-shopping. Each time the court of the Member State of the European Union shall examine concrete situation on objective evidence basis in order to determine that certain conduct is regarded as forum-shopping and shall be prevented.

The example of the abuse of the freedom of establishment could be illustrated by the Staubitz-Schreiber case. The problem came to the front when ‘the applicant in the main proceedings moved the centre of her main interests to Spain after she had requested the opening of insolvency proceedings in Germany’. The CJEU stated in this case:

In the fourth recital in the preamble to the Regulation, the Community legislature records its intention to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position. That objective would not be achieved if the debtor could move the centre of his main interests to another Member State between the time when the request to open insolvency proceedings was lodged and the time when the judgment opening the proceedings was delivered and thus determine the court having jurisdiction and the applicable law.

So it is clear that W. G. Ringe’s approach is doubtful because the CJEU in its case law showed that the courts of the Member States of the European Union can decide on objective evidence basis that certain conduct (transferring assets or judicial proceedings from the one Member State to another) is abusive or fraudulent. Therefore, the freedom of establishment embedded in the Treaty of Lisbon and the forum-shopping prevention referred to in the European Insolvency Regulation is an example of the balance between the implementation of the right to establish and indulgence of this right by transferring assets or judicial proceedings from one Member State to another in order to obtain a more favourable legal position.

In conclusion, the proper usage of the concept of the COMI by the courts of the Member States of the European Union in insolvency cases currently remains the reasonable way to achieve the objectives of the European Insolvency Regulation – improving the efficiency and effectiveness of insolvency proceedings and preventing forum-shopping.

1.4. CONCLUSIONS

After the explanation of the model of the European Insolvency Regulation, the presentation of the basic rules of concurrent jurisdictions in the European Insolvency Regulation, and the analysis of the aims of adopting the European Insolvency Regulation the following conclusions can be drawn.

The European Insolvency Regulation is in favour of a modified universalist approach, however, territorial elements are also embedded in it. This fact determines the distinction between the main insolvency proceedings and the territorial insolvency proceedings as defined in the Article 3 of the European Insolvency Regulation.

The basic rules of concurrent jurisdictions in the European Insolvency Regulation are:

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129 The lecture of the European Company Law and Corporate Governance taught by prof dr Hans De Wulf on the 8th of April 2011 in the University of Ghent.
130 Staubitz-Schreiber (n 44) [19].
131 ibid [25].
1. The Article 3 of the European Insolvency Regulation distinguishes the two different types of insolvency proceedings: the main insolvency proceedings (which have universal effect) and the territorial insolvency proceedings (effect of which is restricted to the assets of the debtor situated in the territory of the Member State of the European Union). The territorial insolvency proceedings could be secondary insolvency proceedings and the independent insolvency proceedings.

2. The law applicable to the insolvency proceedings is the law of the Member State of the European Union within the territory of which such proceedings are opened (with some exceptions).

3. Any judgment of the competent court of the Member State of the European Union opening insolvency proceedings shall be recognized in all the other Member States of the European Union. The other Member States of the European Union may not recognize the judgement only if such recognition might result in a limitation of personal freedom or postal secrecy, or if it would be contrary to the public policy of that Member State of the European Union.

The proper usage of the concept of the COMI by the courts of the Member States of the European Union in insolvency cases currently remains the reasonable way to achieve the objectives of the European Insolvency Regulation – improving the efficiency and effectiveness of insolvency proceedings and preventing forum-shopping.
2. THE COMI

As it was mentioned before, the concept of the COMI is not something specific only to the European Union insolvency law. It is also used in the United States of America\textsuperscript{(132)} as well as in the UNICTRAL Model Law.\textsuperscript{(133)} But the objective of this Chapter is to analyze the definition of the COMI in the European Insolvency Regulation, to present the importance of this concept in the European Union insolvency law and to discuss the case law of the CJEU concerning the COMI.

2.1. THE MEANING OF THE COMI IN THE EUROPEAN INSOLVENCY REGULATION

In this part of the LLM paper the definition of the COMI given by the European Insolvency Regulation and the importance of the concept of the COMI will be analyzed.

2.1.1. The definition of the COMI

Starting to analyze the meaning of the COMI, the Article 2 of the European Insolvency Regulation is worth mentioning. In the Article 2 of the European Insolvency Regulation where all the definitions of the European Insolvency Regulation are given, the COMI is not mentioned.

For the purpose to ascertain what the COMI means there is a need to look to the Recital 13 of the European Insolvency Regulation. In this Recital it is stated that ‘the ‘centre of main interests’ 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’\textsuperscript{(134)}. So as it is clear from the wording of the European Insolvency Regulation, in order to determine the COMI two criterions have to be corresponded: (1) the place where the debtor’s main interests are situated shall be founded; and (2) the fact that debtor conducts the administration of his interests in certain place shall be ascertainable by the third parties. Only when these two cumulative requirements are met the COMI can be determined. In practice, ‘in the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary’\textsuperscript{(135)}.

Two questions arise from this presumption: who can prove that the place of the registered office of the company is not the COMI of the company and what evidence could be accepted to rebut the presumption that the registered office of the company is the COMI of the company?

The answer to the first question could be given: in general any party of the case or stakeholders may submit the evidence that the registered office of the company in question is not the COMI of that company. In this case, it is for the court to decide whether the evidence


\textsuperscript{(134)} European Insolvency Regulation, recital 13.

\textsuperscript{(135)} \textit{ibid}, art 3(1).
submitted is persuasive to rebut the presumption. Of course, in the different Member States of the European Union procedural law differs and the answer to the question, who can prove that the registered office of the company is not the COMI of the company, should be given according to the national procedural law of the certain Member State of the European Union. For example, according to the Article 7 of the Code on Civil Procedure of the Republic of Lithuania persons who participate in the case may present the evidence.\(^{136}\) Article 37 clarifies these persons: parties of the case (plaintiff and defendant) and their agents, third parties, public prosecutor, state and municipal institutions and their agents, stakeholders and their agents, creditors and debtors and their agents.\(^{137}\)

So the answer to the question, who can prove that the registered office of the company is not the COMI of the company, will be different in every Member State of the European Union (of course, some similarities will be discovered), because the procedural laws of each Member State differ. Each time the court of certain Member State of the European Union will decide according to the national law of that country, which could lead to the different application of the provisions of the European Insolvency Regulation.

It could be mentioned that this verification by the third parties is criticized in the legal literature as well. For example, C. G. Paulus states that ‘the need for the recognisability of the centre of main interests for third persons’\(^{138}\) is not appropriate way to determine the COMI of the company. According to C. G. Paulus, there is no ‘explanation as to who constitutes ‘third persons’\(^{139}\). These ‘third parties’ could be ‘the members of the board of directors’\(^{140}\) as well as all the employees of affiliated company or creditors or other persons who could be determined as ‘third parties’. So the existence of different procedural laws in the different Member States of the European Union leads to the different interpretations who are these third parties. One should take into consideration that the fact that in general any party of the case or stakeholders may submit the evidence that the registered office of the company in question is not the COMI of the company, constitutes legal uncertainty. It is logical that these third parties should at least be related to the company in question, for example, they should have a right to lodge a claim to certain assets. Persons who have a right to lodge a claim to assets in case of insolvency of a company are usually creditors or shareholders. So in each situation the court shall decide whether the certain third party which provided evidence that the registered office of the company in question is not the COMI of the company, is sufficiently related to the company in question.

The second question is even more difficult to answer. P. Wautelet stated that ‘analysis of the case law reveals that courts have not been shy in accepting evidence rebutting this presumption.’\(^{141}\) In other words, from the case law it is obvious that given presumption is rebutted often by different means.\(^{142}\) As it was stated before, many multinational groups of companies exercise their business not in the same country where they are registered. In reality the head office of a company cannot automatically be considered as the COMI of the company. So to answer to the second question, the Recital 13 of the European Insolvency

\(^{136}\) Lietuvos Respublikos civilinio proceso kodeksas (Valstybės žinios 2002, No 36-1340), art 7 (Code on Civil Procedure of the Republic of Lithuania).

