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Abstract

One of the goals of the EU Insolvency Regulation, confirmed by recent reform proposals developed by the European Parliament and the Commission, is to limit forum shopping. The real world, however, looks quite different, as insolvency forum shopping is increasingly common in the EU. As is well known, pursuant to the Insolvency Regulation the Member State of a debtor's centre of main interests ("COMI") is competent to govern its main insolvency proceeding with universal effects; additionally, companies' COMI is presumed to coincide with their registered office, unless the contrary is proven. Pursuant to ECJ case law, the reference date to assess the insolvency competence is the date of the filing, with the consequence that, if a company relocates its registered office abroad before filing for insolvency, the new jurisdiction becomes competent to govern its insolvency, unless creditors prove that the COMI is still in the original State. However, the presumption that the COMI coincides with the registered office can not be rebutted if a company actually relocates its headquarter alongside its registered office in a way ascertainable by third parties. Creditors' protection against opportunistic forum shopping, therefore, relies only upon the criterion that a company's COMI must be ascertainable by third parties. This criterion, however, as applied by Member States' case law and the ECJ, does not take into account the viewpoint of pre-existing creditors: If a company relocates headquarter alongside its registered office and makes this transfer public and "ascertainable" for future potential creditors, no evidence whatsoever can be provided that its COMI is still in the State of origin. Forum shopping, therefore, has become an unavoidable component of EU insolvency law.

Keywords: insolvency, insolvency regulation, COMI, transfer of registered office, forum shopping
JEL Classification: G24, G28, K2

1. *Potential creditors and the value of law*

In all jurisdictions, insolvency law addresses creditors' coordination problems in case of debtors' default[1]. Despite this common goal, however, insolvency laws diverge from jurisdiction to jurisdiction regarding significant issues, such as creditors' priorities, avoidance actions or the continuation of executing contracts[2]. A consequence of these differences is that creditors receive different payoffs according to which jurisdiction will govern their debtors' default.

In other words, insolvency law influences the magnitude of the specific risk carried by creditors. Potential creditors, therefore, try to anticipate the effects of the applicable insolvency law in the contractual conditions or in the price of credit[3]. Consequently, insolvency law must be foreseeable and predictable for potential creditors. Any legal uncertainty would produce adverse selection, as potential creditors would not know in advance what their risk is[4]. Uncertainties as to the applicable law and as to the competent jurisdiction would increase the cost of credit, as potential creditors would be discouraged to take excessive risks and would require a higher interest rate or proprietary securities.

As a consequence, the question arises of whether debtors should be allowed to change the competent insolvency venue and applicable law before their debts are entirely paid. These kinds of decisions are usually labelled as "forum shopping", although debtors primarily aim at changing substantive law, not simply the competent court (in other words, they aim at entering into regulatory arbitrages).

A decision to change insolvency law in the verge of insolvency may be similar to corporate decisions taken in the same situation that partially shift investments' risks onto creditors. A typical example of such opportunistic behaviours is when shareholders replace the original investments of their company with a more risky one that have a higher expected return. If the new investments pay off, the company recovers and shareholders gain the whole upside, while if the investment fails, shareholders, who enjoy limited liability, lose only their equity, which is likely to have already lost its value in the vicinity of insolvency[5]. The applicable insolvency law, like debtors' investments, is a component of debtors' specific risk, thus forum shopping may produce the same effects of other opportunistic decision at creditors' expenses.

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[1] Thomas H. Jackson, *The Logic and Limits of Bankruptcy Law* (Cambridge Ma, Harvard University Press, 1986) p. 21 – 25.

[2] See Elizabeth Warren, 'Bankruptcy Policy', 54 *U. Chi. L. R.* 775 (1987); Roy Goode, *Principles of corporate insolvency law* (London, 2011) at pp. 72 – 79.

[3] See Barry Adler, 'A theory of corporate insolvency', 72 *N.Y.U. Law R.* (1997) p. 343 *et seq.*; Sergei A. Davidenko – Julian R. Franks, 'Do bankruptcy codes matter? A study of defaults in France, Germany and the U.K.', 63 *Journal of Finance* (2008) p. 565 *et seq*.

