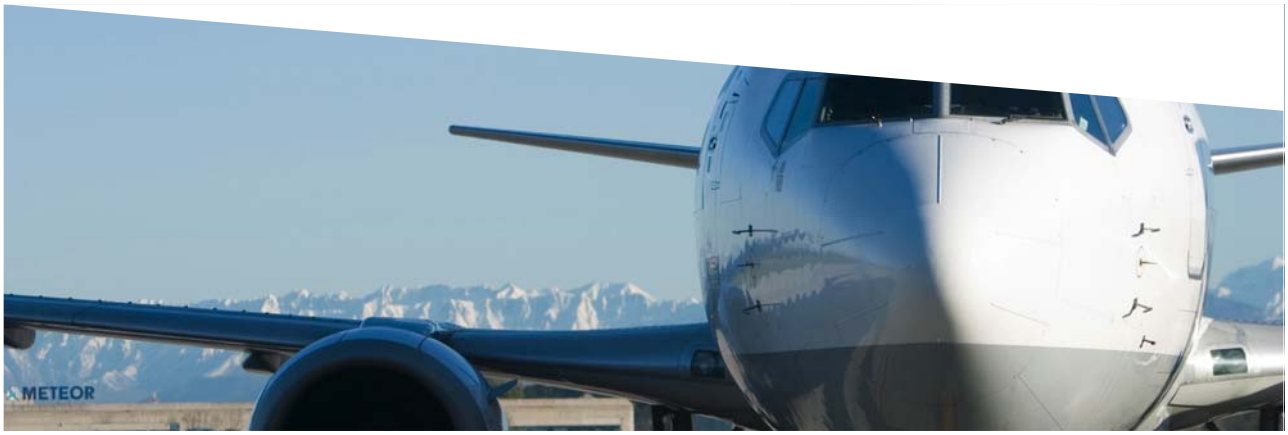

Air Berlin and NIKI – COMI in the Judicial Spotlight again

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1. Introduction

In the European Union, under the provisions of the (Recast) Regulation (EU) 2015/848 on insolvency proceedings ("EIR"), the courts of the member state where the debtor's centre of main interests ("COMI") is located, have jurisdiction to open (main) insolvency proceedings in cross-border insolvency cases. The country where the debtor's COMI is located, is deemed most closely associated with the debtor and is therefore held to be the appropriate forum. The relevance of COMI for insolvency proceedings cannot be overestimated since it determines the country whose courts have jurisdiction, whose law generally applies to the proceedings and whose insolvency proceedings are recognised and given effect in the other member states of the EU (with the exception of Denmark).

The interpretation of the term COMI caused significant practical problems in the past which resulted in a number of disputes being brought before the Court of Justice of the European Union ("CJEU"). The clarifications given by the court have been very helpful for the interpretation of the term and achieved a more uniform application of COMI in the EU. But the practical difficulties in determining COMI have not been resolved, as was recently demonstrated in the case of NIKI Luftfahrt GmbH ("NIKI"), a subsidiary of the insolvent airline Air Berlin.

The NIKI case justifies a closer look at the factors which determine COMI and the guidance provided by the EIR and the CJEU as to what factors are relevant and how they need to be taken into account in practice.

2. The NIKI Case

Air Berlin was Germany's second largest airline and the EU's seventh largest airline in terms of passengers carried. It had been in financial difficulties since 2008 and had to file for insolvency in August of 2017. NIKI was a low-cost airline affiliated to Air Berlin. It operated scheduled and charter services for the Air Berlin group, particularly to European and North African destinations. Although its registered seat was in Vienna, Austria, NIKI filed an insolvency petition on 13 December 2017 with the insolvency court in Berlin-Charlottenburg, Germany. Previously Air Berlin had been adjudicated insolvent by the same court. On 13 December 2017 the court also appointed a preliminary insolvency administrator for NIKI. Since time was very much of the essence, NIKI's management and administrator immediately initiated an M & A process aiming to sell NIKI's business to an investor. By the end of

December 2017, the preliminary insolvency administrator had entered into an agreement to sell the assets of NIKI with IAG, the parent company of British Airways and Spanish Vueling.

On 2 January 2018 a creditor lodged an appeal against the appointment of the preliminary administrator and the other orders passed by the Berlin court in December, arguing that the Austrian and not the German courts had international jurisdiction. On the same day the creditor filed an insolvency petition against NIKI with the regional court in Korneuburg, Austria. On 8 January 2018 the Berlin appellate court upheld the appeal of the creditor and ruled that NIKI's COMI was in Austria. It repealed the orders of the Berlin insolvency court but permitted a further appeal to the German Federal Supreme Court.