\(^{137}\) ibid, art 37.

\(^{138}\) Paulus (n 31) 823.

\(^{139}\) ibid 824.

\(^{140}\) ibid.

\(^{141}\) Wautelet (n 2) 86.
Regulation shall be mentioned again. The second of the two cumulative requirements established in the Recital 13 of the European Insolvency Regulation is of the main importance: the fact that company conducts the administration of its interests in certain place shall be ascertainable by the third parties. So we can assert that the way to prove that the COMI of the company is other than its registered office is declaration made by the third parties. In other words, it is enough for the third party to confirm that the COMI of the company is other than its registered office. Of course it should be added that it is for the court to decide whether this declaration is enough to rebut the presumption. Analyzing the possibility to rebut the presumption, the Eurofood case shall be mentioned. W. G. Ringe emphasizes one very important element of the Eurofood case. The scholar claims that ‘the case has underlined the importance of the ‘presumption’ and has made it more difficult to rebut it’\textsuperscript{143}. This aspect of the Eurofood case will be analyzed later.\textsuperscript{144}

To conclude, the fact that the European Insolvency Regulation does not clarify who are these ‘third parties’ and what means could be used by these ‘third parties’ to rebut the presumption constitutes legal uncertainty which can lead to different interpretations by the courts of the Member States of the European Union. As it is clear from the wording of the European Insolvency Regulation and the scholar’s approach, it is not apparent enough by whom the recognisability of the COMI determines the denial of the presumption. So the answer to the second question could be formed like this: the court may decide that the presumption is rebutted if third parties recognize that the COMI of certain company is other than its registered office.

2.1.2. The importance of the COMI

According to P. Wautelet the COMI ‘plays a key role in the application of the Regulation’\textsuperscript{145} because of the two reasons.

Firstly, the COMI ‘constitutes the main jurisdictional test’\textsuperscript{146}. In the Article 3 of the European Insolvency Regulation international jurisdiction rules are set. It was analyzed before\textsuperscript{147} that the main insolvency proceedings may be opened by the court of the Member State of the European Union ‘within the territory of which the centre of a debtor's main interests is situated’\textsuperscript{148}. In other words, the COMI is important because it answers to the question which of the Member States of the European Union (precisely which court) is competent to open the main insolvency proceedings. The COMI leads to the concrete Member State of the European Union, but not to the particular court of that Member State. Which particular court of the Member State is competent to open the main insolvency proceedings is decided by the national jurisdictional rules of the certain Member State of the European Union.

Secondly, ‘the location of the COMI is also decisive for the consequences of the insolvency’.\textsuperscript{149} The most important aspect of the consequences of the insolvency is that the COMI ‘determines the applicable law’\textsuperscript{150} to the insolvency proceedings. P. Wautelet

\textsuperscript{143} Ringe (n 109) 589.
\textsuperscript{144} pp 27-30 of this LLM paper.
\textsuperscript{145} Wautelet (n 2) 73.
\textsuperscript{146} ibid.
\textsuperscript{147} pp 10-12 of this LLM paper.
\textsuperscript{148} European Insolvency Regulation, art 3(1).
\textsuperscript{149} Wautelet (n 2) 73.
\textsuperscript{150} ibid 73-74.
distinguishes the other consequences of the insolvency which rely on the location of the COMI. These consequences are: ‘the treatment afforded to creditors and, subject to some exceptions, to secured creditors’\(^{151}\). In this research the legal position of the creditors in the insolvency proceedings is not analyzed because it is not the subject-matter of the LLM paper. In addition, the rights and duties of the creditors in the case of the insolvency of a company is the separate subject, because the legal position of the creditors is set down by the national laws of the Member States of the European Union (with some exceptions).

On the one hand, the importance of the COMI has no doubts. On the other hand, the concept of the COMI itself is criticized by some scholars. For example, W. G. Ringe distinguishes two main problems of this concept. First of all, the author claims that the COMI’s ‘standard as it is applied does not accord with the freedom of establishment’\(^{152}\). This aspect was analyzed in the Chapter I of this LLM paper.\(^{153}\) It is worth reminding, that this statement is doubtful. Secondly, ‘the definition of the COMI is still highly unclear’\(^{154}\). And W. G. Ringe continues that the vagueness of the definition of the COMI ‘is most likely to create legal uncertainty both for the respective company and for third parties who are in business relations with the company’\(^{155}\). It could be reminded that the definition of the COMI has two main gaps: (1) it is not apparent enough by whom the recognisability of the COMI determines the denial of the presumption set in the European Insolvency Regulation; and (2) what means could be used by the ‘third parties’ to rebut the presumption.

After the analysis of the COMI given by the European Insolvency Regulation, it is clear that the provisions of the European Insolvency Regulation are not sufficiently precise to reveal the meaning of the COMI. Seeking to understand the meaning of the COMI more deeply, the case law could contribute a lot. The importance of the case law of the CJEU is without any doubt.

2.2. THE EUROFOOD CASE: ITS IMPORTANCE AND CRITIC

One of the most important cases of the CJEU in respect of the concept of the COMI is the Eurofood case.

2.2.1. The facts of the Eurofood case and its outcome

A company named Eurofood was established in Ireland and had its registered office in Dublin. Eurofood was wholly owned subsidiary of Parmalat SpA, a company incorporated in Italy, whose principal objective was the provision of financing facilities for companies in the Parmalat group.\(^{156}\)

On 24 December 2003 Parmalat SpA was admitted to extraordinary administration proceedings by the Italian Ministry of Production Activities, who appointed Mr. Bondi as the extraordinary administrator of Eurofood.\(^{157}\)

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\(^{151}\) ibid 74.
\(^{152}\) Ringe (n 109) 613.
\(^{153}\) pp 19-21 of the LLM paper.
\(^{154}\) Ringe (n 109) 612.
\(^{155}\) ibid 613.
\(^{156}\) Eurofood IFSC (n 3) [17].
\(^{157}\) ibid [18].
On 27 January 2004, the Bank of America NA applied to the High Court of the Republic of Ireland for compulsory winding up proceedings to be commenced against Eurofood and for the nomination of a provisional liquidator. The Bank of America NA claimed that Eurofood was insolvent. On the same day the High Court of the Republic of Ireland appointed Mr. Farrell as the provisional liquidator.

On 9 February 2004 in Italy Mr Bondi was appointed as extraordinary administrator. On 10 February 2004, an application was lodged before the District Court in Parma (Italy) for a declaration that Eurofood was insolvent. The hearing was fixed and Mr. Farrell was informed. On 20 February 2004, the District Court in Parma, taking the view that the COMI of Eurofood was in Italy, held that it had international jurisdiction to determine whether Eurofood was in a state of insolvency.

By 23 March 2004 the High Court of the Republic of Ireland decided that, according to Irish law, the insolvency proceedings in respect of Eurofood had been opened in Ireland on the date on which the application was submitted. Taking the view that the COMI of Eurofood was in Ireland, it held that the proceedings opened in Ireland were the main proceedings. It also held that the circumstances in which the proceedings were conducted before the District Court in Parma were such as to justify, pursuant to the Article 26 of the European Insolvency Regulation, the refusal of the Irish courts to recognise the decision of that court. Finding that Eurofood was insolvent, the High Court of the Republic of Ireland made an order for winding up and appointed Mr. Farrell as the liquidator.

Mr. Bondi appealed against that judgment and the Supreme Court stayed the proceedings and referred to the CJEU for a preliminary ruling.