[4] See George Akelrof, 'The market for "lemons": quality uncertainty and the market mechanism', 84 *Quart. J. Econ.* (1970) p. 488 *et seq.*

[5] See Frank Easterbrook & Daniel Fischel, 'Limited Liability and the Corporation', 52 *U. Chi. l. r.* (1985) at p. 96; Armour, 'Who Should Make Corporate Law? EC Legislation versus Regulatory Competition', *Current Legal Problems* (2005) at p. 367; Bratton jr, 'Bond Covenants and Creditor Protection: Economics and Law, Theory and Practice, Substance and Process', 7 *European Business Organization Review* (2006) at p. 48; Davies, 'Directors' creditor-regarding duties in respect of trading decisions taken in the vicinity of insolvency', 7 *European Business Organization Review* (2006) at p. 306; Armour, Hertig & Kanda, 'Transactions with creditors', *The Anatomy of Corporate Law*, 2nd edition, (Oxford, 2009) at p. 116 *et seq.*

To be sure, forum shopping might also produce positive and efficient outcome, for instance when it allows a workout that wouldn't be possible under the original law. I will not discuss in this paper the much-debated question of whether, and under which circumstances, forum shopping produces efficient results, as probably there is no universally valid answer. [6] The effects of forum shopping can only be estimated in hindsight and on a case-by-case basis, yet its very possibility prevent potential creditors from calculating their risk.[7]

The EU Insolvency Regulation, which harmonizes choice-of-forum and choice-of-law criteria throughout the EU, takes into account this need of legal predictability[8]. According to Recital 4, one of the goals of the Insolvency Regulation is «*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)*»[9]. The rationale of this provision is clearly explained in the report drafted by Prof. Virgos and Prof. Schmitt to the project of a European Convention on cross-border insolvency[10], which states that «*[i]nsolvency is a foreseeable risk. It is therefore important that international jurisdiction* […] *be based on a place known to the debtor's potential creditors. This enables the legal risks which would have to be assumed in the case of insolvency to be calculated*»[11]. This rationale relies upon the idea that creditors must know in advance which insolvency rules and proceedings will apply in case of a debtor's default.

Recent projects to reform the Insolvency Regulation confirm the aim of EU institutions to limit forum shopping and grant legal predictability. At the end of 2011, the European Parliament approved a motion to recommend a partial harmonization of insolvency law in the European Union[12]. The first recitals of this motion read that "*disparities between national insolvency laws create competitive advantages or disadvantages and difficulties for companies with cross-border activities* [which] *favour forum shopping;[…]*"[13] and that "[…] *steps must be taken to prevent abuses, or any spread, of the phenomenon of forum shopping*"[14]. More recently, the European Commission has presented a comprehensive

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[6] In some cases, forum shopping has produced efficient outcomes, while in other circumstances companies aimed simply at avoiding creditors located in the original jurisdiction. See Eidenmüller, 'Free Choice in International Insolvency Law', 6 *European Business Organization Law Review* (2005) pp. 241 – 246; Sefa M. Franken, 'Three Principles of Transnational Corporate Bankruptcy Law: A Review', 11 *European Law Journal* (2005) p. 232 *et seq.*; Wolf-Georg Ringe, 'Forum shopping under the EU insolvency regulation', *European Business Organization Law Review* (2008) p. 579 *et seq.*; Gerard McCormack, 'Jurisdictional Competition and Forum Shopping in Insolvency Proceedings', 68 *Cambridge Law Journal* (2009), at p. 191 *et seq.*

[7] See Marc-Philippe Weller, 'Forum shopping im internationalen Insolvenzrecht?', *IPRax* (2004) p. 412 *et seq.*

[8] EC Regulation 1346/2000 (hereinafter, the "Insolvency Regulation").

[9] Recital 13, Insolvency Regulation.

[10] Miguel Virgos & Etienne Schmit, Report on the Convention on Insolvency Proceedings, Council of the European Union, Doc. 6500/96/EN (1996) (hereinafter, the "Virgos – Schmit Report"), which never entered into force but was then converted into the Insolvency Regulation.

[11] Virgos – Schmit Report, § 75.

[12] European Parliament resolution, with recommendations to the Commission on insolvency proceedungs in the context of EU company law (2011/2006(INI)), 15.11.2011 (hereinafter, the "European Parliament Resolution")

[13] European Parliament Resolution, Recital A.

