

Case: NIKI Luftfahrt GmbH (36n IN 6433/17, 84 T 2/18), 14 December 2017, 8 January 2018

Synopsis: The insolvency court of Berlin Charlottenburg initiated preliminary insolvency proceedings and appointed a preliminary insolvency officeholder in respect of NIKI Luftfahrt GmbH on 14 December 2017 based on the court's finding that the company's COMI was in Berlin, Germany. The decision was appealed by one creditor on the basis that NIKI's COMI was not in Germany, but in Austria. The second instance court (Landgericht Berlin) upheld the appeal and permitted a further appeal to the German Federal Court (Bundesgerichtshof).

Topics covered: Centre of main interests, EU Regulation

The Facts

NIKI Luftfahrt GmbH (NIKI) applied to the insolvency court (Insolvenzgericht) in Berlin Charlottenburg on 14 December 2017 for the opening of insolvency proceedings and certain interim measures to safeguard the business. NIKI is a company incorporated under Austrian law and has its registered office in Vienna. Nevertheless, the first instance court was satisfied that the court had jurisdiction due to NIKI's COMI being in Berlin.

Decision

The main focus of the first instance court's decision was on whether NIKI's COMI was in Berlin. The court reviewed the CJEU cases of Eurofood (technical bulletin 62) and Interedil (technical bulletin 370) and reiterated (citing Recital 30 of the EUIR) that it should be possible to rebut the presumption that a company's COMI is in the place of its registered office 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 of the management of its interests is located in another member state. The court named the following considerations which resulted in its conclusion that NIKI's COMI was in Germany:

- NIKI is part of the Air Berlin group of companies and indirectly controlled by Air Berlin Plc & Co. KG. The court looked to NIKI's shareholders, which nominally were two Austrian companies but economically traceable to Air Berlin Plc & Co. KG which was already in insolvency proceedings in Germany).
- NIKI is part of the Air Berlin operations whose fate is determined centrally from Berlin (including after the opening of insolvency proceedings in relation to Air Berlin Plc & Co. KG). NIKI itself only has one customer, namely Air Berlin Plc & Co. KG

which reimburses NIKI monthly pursuant to a “Cost-Plus” agreement. NIKI is contractually obliged to operate flights as directed by Air Berlin. The court concluded that this meant that NIKI was the “extended workbench” for Air Berlin. The court listed in total 31 activities which NIKI undertook from Berlin, such as flight planning, contract negotiations, budget planning, sales management etc.

- The court stated that NIKI’s COMI was demonstrably (and objectively ascertainable) in Germany due to two main factors: a) NIKI operates 21 planes but only 3 to 6 of those are stationed in Austria (with 2 in Switzerland and the remainder in Germany); and b) there are 176 flights weekly, with 156 departing from Germany and only 20 departing from Austria.

The first instance court declined to grant leave to appeal but the appeal court allowed an appeal by an Austrian creditor (the Appellant) to proceed. The Appellant listed 10 factors demonstrating that NIKI’s COMI should be held to be in Austria. Due to the fact that the judgment is only available in German, all factors are listed here in full:

- third parties were not in a position to see that NIKI was controlled from Germany;
- the “Cost-Plus” agreement was not something a third party would know about;
- NIKI’s management was situated in Vienna, where there were 100 people in the office, and its managing director has an Austrian mobile phone number;
- NIKI paid tax in Austria and was entered into the Austrian public register for traffic, innovation and technology;
- NIKI’s planes showed an Austrian national emblem which demonstrated that it was supervised by Austrian public authorities;
- NIKI’s fit for flying tests were undertaken in Vienna;
- NIKI had a collective bargaining agreement for employees employed in Austria which is publically available;
- the year end accounts were signed in Vienna;
- social media referred to NIKI with the terms “headquartered” in Vienna.

The court held that the first instance court had been wrong to assume jurisdiction and that the presumption that a company’s COMI was in the place of its registered office had not been rebutted. The factors that had been listed did not establish a clear picture. Where relevant, they could demonstrate both an actual COMI in Germany as well as an actual COMI in Austria. In particular:

- the fact that NIKI was part of the Air Berlin group was not – by itself – determinative to rebut the COMI presumption;
- the fact that Air Berlin was practically NIKI’s sole client was not necessarily relevant. COMI was concerned not with markets but with coordination and structure – the EUIR uses the term “administration” of interests;
- NIKI has offices in both Berlin and Vienna and it was not disputed that almost 100 people were employed in the Vienna office;
- the managing director’s domicile (in Germany) was not determinative as he was frequently travelling between Berlin and Vienna;
- NIKI had bank accounts in both Germany and Austria so that this factor (although capable of being determinative) was not determinative here;
- NIKI has an Austrian company licence and an Austrian issued aircraft operating certificate (AOC) issued by Austro Control. The fact that airworthiness is checked in Vienna is objectively ascertainable by third parties by inspecting a public register.

The country that has issued the airline licences is particularly important in the airline industry as it involves arrival slots which are a significant asset – finding NIKI’s COMI to be in Germany would have an impact on its AOC;

- the general public perceives NIKI to be an Austrian company, as can be demonstrated by reference to social media;
- the fact that most activities are undertaken from Germany as most flights are stationed there and most flights depart from there is not relevant as a company can have multiple establishments in the EU and be active on numerous markets;
- 80% of NIKI’s employment contracts are subject to Austrian law. Third parties can see this based on the collective bargaining agreement which is public. This has more weight than where employees are actually employed as the latter is not static;
- the “Cost-Plus” agreement is governed by Austrian law with jurisdiction in favour of the Vienna courts;
- the fact that Air Berlin is subject to German insolvency proceedings is irrelevant as different companies in a group can each have their own and separate COMI;
- NIKI’s actions demonstrate that it believes its COMI to be in Austria. Relying on Recital 28 of the EU IR, NIKI had never told its creditors that its COMI had moved from Austria to Germany. NIKI did not dispute the Austrian jurisdiction in the context of an application to open main insolvency proceedings in Austria.

Comment

In most cases of international jurisdiction it is pretty clear where a company’s COMI lies. This case is one of the rare cases where judges at different courts undertook a comprehensive assessment of all relevant factors and decided respectively that COMI was in Germany and in Austria. The lower court had conducted a detailed analysis of where NIKI’s COMI was, to rebut the registered office presumption. In an equally detailed assessment, the appeal court disagreed. Many factors clearly lay in the balance and could be argued in support of either analysis.

It is interesting to see that social media is now listed as a relevant factor. On the one hand, this could be considered obvious and rational as social media is ascertainable by third parties. On the other hand, it is a very fluid factor to take into account, given how easy it is to manipulate social media and the information conveyed by it.

NIKI intended to appeal the appellate court’s decision to the highest commercial court in Germany, the *Bundesgerichtshof*, but withdrew the appeal in late January.

Procedurally the case is interesting as the Austrian court had to decide in its decision on whether to open main or secondary proceedings for NIKI what the effect of the German appellate court’s decision was. The question was whether the successful appeal at the appellate level meant that the original decision to initiate insolvency proceedings was void or whether the original decision was valid until the final appeal was resolved by the highest appeal court (the *Bundesgerichtshof*).

The Austrian court opened main insolvency proceedings over NIKI on 12 January 2018 holding that the appeal court’s decision meant that the original decision was void and that therefore no insolvency proceedings were on foot for NIKI and that it was therefore entitled to open main proceedings. Secondary proceedings were then opened in Germany.



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