The CJEU delivered an opinion from which it was clear that the COMI of Eurofood was in Ireland.

2.2.2. The reasoning of the CJEU

For the sake of clarity it is constructive to divide the reasoning of the CJEU into two parts. First of all, the CJEU deals with the concept of the COMI and, secondly, the principle of recognition of the insolvency proceedings and the effect of recognition in the other Member States of the European Union are explained.

First of all, it is important that the CJEU described ‘what the determining factor is for identifying the centre of main interests of a subsidiary company, where it and its parent have their respective registered offices in two different Member States’162. In particular the CJEU answers to the question:

How much relative weight should be given as between, on the one hand, the fact that the subsidiary regularly administers its interests, in a manner ascertainable by third parties and in respect for its own corporate identity, in the Member State where its registered office is situated and, on the other hand, the fact that the parent company is

158 ibid [19].
159 ibid [22].
160 ibid [23].
161 ibid.
162 ibid [26].
in a position, by virtue of its shareholding and power to appoint directors, to control the policy of the subsidiary.\textsuperscript{163}

The answer given by the CJEU is the following: ‘where a debtor is a subsidiary company whose registered office and that of its parent company are situated in two different Member States, the presumption laid down\textsuperscript{164} in the European Insolvency Regulation\textsuperscript{165} ‘can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect’\textsuperscript{166}. The CJEU explains that such situation could arise

\[\text{[I]n the case of a company not carrying out any business in the territory of the Member State in which its registered office is situated. By contrast, where a company carries on its business in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by the Regulation.}\textsuperscript{167}\]

The second important element of the reasoning of the CJEU is the one which regards recognition of the insolvency proceedings and the effect of recognition in the other Member States of the European Union.\textsuperscript{168} In this judgement the answer to the question ‘whether the jurisdiction assumed by a court of a Member State to open main insolvency proceedings may be reviewed by a court of another Member State in which recognition has been applied for’\textsuperscript{169} is given. The answer is the following: ‘the main insolvency proceedings opened by a court of a Member State must be recognised by the courts of the other Member States, without the latter being able to review the jurisdiction of the court of the opening State’\textsuperscript{170}. It is important that the CJEU leaves the way for the Member State to refuse to recognize the insolvency proceedings opened in another Member State on the basis that ‘the decision to open the proceedings was taken in flagrant breach of the fundamental right to be heard, which a person concerned by such proceedings enjoys’\textsuperscript{171}.

2.2.3. The importance of the Eurofood case

W. G. Ringe emphasizes the importance of the Eurofood case defining two relevant aspects. Firstly, ‘the case has underlined the importance of the ‘presumption’ and has made it more difficult to rebut it. As far as the registered office gained more importance as a criterion, this has to be welcomed.’\textsuperscript{172} The presumption the author is referring to is the one set in the Article 3(1) of the European Insolvency Regulation that ‘the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary’\textsuperscript{173}.  

\textsuperscript{163} ibid [27].
\textsuperscript{164} ibid [37].
\textsuperscript{165} In particular in the European Insolvency Regulation, art 3(1).
\textsuperscript{166} Eurofood IFSC (n 3) [37].
\textsuperscript{167} ibid.
\textsuperscript{168} The principle of recognition of the insolvency proceedings and the effect of recognition in all the other Member States are set in the European Insolvency Regulation, arts 16-17.
\textsuperscript{169} Eurofood IFSC (n 3) [38].
\textsuperscript{170} ibid [44].
\textsuperscript{171} ibid [67].
\textsuperscript{172} Ringe (n 109) 589.
\textsuperscript{173} European Insolvency Regulation, art 3(1).
As it was discussed before, from the wording of the European Insolvency Regulation it is enough for the third party to declare that the COMI of the company is other than its registered office and the court may follow this declaration by making a decision that the presumption is rebutted. After the *Eurofood* case the presumption was strengthened and the possibility to rebut it was reduced. The CJEU in the *Eurofood* case stated that:

> [T]he simple presumption laid down by the Community legislature in favour of the registered office of that company can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect.\(^{174}\)

Therefore, the CJEU established two cumulative criterions test, which has to be followed seeking to rebut the presumption set in the European Insolvency Regulation. This test consists of both objective and subjective elements. The subjective element is already discussed and criticized as not sufficient to rebut the presumption, because it is not apparent enough by whom and by what evidence the recognisability of the COMI determines the denial of the presumption. So in this case the CJEU justly adds the second – objective – criterion which has to be taken into consideration. The CJEU explains the existence of such actual situation ‘that could be so in particular in the case of a ‘letterbox’ company not carrying out any business in the territory of the Member State in which its registered office is situated’.\(^{175}\) And it continues:

> By contrast, 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 the Regulation.\(^{176}\)

The CJEU underlined that the definition of the COMI ‘shows that the centre of main interests must be identified by reference to criteria that are both objective and ascertainable by third parties’.\(^{177}\) This is the other important aspect of the *Eurofood* case which is emphasized by W. G. Ringe: ‘in insisting on ‘objective and ascertainable’ criteria, the Court has underlined the factual elements of the COMI, thereby rejecting the ‘mind of management’ idea and seemingly interpreting the COMI almost as a ‘de facto’ head office’.\(^{178}\) According to W. G. Ringe, ‘the existence on ‘objective and ascertainable’ criteria makes it more difficult to shift the COMI from one Member State to another, because the connecting factor takes into account more factual and not only legal criteria, which need to be moved across the border’.\(^{179}\)

The other important element of the *Eurofood* case which could be single out is the one that the CJEU strengthens the necessity of that objectivity and possibility of ascertainment by third parties linking them to ensuring the ‘legal certainty and foreseeability concerning the

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\(^{174}\) *Eurofood* IFSC (n 3) [34].

\(^{175}\) ibid [35].

\(^{176}\) ibid [36].

\(^{177}\) ibid [33].

\(^{178}\) Ringe (n 109) 589.

\(^{179}\) ibid 589-590.
determination of the court with jurisdiction to open main insolvency proceedings.’\textsuperscript{180} Furthermore, the CJEU adds that ‘legal certainty and that foreseeability are all the more important in that, in accordance with Article 4(1) of the Regulation, determination of the court with jurisdiction entails determination of the law which is to apply’.\textsuperscript{181} In other words, the two cumulative criterions (objective and ascertainability by the third parties) are important for the determination of the law applicable to the insolvency proceedings.

Lastly, the CJEU emphasized the specificity of the COMI: ‘The concept of the centre of main interests is peculiar to the Regulation. Therefore, it has an autonomous meaning and must therefore be interpreted in a uniform way, independently of national legislation.’\textsuperscript{182} P. Wautelet agrees that the CJEU stressed this need in the \textit{Eurofood} case: ‘the value of the Regulation would be greatly diminished if its provisions – and Article 3 (1) is certainly the key one – were to be construed differently in various European jurisdictions’.\textsuperscript{183}

\textbf{2.2.4. The critics of the \textit{Eurofood} case}

Many legal scholars criticize the CJEU decision in the \textit{Eurofood} case. Particularly the statement that ‘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 the Regulation’\textsuperscript{184} I. Mevorach claims that ‘ideally, domestic regimes should adopt a policy according to which local courts will avoid opening local proceedings against subsidiaries if they were actually managed via the group’s centre located elsewhere’\textsuperscript{185} So it is clear that the outcome in the \textit{Eurofood} case was opposite to the ‘ideal domestic regime’ I. Mevorach suggests.