[14] European Parliament Resolution, Recital B.

proposal to reform the Insolvency Regulation[15], which confirms the general goal to limit forum shopping stated in Recital 4.

However, despite this clear purpose, forum shopping is not uncommon and has become a permanent element of the insolvency law landscape in the EU.

2. *Transfer of registered office and forum shopping*

Pursuant to the Insolvency Regulation, courts of the Member State where debtors have their centres of main interests (hereinafter, the "COMI") are competent to open main insolvency proceedings, which have universal effects on all debtors' assets regardless of their location[16]. Recital 13 clarifies the concept of COMI by stating that "[t]*he concept of "centre of main interests" must be interpreted as the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties*". The COMI, therefore, is a factual and empirical criterion based upon the place of debtors' central administration; such central administration, however, in order to be considered as a debtor' COMI, must be clearly ascertainable by third parties as the place from which the debtor regularly conducts its affairs. The criterions of time-continuity and ascertainability are meant to avoid that companies transfer their headquarters from one Member State to another short before filing for insolvency with the exclusive purpose to select a different insolvency law[17]. The relevance of these criterions within the legal strategy to avoid forum shopping is confirmed by the Commission Proposal, which places them in the very definition of COMI[18].

Nonetheless, it is not uncommon to see companies shifting their COMI from one Member State to another. In order to relocate the COMI, companies take advantage of the presumption that their COMI coincides with their registered offices, stated in the Insolvency Regulation[19]. Consequently, if a company transfers its registered office from one Member State to another, the applicable insolvency law also changes, unless creditors do not prove that the COMI is still in the State of origin. In recent years a number of registered office's relocations throughout the EU were implemented with the explicit aim to change the applicable insolvency law. Whatever opinion one may have on the "efficiency" of forum shopping, it's a fact that a strident discrepancy exists between this reality and the goals of the Insolvency Regulation.

There seems to be no other explanation for this discrepancy but an historical one. When the Insolvency Regulation was enacted, the goal to avoid forum shopping and the presumption that companies' COMIs coincide with their registered office were not conflicting. The drafters of the Insolvency Regulation correctly assumed

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[15] European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceeding, 12 December 2012, COM(2012) 744 final, 2012/0360 (COD), hereinafter the "Commission Proposal".

[16] Art. 3(1) Insolvency Regulation. Besides this "main proceeding" with universal effects, however, courts of states where a debtor has an "establishments" can open ancillary proceeding with mere territorial effects and aimed at liquidation: Art. 3(2) Insolvency Regulation.

[17] See McCormack, 'Jurisdictional Competition and Forum Shopping' at p. 191; Marek Szydło, 'Prevention of Forum Shopping in European Insolvency Law', 11 *European Business Organization Law Review* (2010) at p. 258 – 259.

[18] Commission Proposal, para 22, replacing article 3 of the Insolvency Regulation.

[19] Art. 3(1) Insolvency Regulation.

that companies' registered offices could not be easily transferred throughout the European Union. This assumption, however, is not true anymore. EU derivative law of the last decade has provided legal mechanisms that allow companies to transfer registered office from one Member State to another. The first vehicle is the European Company (SE)[20], which are partially governed by the Member State of their registered office and can transfer their registered office from one Member State to another[21]. Additionally, in 2005 a directive on cross-border merger was enacted[22], granting to European companies the right to merge into companies of another Member State. As a consequence, companies that want to relocate their registered office can incorporate a fully-owned subsidiary in the targeted jurisdiction and then merge into it: as result, assets, plants and activities will belong to the incorporating company. It is less certain whether freedom of establishment grants companies the right to directly transfer their registered offices from one Member State to another[23]; in this regard, Member States behave randomly: many jurisdictions, such as the UK and Germany, do not allow these transactions (although German legal practitioners have found out a strategy to implement cross-border conversions nonetheless)[24], while other Member States, such as France, Spain, Italy or Luxembourg, allow cross-border transfers of registered offices. In sum, either by way of cross-border merger or by using other legal strategies, cross-border relocations of registered offices are feasible.

