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## Cross-border Insolvency: COMI Concept as Recently Applied by Italian Courts

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### **1. COMI concept under the EC Regulation on insolvency proceedings**

Central to any cross-border insolvency proceedings is the concept of the centre of main interests (“COMI”) of the debtor, essential to identify the competent jurisdiction (and the applicable law). At the European Union level, reference is to be made to the EC Regulation No. 1346 of 29 May 2000 (the “**Regulation**”), providing that “*The courts of the Member State within the territory of which the centre of a debtor’s main interests is situated shall have jurisdiction to open insolvency proceedings*” (See Article 3.1 of the Regulation).

However, notwithstanding its essential role, the Regulation does not define the COMI and its meaning, setting forth only that “**in the case of a company or legal person, the place of the registered office shall be presumed to be the center of its main interests in the absence of proof to the contrary**”. Besides, according to Recital 13 of the Regulation, “*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 the parties*”, without indicating elements to address the meaning of “conduct of administration” and “interests”. By way of simplification, within this regulatory framework, there are two general criteria to identify COMI: (i) the necessity to locate the State where the debtor actually conducts its activities and business; (ii) the recognisability of the debtor’s office by third parties.

Therefore, within this regulatory framework, when dealing with the insolvency of a multinational corporation, discussions on where COMI of a subsidiary is located can raise the following question: does COMI correspond to the company’s place of incorporation (presumption set forth by the Regulation) or does it correspond to the place where the company actually conducts its business on a day-by-day basis. In this respect, the European Court of Justice (“**ECJ**”), resolving Eurofood case, clarified that the presumption in favour of the registered/incorporation office “*can be rebutted only if factors exist which are both objective and ascertainable by third parties*”. As a consequence, the mere fact that a company is controlled by a parent company in another Member State is not sufficient to rebut the registered office presumption, being necessary to give evidence that the company/subsidiary does not conduct any actual activity in the Member State of incorporation. Case law resolving upon COMI issue within a context of EC cross-border insolvency has differed as to the criteria for determination of COMI, notwithstanding the precious guidelines set forth by Eurofood judgment of 2 May 2006 (In Case C-341/04).

### **2. COMI concept as applied by Italian Courts**

Italian Courts have generally weighed a number of factors in determining whether COMI corresponds or not to the registered office of the company and reached different outcomes. The three main relevant criteria for the identification of COMI are: (a) the State in which the company actually conducts its activity; (b) the State in which the company’s driving centre is based; (c) the recognisability by third parties of the actual centre. Based on the importance given by the Courts to the criterion of “recognisability” by third parties the identification of COMI could be different. Examining Italian case law, the “driving centre” criterion has been followed by the Court of Rome in In Cirio, the food multinational corporation declared insolvent and admitted to the Italian extraordinary administration proceedings (2003) and in In Parmalat, the multinational Italian dairy and food company (2004).

In particular, in In Cirio, the Court of Rome recognised that a company with registered office in Luxembourg had its COMI in Italy, stating that the company's management and driving centre were located in Italy and where Cirio companies group were managed (See In Cirio, Court of Rome, 26 November 2003, in *Foro italiano*, 2004, I, page 1567).

Later, the Court of Parma admitted to the Italian extraordinary administration proceedings companies of Parmalat group with registered office in The Netherlands, Luxembourg, Ireland, Malta and Germany, stating that their COMI was based in Italy (In Parmalat). These companies included financial companies that had issued bonds (in The Netherlands, Ireland and Luxembourg), intermediate holding companies or trading companies (Malta), and even operating and commercial companies (Germany). In all these cases, the Court of Parma ascertained that the management and the driving centre of several EU-based Parmalat companies was in Italy, even if those companies were incorporated in other Member States (See Court of Parma, 20 February 2004, in *Il Fallimento*, 2004, page 1265).

Furthermore, the Italian Court of Cassation (*Corte di Cassazione*) (Cassazione Civile, no. 10606/2005), ruling on the impacts on COMI identification in case of transfer of the registered office abroad, specified that such transfer does not imply the transfer of COMI for the purposes of Regulation, in the event that in the new office there will be no any actual exercise of the business or the transfer of the centre of the directional, administrative and management activity of the company". Thus, the Italian Court of Cassation recognized that the COMI has to be located where the company conducts activity or it has its management centre. All the aforesaid decisions were issued before Eurofood judgment, which stressed the importance of the recognisability by third parties in locating the COMI. However, as said, also after Eurofood judgment and its valuable guidelines, Italian Courts differed as to the criteria for the identification of COMI.

On July 2007, in In Nylstar, the Court of Monza ascertained that the COMI of the Dutch holding company of Nylstar Group was in Italy, relying on the factual elements relating to the driving-centre of the holding, the lack of activities in the place of incorporation of the company, the nationality of directors and the place of activity of the management. In particular, the Court of Monza ascertained that:

- (i) the Dutch holding did not have any operative structure in The Netherlands;
- (ii) the Dutch company had no employees;
- (iii) the activity of the company (to find funds for the activity of the group and to manage the equity participation) was conducted mostly in Italy;
- (iv) the directors, who were all Italians except one, held the board meetings through videoconferences from Italy;
- (v) the external auditor sent its report to the offices of the Italian subsidiary in Italy;
- (vi) the Dutch holding company had no creditors in the Netherlands, except one utilities company which was completely aware that the COMI was not in the Netherlands.