In addition, C. G. Paulus also criticizes that ‘the ‘mere fact’ that the mind of management is abroad does not suffice anymore’\textsuperscript{186} The author claims that if additional facts would be added, the outcome of the decision would be different.\textsuperscript{187}

W. G. Ringe asserts that ‘this judgement solves only part of the problem, if at all. It has become more difficult to easily shift the COMI within the corporate group and to argue for a ‘group insolvency’ procedure at the COMI of the group’s parent company, comprising all subsidiaries.’\textsuperscript{188}

The critics of the \textit{Eurofood} case could be seen through ‘creditor wealth maximisation vision’\textsuperscript{189} In order to protect creditors of a subsidiary in certain situations (e.g. when corporate group is strongly integrated) not only the COMI of a subsidiary could be considered to be located where the COMI of a parent company is situated, but also the substantive consolidation or at least the procedural consolidation could be allowed. So the

\textsuperscript{180} \textit{Eurofood} IFSC (n 3) [33].
\textsuperscript{181} ibid.
\textsuperscript{182} ibid [31].
\textsuperscript{183} Wautelet (n 2) 84.
\textsuperscript{184} \textit{Eurofood} IFSC (n 3) [36].
\textsuperscript{185} Mevorach, ‘Appropriate Treatment of Corporate Groups in Insolvency: A Universal View’ (n 4) 180.
\textsuperscript{186} Paulus (n 31) 824.
\textsuperscript{187} ibid.
\textsuperscript{188} Ringe (n 109) 589.
\textsuperscript{189} Vanessa Finch, \textit{Corporate Insolvency Law Perspectives and Principles} (2\textsuperscript{nd} edn, Cambridge University Press, 2009) 33.
critics of the *Eurofood* case could be explained through intention to guarantee maximum creditors protection.

In conclusion, the CJEU decision in the *Eurofood* case is criticized in legal literature mostly because of the one of the arguments that the ‘mere fact’ that the subsidiary is controlled by a parent company in another Member State of the European Union is not enough to conclude that the COMI of such subsidiary is situated in the Member State where parent company is located. As it was demonstrated above, the opinion (how to determine the COMI of a subsidiary when it is controlled by a parent company) of the CJEU and the opinion shared in the legal literate differ.

### 2.3. THE CASE LAW OF THE CJEU REGARDING THE CONCEPT OF THE COMI

For the moment there are five cases solved by the CJEU which deal with the application of the European Insolvency Regulation. There are also six cases pending before the CJEU.

#### 2.3.1. The decisive moment of the location of the COMI

In the *Staubitz-Schreiber* case the problem came to the front when ‘the applicant in the main proceedings moved the centre of her main interests to Spain after she had requested the opening of insolvency proceedings in Germany, but before such proceedings were opened or produced their effects under German law’\(^\text{190}\).

The CJEU noted that the Article 3 (1) of the European Insolvency Regulation ‘does not specify whether the court originally seised retains jurisdiction if the debtor moves the centre of his main interests after submitting the request to open proceedings but before the judgment is delivered’\(^\text{191}\). So the question arose: whether the court in Germany remains jurisdiction to insolvency proceedings? The CJEU answered to the question as following:

> [T]he court of the Member State within the territory of which the centre of the debtor’s main interests is situated at the time when the debtor lodges the request to open insolvency proceedings retains jurisdiction to open those proceedings if the debtor moves the centre of his main interests to the territory of another Member State after lodging the request but before the proceedings are opened.\(^\text{192}\)

The reasoning of the CJEU is important in this case. Although some of the reasons why the court in Germany retains the jurisdiction in the insolvency proceedings are the ones already discussed above.\(^\text{193}\)

The most general reason is that ‘a transfer of jurisdiction from the court originally seised to a court of another Member State on that basis would be contrary to the objectives pursued by the Regulation’\(^\text{194}\).

Secondly, in the European Insolvency Regulation\(^\text{195}\) the ‘legislature records its intention to avoid incentives for the parties to transfer assets or judicial proceedings from one Member

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\(^{190}\) *Staubitz-Schreiber* (n 44) [19].

\(^{191}\) ibid [23].

\(^{192}\) ibid [29].

\(^{193}\) See pp 18-19 of this LLM paper.

\(^{194}\) *Staubitz-Schreiber* (n 44) [24].
State to another, seeking to obtain a more favourable legal position." In other words, one of the aims of adopting the European Insolvency Regulation is preventing forum-shopping.

Thirdly, such a transfer would also be contrary to the objective of efficient and effective cross-border proceedings, as it would oblige creditors to be in continual pursuit of the debtor wherever he chose to establish himself more or less permanently and would often mean in practice that the proceedings would be prolonged.

Fourthly, retaining the jurisdiction ‘ensures greater judicial certainty for creditors who have assessed the risks to be assumed in the event of the debtor’s insolvency with regard to the place where the centre of his main interests was situated when they entered into a legal relationship with him’.

Lastly, retaining the jurisdiction is one of the elements which constitutes ‘important guarantees for creditors, which ensure the widest possible coverage of the debtor’s assets, particularly where he has moved the centre of his main interests after the request to open proceedings but before the proceedings are opened.

The importance of this case is that the CJEU defined the moment of location of the COMI which is an essential fact determining the jurisdiction and the law applicable to the insolvency proceedings. This decisive moment of the location of the COMI is the time when the debtor lodges the request to open insolvency proceedings. W. G. Ringe this judgement describes as ‘a legal phenomenon usually referred to as perpetuation of fori’.

2.3.2. Pending cases before the CJEU regarding the concept of the COMI

There are several pending cases before the CJEU regarding the concept of the COMI at the moment. It is obvious from the questions referred to the CJEU, that the outcome of these judgements will be noteworthy for the interpretation of the COMI.

One of these cases is a reference for a preliminary ruling from the Tribunale ordinario di Bari (Italy) lodged on 12 October 2009. The questions referred are:

1. Is the concept of the COMI to be interpreted in accordance with European law or national law, and, if the former, how is that concept to be defined and what are the decisive factors or considerations for the purpose of identifying the COMI?

2. Can the presumption laid down in Article 3(1) of the European Insolvency Regulation be rebutted if it is established that the company carries on genuine business activity in a State other than that in which it has its registered office, or is it necessary, in order for the

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195 European Insolvency Regulation, recital 4.
196 Staubitz-Schreiber (n 44) [25].
197 European Insolvency Regulation, recital 2.
198 Staubitz-Schreiber (n 44) [26].
199 ibid [27].
200 ibid [28].
201 Ringe (n 109) 591.
203 In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.
presumption to be deemed rebutted, to establish that the company has not carried on any business activity in the State in which it has its registered office?  

3. If a company has, in a Member State other than that in which it has its registered office, immovable property, a lease agreement concluded by the debtor company with another company, and a contract with a bank, are these sufficient factors or considerations to rebut the presumption and are such circumstances sufficient for the company to be regarded as having an ‘establishment’ within the meaning of Article 3(2) of the European Insolvency Regulation?  

The other interesting case pending is a reference for a preliminary ruling from the Cour de Cassation (France) lodged on 19 April 2010. The outcome of this case should be particularly significant and remarkable. The questions referred are:

1. Where a court in a Member State opens the main insolvency proceedings in respect of a debtor, on the view that the COMI of a debtor is situated in the territory of that Member State, does the European Insolvency Regulation preclude the application, by that court, of a rule of national law conferring upon it jurisdiction to join to those proceedings a company whose seat is in another Member State solely on the basis of a finding that the property of the debtor and the property of that company have been intermixed?

2. If the action for joinder falls to be categorised as the opening of new insolvency proceedings in respect of which the jurisdiction of the court of the Member State first seised is conditional on proof that the company to be joined has the COMI in that Member State, can such proof be inferred solely from the finding that the property of the two companies has been intermixed?  

2.4. CONCLUSIONS

After the analysis of the concept of the COMI in the European Insolvency Regulation and the analysis of the case law of the CJEU, the following conclusions could be drawn.

Albeit the COMI constitutes the main jurisdictional test and the location of the COMI is decisive for the consequences of the insolvency, the provisions of the European Insolvency Regulation are not sufficiently precise.