3. *The reference date to assess the COMI*

When a company transfers its registered office abroad and then files for insolvency with a court of the new Member State, the question arises of whether its COMI is also presumed to be in the new State of incorporation. The answer to this question depends primarily on the date as to which the COMI is to be determined (s.c. "reference date").

As we have seen above, a decision to transfer the COMI in the vicinity of insolvency might increase creditors' risks, similarly to opportunistic decisions taken in the "twilight zone". A simple solution to avoid opportunistic relocation of

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[20] Regulation of the Council 2157/2001/CE, October 8th 2001, on the statute of the European Company (the "SE Regulation").

[21] Luca Enriques, 'Silence is Golden: the European company as a catalyst for company law arbitrage', *J. Corp. L. Stud.* (2004) p. 78 *et seq.*; Horst Eidenmüller, Andreas Engert & Lars Hornuf, 'Incorporating under European Law: The Societas Europaea as a Vehicle for Legal Arbitrage', 10 *European Business Organization Review* (2009) p. 1 *et seq.*

[22] Directive 2005/56/CE, of the Parliament and the Council, October 26th 2005, on cross-border mergers of limited liability companies, entered into force on December 16th 2007.

[23] The European Court of Justice, in the case Cartesio, has stated that member states cannot bar domestic companies from converting into a company's type of another member state, yet it is uncertain whether this statement has binding force or is a mere obiter dictum. European Court of Justice, C-210/06, *CARTESIO Oktató és Szolgáltató* [2008] ECR I-09641. See: Andrzej W. Wiśniewski – Adam Opalski, 'Companies' freedom of establishment after the ECJ *Cartesio* judgment' 10 *European Business Organization Law Review* (2009) 595 *et seq.*; Stefano Lombardo, 'Regulatory competition in company law in the European Union after *Cartesio*' 10 *European Business Organization Law Review* (2009) p. 627 *et. seq.* In the Vale case, the ECJ has stated that member states can not restrict "inbound" reincorporations, yet this statement seems to be not applicable to the state of origin or not. European Court of Justice, C-378/10, *Vale Építési kft* [2011].

[24] Federico M. Mucciarelli, 'The Function of Corporate Law and the Effects of Reincorporations in the U.S. and the EU', 20 *Tulane Journal of International and Comparative law* (2012) p. 429.

COMI may be to "freeze" the international competence at the day when the company becomes insolvent or when the insolvency becomes imminent and unavoidable, even if the filing for insolvency is postponed to a later moment[25]. This solution, however, ha significant practical drawbacks: it would significantly reduce legal certainty as to the applicable law and would increase litigation on jurisdiction.

Member States courts, therefore, do not follow this strategy. Indeed, the European Court of Justice has faced the different question of whether the reference date should be the date of the filing or the date of the opening of the insolvency proceeding. The ECJ addressed this question for the first time in the case *Staubitz-Schreiber,* in which a German self-employed transferred her residence from Germany to Spain after the filing for insolvency with a German court, but before its opening decision[26]. The ECJ maintained that German courts were still competent despite the transfer and supported this decision with the need to avoid forum shopping, according to recital 4 of the Insolvency regulation[27]. Indeed, if transfers of business domicile after the filing shifted the international competence, the debtor would have the power to select the competent venue and the applicable law. It was not entirely clear, however, whether the same principle was to be applied in case of COMI transfer before the filing for insolvency[28].

More clarity on this issue was made by the *Interedil* decision delivered in 2011[29]. In that case, an Italian company (Interedil) decided to transfer its registered office to London and was consequently cancelled from the local register[30]. Interedil, however, still held some assets and a bank account in Italy. Almost two years later an important creditor filed for Interedil's insolvency with the Tribunal of Bari (where the company was originally registered). The question arose as to whether the relocation of a debtor' registered office before the filing for insolvency shifts the international competence from the state of origin to the state of the new registered office. The ECJ stated that the reference date is always the filing for

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[25] Weller, 'Forum shopping', p. 416.

[26] European Court of Justice C-1/04 *Staubitz-Schreiber* [2006] ECR-I 00701.

[27] "[I]n 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": Staubitz-Schreiber, para 25.