Based on these elements, the Court of Monza ascertained that the Dutch holding had its COMI in Italy at the subsidiary's registered office, as ascertainable by third parties, thus giving importance to the recognisability of the COMI by third parties (See Court of Monza, 27 July 2007 no. 72, in *Diritto e Pratica del Fallimento*, no. 1, 2008, page 37).

In In IT Holding analogous interpretation has been followed. The companies of the fashion group having there registered office in Luxembourg had been admitted to the Italian extraordinary administration proceedings. For example, the Court of Isernia extended the Italian insolvency procedure also to the Luxembourg subsidiary of the Group and the issuer of the bond, since notwithstanding the company's registered office was in Luxembourg, objective factors ascertainable by third parties have been submitted to the Court: the executive directors carrying out the main functions were only Italians, the entire equity was owned by an Italian company, the activity of the company was only the issuance of bonds, all guaranteed by the Italian companies (Court of Isernia, 10 April 2009, no. 12). Also in this case, the company was not operating and commercial, but just a financial company that issued the bond. Once more, the Court focused its attention on the recognisability of COMI in a Member State different from the one of the incorporation.

Conversely, in some cases, the Italian Courts have located in Italy the COMI of operating companies incorporated in other Member States and having plants, employees, production and clients in such other Member States. In this respect, the COMI of the Polish company of Maflow Group, the multinational group player in the market of reinforced rubber and composites hoses for automotive industry, has been located in Italy by the Court of Milan. The latter has ascertained that the COMI of the Polish company corresponded to the registered office of the holding Italian company, which was the actual driving centre of the Polish company, dealing with the clients and suppliers of the Polish company and managing all the decisions of the Polish company (See Court of Milan, 11 May 2009, no. 261), although the production of the Polish company was carried out in plants situated in Poland, the company registered more than 1,000 employees, only one of which was Italian, and had Polish suppliers and clients in many countries, not only in Italy.

In such case, however, it could be argued that, considering the size and the production activity carried out by the companies having the registered office in other Member States, the third parties were aware that the COMI of said companies was not in the State of incorporation but in Italy. Indeed, the Judgment declaring that the COMI of the Polish company of Maflow Group was in Italy had been challenged by some creditors, thus arguing about the recognisability of the location of COMI identified by the Courts.

In the light of the above, it seems possible to locate in Italy the COMI of companies incorporated in other Member States: (i) if the executive directors carrying out the main functions are Italians; (ii) the subsidiary carries out activities instrumental to the Italian parent company and/or guarantees all the transactions; (iii) in cases where third parties perceive that the actual location of the company's business is Italy; and (iv) the Italian parent has guaranteed the financing of the subsidiary. Therefore, the place of the registered office appears to constitute only one of the factors to be taken into account with the whole of the evidences and other factors available in order to locate COMI.

### **3. COMI under Chapter 15 of US Bankruptcy Court**

The concept of COMI is also central to Chapter 15 of the US Bankruptcy Code, which is derived from the Uncitral Model Law on Cross-Border Insolvency and, in many significant respects, is similar to the Regulation. Chapter 15 is planned to harmonize foreign proceedings and to assist foreign representatives of those foreign proceedings that, upon specific requirements, take place in a country where the debtor has its COMI. Consistent with the Model Law and similarly to the Regulation, US Chapter 15 does not define COMI, but contains a presumption that it corresponds to the place of incorporation. The proceedings opened where the debtor's COMI is located constitute the main proceedings.

In some recent cases, US Bankruptcy Courts had to address the concept of COMI. As explained *In re Sphinx*, it is a rebuttable presumption that the debtors' place of registration or incorporation is its COMI but, in order to rebut such presumption, the court has to investigate factors such as "the location of the debtor's headquarters, management, primary assets, creditors, and the jurisdiction whose law would apply to most disputes", which should constitute objective and ascertainable to third parties. *In re Sphinx*, 351 B.R. 103 (Bankr. S.D.N.Y. 2006), *aff'd*, 371 B.R., 10 (S.D.N.Y. July 2007). In this case, the bankruptcy court ruled that, based on objective factors and ascertainable to third parties, the COMI of the Cayman company had not its COMI in the Cayman Islands and rebutted the statutory presumption. Subsequently, Judge Lifland decided to reject the Chapter 15 application of the Cayman proceedings of Bear Stearns hedge funds, rebutting the presumption that the COMI was the debtors' registered office in the Cayman Islands, even though no parties objected to the Chapter 15 application. The Judge based his decision on the fact that there were no employees or managers in the Cayman Islands, since the manager and the administrator of the fund, as well as its books and records and assets were located in the United States.

Therefore, similarly to the concept of COMI under the Regulation, the identification of the Chapter 15 debtors' COMI requires a fact-based inquiry in order to verify whether the registered office is the actual COMI of the debtor, but the registered office constitutes the starting point of the analysis of the Court.