The judgement in the Eurofood case contributed in disclosing the meaning of the COMI mainly by clarifying what factors should be taken into account in order to rebut the presumption (both objective and subjective elements are needed) and ascertained that the mere fact that a subsidiary is controlled by a parent company is not enough to rebut the presumption.

Since the European Insolvency Regulation is a relatively new instrument of the insolvency law of the European Union, there are only few cases solved by the CJEU. The concept of the COMI will be clarified more in the length of time.

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204 Interedil (n 202).
205 ibid.
207 ibid.
3. THE THEORETICAL AND PRACTICAL BACKGROUND OF THE INSOLVENCY OF MULTINATIONAL GROUPS OF COMPANIES

In this Chapter the variety of groups of companies in their form and the different approaches of treating groups of companies are presented. In the second part of this Chapter the current legal background of the insolvency of multinational group of companies in the European Union and in the United States of America as well as the UNCITRAL Model Law is analyzed. After the analysis of the case law in the different Member States of the European Union the possible model of dealing with the insolvency of multinational group of companies in the European Union is presented.

3.1. THE SEPARATE ENTITY APPROACH AND SINGLE ENTERPRISE APPROACH

According to P. Wautelet, ‘when one looks at the reality of groups of companies, one cannot but recognize the existence of a surprising variety’. This variety may be classified according to various criterions.

One of the ways to classify the groups of companies is according to their structure. According to their structure, groups of companies may be classified to groups of companies with hierarchical integration and groups of companies with vertical integration.

Vertical integration generally takes place within a single industry and combines, for example, some or all of the sequential operations between the sourcing of raw materials and sale of the final product. It can be pursued as a strategy by acquiring suppliers, wholesalers, and retailers to increase control and reliability. It can also be achieved when a company gains strong control over suppliers or distributors, usually by exercising purchasing power.

The groups of companies

[M]ay also have a horizontal structure, with many sibling group members, often with a high degree of cross-ownership, operating at the same level in a particular process. Horizontal integration is generally associated with control of a single stage of production or a single industry, enabling the group to take advantage of economies of scale, but horizontally integrated groups may also conduct businesses in a related field or in a diverse range of unrelated fields.

It is interesting to note that horizontal groups are more common in Europe, while vertical groups are more common in the United States of America and Japan. In addition, vertical integration might be more common in manufacturing, while horizontal integration is more common in marketing.

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208 Wautelet (n 2) 89-90.
210 ibid, art 8.
211 ibid.
The other possible classification of groups of companies is according to the degree of integration. I. Mevorach claims that ‘the degree of integration may differ between enterprises with different levels of autonomy enjoyed by affiliates’\(^{212}\) The scholar states that ‘the group may be centrally controlled or decentralised in its organisational structure’\(^{213}\) P. Wautelet adds that ‘some groups may be strongly integrated, with the business of all companies conducted (carelessly or as a strategy) as if it was a single entity’\(^{214}\) On the other hand, ‘some companies could form a group and still operate in a more separate mode, with each company organized within national borders and functioning in accordance with national regimes’\(^{215}\)

So the question arises: should the legislator of a country treat the group of companies as one single entity with one legal personality or should the group of companies be treated as separate companies with different legal personalities? There are two different approaches shared in the legal literature which reflect in the national legal regimes. These approaches are the separate entity approach and the single enterprise approach. It is worth mentioning, that ‘regulation of enterprise groups is generally based on one of two approaches or in some cases on a combination of the two’\(^{216}\)

The basic principles of the separate entity approach are: each company with the group of companies has separate legal personality; the shareholders have limited liability and board of directors has duties of each separate company within the group of companies\(^{217}\)

The single enterprise approach ‘relies upon the economic integration of enterprise group members, treating the group as a single economic unit that operates to further the interests of the group as a whole, or of the dominant group member, rather than of individual members’\(^{218}\)

The most common approach is the separate entity approach in many countries of the world. But there are some countries that recognize exceptions to strict application of that approach and others that have developed, either by legislation or the courts, a single enterprise approach that applies to certain situations\(^{219}\)

If the country recognizes a single enterprise approach or single enterprise approach is allowed in certain situations, then the procedural consolidation and the substantive consolidation should be mentioned in this respect.

The procedural consolidation allows linking the ‘procedural aspects’\(^{220}\) of multiple proceedings in different ways: e.g., appointing only one insolvency administrator for all the insolvency proceedings of the companies within the group or assigning one court as competent to deal with the insolvency of the companies belonging to the group\(^{221}\)

\(^{212}\) Mevorach, ‘Appropriate Treatment of Corporate Groups in Insolvency: A Universal View’ (n 4) 186.

\(^{213}\) ibid.

\(^{214}\) Wautelet (n 2) 90.

\(^{215}\) ibid.

\(^{216}\) UNCITRAL Legislative Guide, art 31.

\(^{217}\) ibid, art 32.

\(^{218}\) ibid, art 34.

\(^{219}\) ibid, art 35.

\(^{220}\) Mevorach, ‘Appropriate Treatment of Corporate Groups in Insolvency: A Universal View’ (n 4) 189.

\(^{221}\) Paulus (n 31) 827.
The substantive consolidation is ‘the treatment of the assets and liabilities of two or more enterprise group members as if they were part of a single insolvency estate’.\textsuperscript{222} In other words, the substantive consolidation allows linking of assets and liabilities of companies within the group.

C. G. Paulus describes the procedural consolidation and the substantive consolidation as ‘two options for a modernized treatment of group insolvencies’\textsuperscript{223} These ‘two options for a modernized treatment’ of group of companies in case of insolvency are undoubtedly more effective ways to deal with a group’s insolvency than to treat each company belonging to the group as separate legal entity and open separate insolvency proceedings. Moreover, under the separate entity approach, the assets and liabilities of each company’s belonging to the group shall be treated separately. Of course, if the economic reality would be taken into account, most of the groups of companies (most, but not all) are so strongly integrated that the assets and liabilities of each company within the group are interconnected and cannot be separated in practice.

However, as it was said, not all the groups of companies are so strongly integrated that the assets and liabilities of each company within the group cannot be separated. So sometimes ‘to pack all assets into one estate does not necessarily correspond with the economic realities’\textsuperscript{224} As it was mentioned, ‘some companies could form a group and still operate in a more separate mode, with each company organized within national borders and functioning in accordance with national regimes’.\textsuperscript{225} So in case of insolvency of such companies which are formed in decentralized way (which operate in a more separate mode) neither procedural, nor substantive consolidation should be allowed.

As G. McCormack correctly remarks, ‘consolidation generally is a controversial topic not least because of a prima facie conflict with the principle that each company, even with the group, is a separate legal entity with rights and liabilities that appropriate to itself’\textsuperscript{226} This approach could be accepted in the case of insolvency of the decentralized group of companies.

So each time when the court is dealing with the insolvency of the group of companies, it has to determine whether any consolidation should be allowed. Of course, firstly, it should be embedded in the national insolvency laws of each country.

\section*{3.2. THE CURRENT LEGAL BACKGROUND OF THE INSOLVENCY OF MULTINATIONAL GROUP OF COMPANIES}

In this part of the research the current legal background of the insolvency of multinational group of companies within the European Union as well as the current legal background of the insolvency of multinational group of companies in other countries of the world is discussed.