[28] Weller, 'Die Verlegung des Centre of Main Interest von Deutschland nach England', *Zeitschrift für das gesamte Handels- und Gesellschaftsrecht,* (2008) p. 850?? Horst Eidenmüller, 'Abuse of Law in European Insolvency Law', *European Company Financial Review* (2009) at p. 13; Stefania Bariatti, 'Il regolamento n. 1346/2000 davanti alla Corte di Giustizia: il caso Eurofood', *Riv. dir. proc.* (2007) p. 203 *et seq*.

[29] European Court of Justice, C-396/09, *Interedil Srl, in liquidazione, v. Fallimento Interedil Srl, Intesa Gestione Crediti SpA*, [2011].

[30] Actually, the real story behind the Interedil decision was more complicated. Although Interedil decided to shift the registered office to London and was cancelled from the Italian registry, it was registered in the English Company House as an "overseas company", having only a "place of business" in England. On this issue see Federico Mucciarelli 'The hidden voyage of a dying Italian company: from the Mediterranean See to Albion', 9 *European Company Financial law Review* (2012) p. 571 *et seq.*

insolvency, thus relocations before the filing would also shift the insolvency competence[31].

Despite their apparent continuity, a closer look reveals a hidden discrepancy between the opinions *Staubitz-Schreiber* and *Interedil*. While the former decision was underpinned by the purpose to avoid forum shopping, the latter paves the way to it and to regulatory arbitrages. According to *Interedil*, a company's COMI is to be determined having regard exclusively to factual elements existing at the day of the filing, regardless of the previous location of headquarter and registered office. If a company transfers its registered office to another Member State before filing for insolvency, the presumption of coincidence between registered office and COMI is also transferred, because the filing is the only relevant reference date. Consequently, the COMI is in the Member State of the new registered office, until the contrary is proven and the burden to prove the contrary is shifted onto dissenting creditors. Creditors have to show that this company's headquarter is still in the original Member States and that this location was the only one that third parties can ascertain as the company's management centre. Yet to provide this evidence is not an easy task, as we shall see in the next paragraphs[32].

4. *How to rebut the presumption that a company's COMI coincides with its registered office*

In the decision Eurofood, the European Court of Justice clarified what evidence can overcome the presumption that a company's COMI is in the Member State of its registered office. In that specific case, the question arose of whether the COMI of Eurofood, an Irish subsidiary of the Parmalat group, was in Ireland, where it was incorporated, or in Italy, home country of the holding company. The ECJ's response was in favour of the competence of the Irish court and, among other arguments, it stated that "*in determining the centre of the main interests of a debtor company, the 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.*"[33] In other words, to overcome the presumption that a company's COMI coincides with its registered office, creditors must give evidence that the insolvent company was internally managed from that Member State and that third parties could ascertain that the company's headquarter was in that state. By issuing this decision, the ECJ dismissed the theory, followed by many member states' courts, according to which a debtor's COMI is in the place of its central administration, where the head office functions are carried out on a regular basis[34]. The drawback of this

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[31] *Interedil*, para 56.

[32] Indeed, pursuant to ECJ' case law of the last decade, Member States can not bar companies incorporated in other member states from having their entire activities or their headquarters on their territory, providing that the state of incorporation allows this: European Court of Justice C-212/97, *Centros Ltd v Erhvervsog Selskabsstyrelsen* [1999] ECR I-1459; European Court of Justice C-208/00, *Überseering BV v Nordic Construction Company Baumanagement GmbH* [2002] ECR I-9919; European Court of Justice C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art*, [2003] ECR I-1095.

[33] European Court of Justice, *Eurofood IFSC Ltd*, C-341/04 [2006] ECR-I 1078.

[34] See, for instance, High Court chancery division, *BRAC*, 7 February 2003, [2003] EWHC (Ch) 128 = [2003] 2 All ER 201 = [2003] BPIR 531; High Court chancery division Leeds, *Daisytek-*

«central administration» theory was that third parties or creditors might not be aware of the place where the internal head office is, and consequently, would not know in advance which bankruptcy law will apply in case of default. The solution endorsed by the Eurofood decision grants a high degree of legal certainty as to the location of the COMI, yet it makes also more difficult to overcome the presumption that it coincides with a company's registered office, unless the company is a mere "letterbox" that carries no activity in the member state of incorporation.