Subsequently, the Austrian court opened insolvency proceedings with respect to NIKI and appointed an Austrian insolvency administrator before the German Federal Supreme Court could rule in the case. The Austrian insolvency administrator started a new sales process in the Austrian insolvency proceedings and this time not IAG but Laudamotion, a company owned by the former Austrian Formula 1 racing driver Niki Lauda, was the winning bidder. NIKI's business was sold to Laudamotion and as a result the German administrator could not consummate the sale and purchase agreement with IAG.

The case shows that aborting an insolvency proceeding with respect to a debtor entity in one country and starting such a process with respect to the same entity in another country often results in very substantial commercial and legal risk for stakeholders. In the case of NIKI, IAG which had successfully gone through the whole sales process in the German proceedings, was not able to prevail in the Austrian sales process. There was considerable concern expressed at the time that the disruption to proceedings caused by the appellant's success before the Berlin regional court would prevent badly needed new financing being made available to NIKI in time for it to continue operations and might cause the airline's operating licences to be withdrawn by the authorities. It subsequently turned out that the operating licences were not withdrawn.

3. The Provisions in the (Recast) European Insolvency Regulation

The EIR provides that the courts of the member state of the European Union where the debtor's COMI is situated, shall have jurisdiction to open (main) insolvency proceedings. The court decision opening main proceedings in an EU member state will be recognised in all other member states (other than Denmark), i.e. it will, without further formalities, generally produce the same effect in any other member state as under the law of the country of the opening of proceedings. Only one main insolvency proceeding can be opened with respect to the debtor in the EU because it can only have one COMI. Once the court of a member state has opened main proceedings, the courts in the other EU countries are required to recognise this decision, even if they are of the view that the first court wrongfully assumed that it has jurisdiction.

The EIR describes COMI as the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties[1]. It goes on to say 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.

The legal presumption that the registered office is the COMI, may be rebutted if the company's central administration is located in a member state other than that of its registered office, and where a comprehensive assessment of all the relevant factors establishes, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and the management of its interests is located in that member state[2]. The recitals[3] elaborate that special consideration should be given to the creditors and to their perception as to where a debtor conducts the administration of its interests. This may require informing creditors of the new location from which the debtor is carrying on its activities, if the debtor shifts its COMI.

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[1] Art. 3 para 1 EIR
[2] Recital 30
[3] Recital 28

The court which is called on to open insolvency proceedings, is required to examine of its own motion whether it has jurisdiction and, in its decision to open proceedings, to specify the grounds on which the jurisdiction of the court is based. The EIR now specifically provides that the debtor or any creditormay challenge before a court the decision opening main insolvency proceedings on grounds that the court which passed the decision, incorrectly assumed that it had jurisdiction

4. COMI in the Jurisdiction of the Court of Justice of the European Union

The provisions of the EIR reflect the guidance previously provided by the CJEU in its three leading cases on COMI which were all decided before the (Recast) EIR came into force.[4]

Establishing the location of the debtor's registered office is the first step in the CJEU's assessment of the location of COMI since the COMI is presumed to be located at the place of the registered office of the company. The presumption is based on the fact that the place where the debtor conducts the administration of its business in a manner ascertainable for third parties, is typically the place of its registered office. NIKI's registered office was in Vienna so that COMI was presumed to be in Austria.

The CJEU held in the Eurofood – case that this presumption "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 location at that registered office is deemed to reflect". This is a roundabout way of saying that the presumption is rebutted if objective factors, ascertainable by third parties, show that the debtor conducts the administration of its interests not at the place of its registered office but elsewhere. The court goes on to say that the presumption could, in particular, be rebutted in the case of a company not carrying out any business in the member state where its registered office is situated.

In the Interedil case the CJEU ruled that the presumption cannot be rebutted if the bodies responsible for management and supervision of the company are in the same place as its registered office and if the management decisions of the company are taken in that place in a manner that is ascertainable by third parties. Then the presumption that the COMI is in the place of the registered office, is wholly applicable and it is not possible that the COMI is located elsewhere.