\textsuperscript{222} UNCITRAL Legislative Guide, art 4(e).
\textsuperscript{223} Paulus (n 31) 826.
\textsuperscript{224} ibid 830.
\textsuperscript{225} Wautelet (n 2) 90.
\textsuperscript{226} Gerard McCormac, ‘Time to Revise the European Insolvency Regulation’ in Bob Wessels and Paul J. Omar (eds), \textit{The European Insolvency Regulation: An Update} (INSOL Europe 2010) 82.
3.2.1. The current legal background within the European Union

One should take into account that the European Insolvency Regulation itself does not have specific rules for parent-subsidiary relations. It should not be seen as a surprise, because ‘legal regimes normally lack a coherent law of corporate or enterprise groups’. In addition, the company law of the European Union does not recognize corporate group as one legal entity. In other words, ‘corporate groups lack legal personality’. Furthermore, P. Wautelet claims that ‘under the Regulation the mere fact that a company is part of a group should not be taken into account as a decisive factor to identify the COMI’.

The Eurofood case could be reminded in this respect. The CJEU in the reasoning of the Eurofood case made it clear that ‘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 the Regulation’. In other words, the fact that a subsidiary which is controlled by a parent company established in another Member State of the European Union is not a decisive factor concluding that the COMI of a subsidiary is located in the Member State where a parent company is situated. So according to the European Union company law and the case law of the CJEU, each company within the multinational group of companies is subject to separate insolvency proceedings.

So it is clear that the European Union company law is based on the separate entity approach. Furthermore, the European Union company and insolvency laws do not provide any guidelines for the court of the Member States of the European Union how groups of companies should be treated in case of insolvency. The treatment of groups of companies in case of insolvency is left for the national laws of the Member States of the European Union to define.

The European Insolvency Regulation does not deal with issues of linking between the companies which form a group of companies (neither the procedural consolidation nor the substantive consolidation is mentioned). The question, whether linking between the companies within the group of companies is allowed, should be answered in the national laws of the each Member State of the European Union.

Each time when the court has to answer to the question whether linking shall be allowed, such aspects as ‘preserving the insolvency estate, maximizing value, and enabling rescues in the handling of the insolvency process’ shall be taken into account. As it was discussed before, the integration level between the companies within the group of companies is important and should be held as one of the decisive factors determining whether the consolidation is allowed.

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227 Wautelet (n 2) 89.
228 Mevorach, Insolvency within Multinational Enterprise Groups (n 16) 26.
229 Hirte (n 7) 214.
230 Wautelet (n 2) 89.
231 Eurofood IFSC (n 3) [36].
232 Mevorach, Insolvency within Multinational Enterprise Groups (n 16) 151.
3.2.2 The UNCITRAL Model Law and the system of the United States of America of the insolvency of multinational groups of companies

The UNCITRAL Model Law was adopted by the General Assembly on the 30th of January 1998. The UNCITRAL Model Law is designed to assist different countries of the world to equip their insolvency laws with a modern, harmonized and fair framework to address more effectively instances of cross-border insolvency.\(^{233}\) It is important to note that UNCITRAL Model Law is not a convention which is binding between all the contracting states, but rather a model which could be adapted by the enacting states.\(^{234}\)

In the UNCITRAL Model Law the term ‘cross-border insolvency’ covers cases (1) where the insolvent debtor has assets in more than one State or (2) where some of the creditors of the debtor are not from the State where the insolvency proceeding is taking place.\(^{235}\) The UNCITRAL Model Law does not unify the substantive insolvency law. It offers solutions in: foreign assistance for an insolvency proceeding taking place in the enacting State; foreign representative's access to courts of the enacting State; recognition of foreign proceedings; cross-border cooperation; and coordination of concurrent proceedings.\(^{236}\)

The definitions of procedural and substantive consolidation (coordination) are provided in the UNCITRAL Legislative Guide on Insolvency Law Part three: Treatment of enterprise groups in insolvency.

The procedural consolidation (coordination) is defined as following: ‘coordination of the administration of two or more insolvency proceedings in respect of enterprise group members. Each of those members, including its assets and liabilities, remains separate and distinct’.\(^{237}\)

Substantive consolidation is ‘the treatment of the assets and liabilities of two or more enterprise group members as if they were part of a single insolvency estate’.\(^{238}\)

Albeit the definitions of procedural consolidation (coordination) and substantive consolidation are provided in the UNCITRAL Model Law, but similarly to the European Union insolvency law, the UNCITRAL Model Law ‘does not deal explicitly with the issue of corporate groups’.\(^{239}\)

The UNCITRAL Model Law was incorporated in legal systems of many different countries ‘using more or less the identical wording’\(^{240}\). Mexico, Japan, South Africa, Argentina, Pakistan and others. The United States of America is one of those countries which included UNCITRAL Model Law in its legal system. In the United States Bankruptcy Code Chapter 15 Section 1501 it is stated: ‘The purpose of this chapter is to incorporate the Model Law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of


\(^{234}\) Pannen (n 35) 12.

\(^{235}\) Model Law, art 1.

\(^{236}\) United Nations Commission on International Trade Law (n 233).

\(^{237}\) UNCITRAL Legislative Guide, art 4(d).

\(^{238}\) ibid, art 4(e).

\(^{239}\) Mevorach, *Insolvency within Multinational Enterprise Groups* (n 16) 97.

\(^{240}\) Pannen (n 35) 12.
cross-border insolvency’.\textsuperscript{241} So it is clear that in the United States of America the current legal background of the insolvency of multinational group of companies is based on the UNCITRAL Model Law.

As it was mentioned before, the concept of the COMI is also used in the United States of America\textsuperscript{242} as well as in the UNCITRAL Model Law\textsuperscript{243}. Though, it is interesting to note that ‘the concept of COMI was undoubtedly meant to be the same under the EIR and the Model Law’,\textsuperscript{244} but this concept is interpreted differently by the courts of the Member States of the European Union and by the courts of the United States of America.

In the following part of this LLM paper, the case law of the courts of the Member States of the European Union as well as the case law in the United States of America is discussed in order to disclose the differences in interpretation of the concept of the COMI.

3.3. THE PRACTICAL BACKGROUND OF THE INSOLVENCY OF MULTINATIONAL GROUPS OF COMPANIES

The practical background of the insolvency of multinational groups of companies is analyzed in this part of the paper. Such cases as the Daisyteck case, the Rover case and the Eurotunnel case are discussed in order to provide the examples how national courts of the Member States of the European Union deal with the insolvency of multinational groups of companies. The Stanford International Bank Limited case is talked over seeking to disclose the differences of interpretation of the concept of the COMI in Europe and in the United States of America.

3.3.1. The Daisyteck case

Daisyteck case\textsuperscript{245} ‘illustrates several questions and uncertainties connected to parent-subsidiary relations’\textsuperscript{246}.

The Daisyteck group was constituted of sixteen companies which were located in Europe and controlled by the American company. The parent company in the United States of America ‘filed for re-organization proceedings under Chapter 11 of the United States bankruptcy Code’\textsuperscript{247}. In addition, the court in the United Kingdom issued ‘a coordinated administration order in relation to 14 companies, 10 of which were in the UK, 3 of which were in Germany and one of which was in France’\textsuperscript{248}.

The court in the United Kingdom decided on factual evidence basis that the COMI of all fourteen companies was located in the United Kingdom, because (1) ‘effective management and control of all the companies in the group was conducted from the head office in England’\textsuperscript{249}; (2) ‘the companies’ funding was provided through English financial

\textsuperscript{241} United States Code, art 1501 (a).
\textsuperscript{242} United States Code.
\textsuperscript{243} Model Law, art 2(b).
\textsuperscript{244} Gabriel Moss, ‘New World and Old World: Symphony or Cacophony?’ in Bob Wessels and Paul J. Omar (eds), The European Insolvency Regulation: An Update (INSOL Europe 2010) 164.
\textsuperscript{245} Re Daisyteck-ISA Ltd [2003] BCC 562.
\textsuperscript{246} Wessels (n 95) 333.
\textsuperscript{247} Kastrinou (n 247) 6-7.
institutions; (3) ‘all financial information was compiled pursuant to English accounting principles and reviewed in England’; (4) ‘70% of the purchases were under contracts negotiated and dealt with’ through the English head office.