In light of this, the decision Interedil specified what evidence must be alleged in case of registered office's relocation before the filing for insolvency. At the moment of the filing, Interedil still had assets and liabilities in the State of origin (Italy). It was however uncertain whether these assets and liability were a sufficient evidence that Interedil' COMI was still in Italy. The ECJ held that the fact that a company has assets in the Member State of origin may only rebut the presumption if "*a comprehensive assessment of all the relevant factors makes it possible to establish, 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 that other Member State"*[35]. However, according to the ECJ if a company's headquarter actually coincides with its registered office, in a way ascertainable by third parties, "*the presumption in that provision can not be rebutted*"[36].

The Commission Proposal restates the principles of the Interedil decision. The proposed new Recital 13a of the Insolvency Regulation states that the presumption that a company's COMI coincides with its registered office can be rebutted if "*the company's central administration is located in another Member State* […] *and 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 that other Member State*", yet "*it should not be possible to rebut the presumption where the bodies responsible for the management and supervision of a company are in the same place as its registered office and the management decisions are taken there in a manner ascertainable by third parties*"[37].

Both the ECJ's decision and the Commission Proposal distinguish "fictive" COMI transfers, where the headquarter is not transferred together with the registered office, from "real" COMI transfers, when a company transfers its headquarter' functions together with its registered office before filing for insolvency. If a transfer of COMI is "real" and third parties can clearly ascertain that the company is managed from the new Member State, no evidence whatsoever can be given to overcome the presumption that a company's COMI coincides with its registered office. The presumption can only be rebutted either if

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ISA, 16 May 2003 [2004] BPIR 30; Tribunale Roma, *Cirio Holding Luxembourg*, 26 November 2003, *Rivista di diritto internazionale privato e processuale* (2004) 691 *et seq*.; Tribunale Parma, *Parmalat Netherland BV*, 4 February 2004, *Rivista di diritto internazionale privato e processuale* (2004) 693 *et seq*.; High Court chancery division Birmingham, 18 April 2005, *MG Rover* [2005] BWHC 874 (Ch); High Court chancery division, Re Collins & Aikman Corp Group Chancery Division (Companies Court), 15 July 2005 [2005] EWHC 1754 (Ch); High Court chancery division, *Re Lennox Holdings Ltd*, 20 June 2008 [2009] BCC 155.

[35] Interedil, 53.

[36] Interedil, Para 59.

[37] Commission Proposal, para 11.

the transfer of COMI is "fictive" or when the insolvent company transferred its headquarter, but did not make such transfer sufficiently public. If a company's headquarter is transferred together with the registered office in a way ascertainable by third parties, forum shopping is possible. However, if third parties can not "ascertain" that the company's managerial functions are carried on from the new State and believe that its headquarter is still in the State of origin, the presumption that a company's COMI coincides with its registered office is rebutted. Consequently, the question arises as to what extent the "ascertainability" criterion may avoid opportunistic forum shopping at creditors' expenses. The answer, as we will se in the next paragraphs, is highly controversial.

5. *Pre-existing creditors v. subsequent creditors*

The "ascertainability" criterion does not make clear which creditors' viewpoint is relevant to rebut the presumption. If a company transfers its headquarter and registered office into another state before filing for insolvency, two classes of creditors may exist at the moment of filing: those whose debts were incurred before the transfer ("pre-existing creditors") and those whose debts were incurred after the transfer ("subsequent creditors"). This distinction is purely chronological, not geographical: pre-existing creditors are not necessarily located in the state of origin and subsequent creditors could be not domiciled in the new home state.

At the moment when their debts were incurred, the beliefs of these two classes of creditors do not coincide: under the viewpoint of pre-existing creditors, their debtor' headquarter was in the State of origin, while from the viewpoint of subsequent creditors the company was managed from the new Member State.