The court of a member state called on to open insolvency proceedings needs to assess comprehensively all relevant circumstances to determine where the debtor company administers its interests when establishing where the COMI is located. Furthermore, the administration of interests occurs at the place where the bodies responsible for the management and supervision of the company are located if management decisions are taken at that place and provided that this is ascertainable by third parties. The difficulty in the NIKI case and in many other cases is that the factors which are relevant for COMI, do not all point to one place but to two or even more places if the debtor's business operations extend beyond national boundaries.

It follows from the guidance provided by the CJEU that specific rules need to be followed when ascertaining and considering the relevant criteria to determine where the debtor's COMI is. These are often not observed by the courts. In its report of 12 December 2012 to the European Parliament, the Council and the European Economic and Social Committee on the application of the original European Insolvency Regulation, the European Commission observed that it had received reports that in many member states the presumption was sometimes considered rebutted without carrying out the comprehensive analysis required by the CJEU.The CJEU and the (Recast) EIR are very clear in that only criteria which are ascertainable by third parties, may be taken into consideration. Furthermore, appropriate weight should be given to such circumstances which give a strong indication that management is located, and that management decisions are taken, at a certain place. Addresses used by the relevant management bodies in commercial correspondence, the location of their offices, social media entries and websites referring to a specific place as the company's headquarters as well as telephone and facsimile numbers of management with the same country code normally have significant informative value as to

[4] CJEU, Judgment of 2 May 2006, Case C-341/04 (*Eurofood*); Judgment of 20 October 2011, Case 396/09 (*Interedil*); Judgment of 15 December 2011, Case C-191/10 (*Rastelli*).

the place where management is located and where the debtor administers its interests. The same is not necessarily true for other factors such as the location of bank accounts, the law governing important agreements of the debtor or the location of certain assets of the debtor. Such other factors by themselves need not necessarily relate to the place of administration of interests. However, if there are a number of such factors and substantially all of them point to one country, then that may again be a strong indication that COMI is located there.

In cases where the debtor has business premises in more than one place, the relevant circumstances need to be considered carefully to distinguish the centre of the debtor's main interests from any branches of its business. The latter would only allow the courts of the country where the branch is located, to open territorial or secondary insolvency proceedings.

In the NIKI case it is difficult to determine on the basis of the published versions of the court decisions whether international jurisdiction was eventually correctly established. NIKI's senior management apparently had offices in both Vienna and Berlin and there are varying accounts as to where certain other administrative functions were located. The case does, however, demonstrate that the CJEU's guidance was not strictly observed by the courts in Germany and Austria when taking into account some of the other criteria to determine COMI. Of the circumstances that were used to justify the assessment that the COMI was located in Austria, the fact that NIKI's direct shareholders were Austrian entities and that Air Berlin, a German entity with its registered office in Berlin, was only an indirect minority shareholder do not seem particularly relevant. The nationality and location of shareholders says very little about where the administration of the interests of the insolvent entity occurs. The fact that NIKI was taxed in Austria would only have been relevant if that was ascertainable by the creditors. This was not addressed at all in the reasoning of the relevant court decision. The same applies to the fact that NIKI's operating licence was issued by Austrian authorities and that its continuing airworthiness management organisation was also located in Austria.

A number of the circumstances that were held to establish the COMI in Germany were probably also not relevant. The cost-plus agreement between NIKI and Air Berlin which provided that NIKI would carry out the flights for the Air Berlin group and be reimbursed for the costs it incurred plus a mark-up for profits, was probably not ascertainable by third parties. The same is true for NIKI's operations centre which planned the flights and supported crews and aircraft during flights, and was located in Berlin. The fact that sixteen of NIKI's twenty-one aircraft were stationed in Germany, two in Switzerland and only three in Austria and the fact that flight planning and revenue management was carried out in Berlin by another company of the Air Berlin group for NIKI had very little significance in relation to the question as to where the administration for NIKI was located.

5. Conclusion

What the NIKI case shows very clearly is that – notwithstanding the guidance provided by the CJEU and the Recast EIR – the determination of the COMI of the debtor company continues to be difficult in practice. The time that is lost and the uncertainty as to future developments that occurs if the insolvency proceeding in one country is aborted and a new proceeding is started in another country, may have severe commercial repercussions for stakeholders. To avoid similar situations in future, care should be taken by debtors or creditors to establish the international jurisdiction of the court they approach in the light of the guidance provided by the CJEU and the Recast EIR when preparing insolvency petitions, and to set out the relevant factors in their petition. Courts called on to open insolvency proceedings should, in turn, apply such guidance strictly when establishing their jurisdiction.