It is important to note that the court in the United Kingdom ‘did not simply rely in its decision on the fact that these subsidiaries belonged to one group. Rather, the court discussed an impressive list of factors (...) to justify its findings on jurisdiction’.

In conclusion, the court in the United Kingdom did not take into account the mere fact that economic choices are controlled by a parent company, but it analyzed the facts which led to the conclusion that the COMI of all fourteen companies was located in the United Kingdom.

### 3.3.2. The Rover case

**MG Rover Group** was active in Europe through many subsidiaries located in the different Member States of the European Union: MG Rover Deutschland, MG Rover Nederland, MG Rover Group Benelux, MG Rover España, MG Rover Italia, MG Rover Portugal, MG Rover France and MG Rover Ireland.

The court in the United Kingdom decided that the COMI of all those subsidiaries were located in England. To reason its decision, the court emphasized such facts as:

> [T]he overall control exercised in England on the management of each subsidiary (including on the appointment and removal of senior employees), the absence of any autonomy in budget setting, financial scrutiny and funding, the absence of any independent trading by the subsidiaries, which functioned as mere gateways through which cars were sold from England to the local markets, the fact that the parent company in England was the main creditor and main supplier of the subsidiaries, the fact that creditors would look to England for the satisfaction of their claims and finally the overall consideration that the local subsidiaries formed part of a network held together by their relationship with the MG Group.

So the court in the United Kingdom based its decision on factual evidence basis that the COMI of all the subsidiaries of MG Rover Group was situated in England. In addition, the court did not rely on mere fact that all the subsidiaries belong to the group of companies, because such fact is not sufficient enough to declare that the COMI is located in one country.

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250 ibid 7.
251 ibid.
252 Wessels (n 95) 334.
253 Wautelet (n 2) 96.
254 The CJEU in the Eurofood case stressed 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 the Regulation’. *(Eurofood IFSC (n 3) [36]).*
256 Wautelet (n 2) 80-81.
3.3.3. The Eurotunnel case

The insolvency proceedings were opened towards 17 companies, which were incorporated in the different Member States of the European Union: England, Belgium, Germany and the Netherlands, but all the main activities of these companies were in France.\(^{257}\)

The Paris Commercial Court decided that the COMI of the Eurotunnel companies was in France and reasoned its decision by ‘numbers of factors ascertainable by third parties’.\(^{258}\)

(a) the management of various subsidiaries was exercised by a joint committee which was located in France and consisted of French nationals;
(b) the registered office of the two main French companies belonging to the group was in France;
(c) the financial management was located in France;
(d) the main part of all the activities the Eurotunnel Finance Ltd. was engaged in was in France.\(^{259}\)

So it is clear, that the court in France rebutted the presumption laid down in the European Insolvency Regulation using both subjective and objective criterions.

3.3.4. The Stanford International Bank Limited case

The Stanford International Bank was established in Antigua\(^{260}\) where its registered office was situated.\(^{261}\) The major part (88 of 93 persons) of staff was working in Antigua as well as all the main departments were located there (Accounts Department, Human Resources Department, IT Department, etc.). In many brochures which purpose was to promote Stanford International Bank’s activities expressly said that ‘the Bank conducted its business with the world from its headquarters in Antigua’.\(^{262}\)

Albeit, the registered office of the Stanford International Bank was in Antigua, the employers were carrying their activities in Antigua, the Bank’s advertising expressly points out to Antigua, the decision was made that the COMI of the Stanford International Bank was located in the United States of America.

The reasoning of such decision was that ‘many strategic decisions were taken in the United States and that majority of those taking them were domiciled and resident in the United States and carried out their work there’.\(^{263}\)

The main critic for this decision is the one based on fact that the ascertainability by the third parties was not taken into account. It is clear from the facts of the case that third parties could ascertain that the COMI of the Bank was in Antigua. Unfortunately, the decision was based on other grounds and ascertainability by the third parties was not taken into account.

\(^{257}\) ibid 85.
\(^{258}\) Kastrinou (n 247) 16.
\(^{260}\) Antigua is one of the main islands of the country of Antigua and Barbuda located in the Caribbean region.
\(^{262}\) Moss (n 244) 150.
\(^{263}\) ibid 151.
The same critic for this decision is expressed in the legal literature as well. G. Moss describes this decision as ‘clearly a controversial one’.264

One should remember that the CJEU in the Eurofood decision stated that the definition of the COMI ‘shows that the centre of main interests must be identified by reference to criteria that are both objective and ascertainable by third parties’.265 C. G. Paulus analyzing this aspect in the Eurofood decision even stated that ‘the decision of the ECJ will have some impact on foreign jurisdictions such as the U.S., which also rely on the “centre of main interests” due to the influence insofar with the UNCITRAL Model Law’.266 But it is clear that in the Stanford International Bank decision the identification of the COMI was made without referring to the subjective element required under the case law of the CJEU.

To sum up the case law analyzed, it could be stated that the national courts of the different Member States of the European Union use various criterions (both subjective and objective) in order to rebut the presumption laid down in the European Insolvency Regulation that the COMI in the case of a company or legal person is the place of its registered office is established.267 In the United States of America the identification of the COMI lacks the subjective element (ascertainability by the third parties), required under the European Insolvency Regulation and the case law of the CJEU.

3.4. THE POSSIBLE MODEL OF DEALING WITH THE INSOLVENCY OF MULTINATIONAL GROUPS OF COMPANIES IN THE EUROPEAN UNION

In this part of the paper the possible model of dealing with the insolvency of multinational groups of companies in the European Union is presented. The three main issues are discussed: (1) possibility of having only one insolvency proceedings with universal effect; (2) the possibility to introduce the institute of `economic unit’ while dealing with the insolvency of multinational groups of companies; (3) the possibility to delete the presumption laid down in the European Insolvency Regulation.

3.4.1. Only one insolvency proceedings

While presenting the possible model of dealing with the insolvency of multinational groups of companies in the European Union, it is interesting to look back to the circumstances which were at the time when the European Insolvency Regulation was proposed.

After the proposal of the European Insolvency Regulation was submitted by the Federal Republic of Germany and the Republic of Finland, the Economic and Social Committee delivered an opinion. Few interesting aspects were mentioned in the opinion of the Economic and Social Committee on the Initiative of the Federal Republic of Germany and the Republic of Finland with a view to the adoption of a Council Regulation on insolvency proceedings, submitted to the Council on 26 May 1999.

264 ibid 151-152.
265 Eurofood IFSC (n 3) [33].
266 Paulus (n 31) 825.
267 European Insolvency Regulation, art 3(1).
The Economic and Social Committee expressed an opinion that it is regrettable that the European Insolvency Regulation ‘does not simply enshrine the principle of the uniqueness and universality of insolvency within the European Union: this would mean that a business declared insolvent would be subject to single proceedings, the effects of which would be recognised by all Member States’.

To put it simply, the Economic and Social Committee states that it would rather see the only insolvency proceedings in the European Insolvency Regulation – the main insolvency proceedings and the territorial insolvency proceedings should not be possible within the European Union. The idea of the only one insolvency proceedings is based on the fact the European Union forms a single market – ‘a concept which, by its very nature, should exclude the possibility of secondary insolvency’.

Furthermore, ‘the universality of insolvency approach is unquestionably that most likely to guarantee equality of creditors and rapid and rational organisation of liquidation’. In addition, having only one – the main insolvency proceedings would ‘serve to boost the chances of success of action to put failing businesses back on their feet.’

It is interesting to note that in the legal literature there is an opinion completely opposite to the one expressed by the Economic and Social Committee. G. McCormack suggests to reject ‘the concept of universal insolvency jurisdiction’ and to move to ‘a position where insolvency proceedings are administered on a territorial basis with cooperation between courts across national frontiers in appropriate cases’.

