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Revised Guide to Enactment of the Model Law and draft Part four of the Legislative Guide on Insolvency Law

Compilation of comments by Governments

Addendum

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II. Comments received from Governments

Czech Republic

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A. Interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests (COMI)

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1. The Czech Republic prefers concept of centre of main interests with respect to rulings of the Court of Justice of the European Union, i.e. Eurofood (Parmalat), case C-341/04, or Interdil, case C-369/09.

2. Regarding Eurofood case there were two parallel main insolvency cases for the same entity. First court determined COMI with respect of Eurofood's management and the centre of control which came from parent company registered office. The other court ruled that COMI was located where the registered office was and where it appeared as located to the third party (creditors). Court of Justice ruled that in order to determine the location of the COMI of a subsidiary company, it is necessary to examine two sets of factor – (a) the location where a debtor regularly administer its own interests, as ascertainable by third parties, and the country in which it is incorporated; and (b) location of the parent company which is able to control the policy decisions of the subsidiary company. The determination of the location of a debtor's COMI must be based on criteria that are both objective and ascertainable by third parties. COMI should correspond to the place where the debtor conducts the administration of its interests on a regular basis and is therefore ascertainable by third parties. If a debtor is a subsidiary company and meets the criteria above, COMI is based on registered office location because in that place the debtor conducts the administration of its interests employs its employees and enters into contracts.

3. Different matter is in case of a "letter-box" company which is not carrying on any business in the country where its registered office is located. Concerning the Interdil case it was ruled that if the place where the debtor conducts the administration of its interests on regular basis is not where the registered office is located, COMI could be based on location of company's assets and financial activity in other member state. However the debtor's COMI must meet the both criteria objective and ascertainable by third parties.

B. Directors' obligations in the period approaching insolvency

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4. The period approaching insolvency in which directors should avoid insolvency proceedings to commence and minimize its effects could be determined with respect of actual insolvency of the company. Directors' obligation therefore should be based

on period from which the director was able to acknowledge the vicinity of insolvency. Liability could be based on responsibility for causing insolvency or failing to take appropriate action, to avoid financial difficulty, to minimize potential losses to creditors or to avoid insolvency etc.

5. The necessary objective is to establish the definition of director. In our opinion this definition should include a body who can actually affect the governance of the company.

6. Nevertheless the rules of liability imposed on a director should not be related to the third parties creditors.