If the idea to have only one – main insolvency proceedings within the European Union would be implemented it would be a step forward to stronger integration between the Member States of the European Union. And this stronger integration is welcomed. In contrast, if the idea to have only territorial proceedings with the European Union would be implemented, it would be a step backward to inter-governmental union. It should be accepted, that having only one – main insolvency proceedings – would contribute to the proper functioning of the internal market as such.

In conclusion, one of the elements of the possible model of dealing with the insolvency of multinational group of companies in the European Union could be to introduce only one – main insolvency proceedings – on the European level.

### 3.4.2. Multinational group of companies as an economic unit

The second proposal of the possible model of dealing with the insolvency of multinational groups of companies in the European Union is to introduce the ‘economic unit’ institute in the field of insolvency law of the European Union.

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269 ibid, art 3(4)(2).
270 ibid, art 3(4)(3).
271 ibid, art 3(4)(5).
272 McCormac (n 226) 80.
273 ibid.
This institute is known in the competition law of the European Union. The ‘economic unit’ institute was developed by the CJEU in its case law. The CJEU consistently held that the term of ‘economic unit’ shall be used to determine the ‘undertakings belonging to the same group which have the status of parent company and subsidiary’.274

In the Viho/Commission case the CJEU stated that undertakings form an economic unit if: ‘within which the subsidiary has no real freedom to determine its course of action in the market because the parent company permanently supervises the making of decisions by, and the administration of, its subsidiary’.275

If this institute would be transferred to the insolvency law of the European Union, in the situations when a subsidiary cannot freely conduct itself on the market and does not have real autonomy from the parent company, parent company together with a subsidiary company would be regarded as an economic unit.

In case of insolvency of one or several subsidiaries, the economic unit approach could be applied and the procedural consolidation (or in certain situations even the substantive consolidation) could be allowed. In other words, if a group of companies is strongly integrated, the procedural aspects of the insolvency proceedings or the assets and liabilities in case of insolvency could be consolidated in order to maximise creditors’ protection.

3.4.3. The necessity of the presumption

The third proposal of the possible model of dealing with the insolvency of multinational groups of companies in the European Union is to surrender the presumption laid down in the Article 3 of the European Insolvency Regulation that ‘in the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary’.276

As it was discussed before277, the presumption laid down in the European Insolvency Regulation raises several questions to which the answers are given neither in the European Insolvency Regulation, nor in the case law of the CJEU. These questions are: who can prove that the place of the registered office of the company is not the COMI of the company and what evidence could be accepted to rebut the presumption that the registered office of the company is the COMI of the company?

P. Wautelet shares the same opinion: ‘In our view, deleting the presumption will clarify the debate. At the very least it will help avoid controversies on the question which degree of proof is required in order to overcome the presumption’.278 In addition, if the presumption would be deleted from the European Insolvency Regulation, the vagueness of who can prove that the place of the registered office of the company is not the COMI of the company would be dispelled.

Another reason why the presumption should be deleted is demonstrated by the case law of the different Member States of the European Union. As it was shown from the cases analyzed,

275 ibid.
276 European Insolvency Regulation, art 3(1).
277 See pp 23-25 of this LLM paper.
278 Wautelet (n 2) 87.
the courts of the Member States of the European Union rebut the presumption on factual evidence basis, so the necessity of the presumption itself is questionable. Moreover, the existence of the presumption brings more uncertainty than use.

As it was mentioned before, the European Insolvency Regulation does not deal with parent-subsidiary relations in case of insolvency, but the possible model of dealing with the insolvency of multinational groups of companies may be suggested.

The elements of the possible model of dealing with the insolvency of multinational groups of companies are:

- introducing only one – main insolvency proceedings – on the European level;
- treating the strongly integrated multinational group of companies in case of insolvency as one economic unit;
- deleting the presumption that the COMI of a company is located where its registered office is situated.

3.5. CONCLUSIONS

After the analysis of theoretical and practical background of the insolvency of multinational groups of companies and after the presentation of possible model of dealing the insolvency of multinational groups of companies in the European Union, the following conclusions could be drawn.

If a group of companies is strongly integrated and the assets and liabilities of each company within the group are interconnected and cannot be separated in practice, the substantive consolidation should be allowed. In case of insolvency of less integrated group of companies, the procedural consolidation should be allowed.

If a group of companies is formed in decentralized manner and operates in more separate mode, neither procedural linking nor substantive consolidation should be allowed.

The European Union company law is based on the separate entity approach and the European Insolvency Regulation itself does not have specific rules for parent-subsidiary relations.

National courts of the different Member States of the European Union use various criterions (both subjective and objective) in order to rebut the presumption laid down in the European Insolvency Regulation that the COMI in the case of a company or legal person is the place of its registered office is established. In the United States of America the identification of the COMI lacks the subjective element (ascertainability by the third parties), required under the European Insolvency Regulation and the case law of the CJEU.

The elements of the possible model of dealing with the insolvency of multinational groups of companies are: (1) introduction of only one – main insolvency proceedings – on the European level; (2) treatment of the strongly integrated multinational group of companies in case of insolvency as one economic unit; (3) erasure of the presumption that the COMI of a company is located where its registered office is situated.
CONCLUSIONS

In this LLM paper the following issues were analyzed:

- the model of the European Insolvency Regulation,
- the basic rules of concurrent jurisdictions in the European Insolvency Regulation,
- the aims of adopting the European Insolvency Regulation,
- the meaning of the COMI in the European Insolvency Regulation,
- the case law of the CJEU regarding the European Insolvency Regulation,
- the theoretical and practical legal background of the insolvency of the multinational groups of companies.

After the analysis of these issues the possible model of dealing with the insolvency of multinational group of companies in the European Union was presented.

On the basis of the research the following main conclusions can be drawn:

1. The European Insolvency Regulation is in favour of a modified universalist approach, however, territorial elements are also embedded in it.

2. The proper usage of the concept of the COMI by the courts of the Member States of the European Union in insolvency cases is currently the way to achieve the objectives of the European Insolvency Regulation – improving the efficiency and effectiveness of insolvency proceedings and preventing forum-shopping.

3. Albeit the COMI constitutes the main jurisdictional test and the location of the COMI is a decisive factor for the law applicable to the insolvency proceedings, the provisions of the European Insolvency Regulation regarding the determination of the COMI are not sufficiently precise.

4. The Eurofood case contributed in disclosing the meaning of the COMI mainly by clarifying what factors should be taken into account in order to rebut the presumption (both objective and subjective elements are needed) and ascertained that the mere fact that a subsidiary is controlled by a parent company is not enough to rebut the presumption.

5. The national courts of the different Member States of the European Union use various criterions (both subjective and objective) in order to rebut the presumption laid down in the European Insolvency Regulation that the COMI in the case of a company or legal person is the place of its registered office is established. In the United States of America the identification of the COMI lacks the subjective element (ascertainability by the third parties), required under the European Insolvency Regulation and the case law of the CJEU.

6. If a group of companies is strongly integrated and the assets and liabilities of each company within the group are interconnected and cannot be separated in practice, the substantive consolidation should be allowed. In case of insolvency of less integrated group of companies, the procedural consolidation should be allowed.
7. If a group of companies is formed in decentralized manner and operates in more separate mode, neither procedural linking nor substantive consolidation should be allowed.

8. Although the European Insolvency Regulation itself does not deal with parent-subsidiary relations in case of insolvency, the possible model of dealing with the insolvency of multinational groups of companies may be suggested.

9. The elements of the possible model of dealing with the insolvency of multinational groups of companies are:

   - introduction of only one – main insolvency proceedings – on the European level;
   - treating the strongly integrated multinational group of companies in case of insolvency as one economic unit;
   - deleting the presumption that the COMI of a company is located where its registered office is situated.
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