The conflict of pre-existing and subsequent creditors' beliefs may be resolved by expanding the range of facts that courts consider to determine the location of the COMI[38]. According to the "all facts theory", also historical facts and pre-existing creditors' beliefs have relevance in assessing where its COMI is in case of subsequent transfer of registered office *and* headquarter. Consequently, if past activities are in the Member State of origin and most debts where incurred before the transfer, the original state is competent to govern the insolvency. This solution actually bans forum shopping by requiring courts to consider exclusively the location of the COMI at the date on which unpaid debts were incurred.[39]

The "all facts theory", however, has significant drawbacks. In particular, if an insolvent company has both pre-existing and subsequent creditors, the all facts theory requires "weighting" these two classes of creditors. In practice, this theory produces clear solutions only if all creditors of the insolvent company are pre-

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[38] See: Bob Wessels, *International insolvency law*, 3rd edition, Deventer, 2012, pp. 499 – 500 (para 10576); Costanza Honorati – Giorgio Corno, 'A double lesson from Interedil: higher courts, lower courts and preliminary ruling and further clarifications on COMI and establishment under EC Insolvency Regulation' *International Insolvency Law Rev.* (2012) p. 20.

[39] A good example of the "all facts theory" is the decision of the Court of Appeal Milan in the case Immobilink. Court of Appeal Milan, 14 May 2008, *Il Fallimento* (2009) p. 65 *et seq.* Immobilink S.p.A. transferred its registered office from Milan to Luxembourg and a creditor filed for insolvency with the Tribunal of Milan after that transfer. The Tribunal and the Court of Appeal of Milan affirmed the international competence of Italian courts. The rationale of this decision was that the debtor at the moment of filing still had unpaid debts with Italian creditors and a relevant lawsuit was still pending in Italy. See also Districht Court Dordrecht, May 12th 2004.

existing, which happens only in two circumstances: when the company interrupts all economic activities after the registered office' relocation or when the company files for insolvency immediately after the transfer. This is why the most decisions in the Member States follow a different deny any relevance to historical facts and to the moment when the debts were incurred (s.c. "snapshot theory").

Two examples from the UK and Germany, both related to single businesses, will help clarifying this theory. In the UK, the leading case is *Shierson* of 2005[40]; after his separation from his wife, Mr Shierson moved from the UK to Spain, yet he maintained a property in the UK and came regularly to visit his children. After Mr Shierson' default, the question arose of whether English courts had jurisdiction to open a main insolvency proceeding, or whether they could only open a secondary proceeding having mere territorial effects[41]. The Court of Appeal, by denying UK competence, concluded that "*it is reading too much into the* [Virgos – Schmit Report] *to conclude that the centre of main interests will not change — if the underlying facts change — between the time that the creditor extends credit and the time when a court is asked to open insolvency proceedings*[42]*"*. In Germany, the Tribunal (*Amtsgericht*) of Celle addressed in 2005 a similar case[43]. The debtor was a dental technician originally based in Bergen who moved to the UK, together with his family, short before filing for insolvency in Germany. Although at the moment of filing the debtor still had propriety in Germany and all his creditors were pre-existing ones, the Tribunal denied to be competent. The main argument was that the reference date to determine the COMI is exclusively the date of the filing and that the date on which the debts occurred is not relevant.

Eventually, the European Court of Justice supported also the snapshot theory in the Interedil opinion. As we have seen above, at the moment of the filing for insolvency, Interedil still had assets and a financial contract in Italy, yet this was not considered as sufficient to overcome the presumption that the COMI is in the State of arrival. The European Court of justice does not exclude that pre-existing facts might also influence the determination of the COMI, if 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 a Member State different from that of the registered office. The existence of pre-existing and still unpaid creditors, however, in ECJ's view was not among the factors that

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[40] Court of Appeal, 27 July 2005, *Malcolm Brian Shierson v Clive Vlieland-Boddy* [2005] EWCA Civ 974.

[41] The registrar, recognized the jurisdiction of UK courts' on the premise that "in order to give effect to the policy of the [Insolvency Regulation], the court must, in my judgment, have regard to the time at which the debt is incurred because that is the time at which the creditors need to assess the risks of insolvency." The logic underlying the registrar's approach was precisely to grant that the location of the COMI and the applicable insolvency law would be entirely predictable and certain for potential creditors. In order to reach this goal, the registrar the date as to which to assess the COMI is set at the moment when the most debts were incurred.

[42] *Shierson,* 48. Actually, the Court of Appeal in the case Shierson did not entirely exclude that a court can legitimately use historical fact to assess where a company's COMI is. The Court, indeed, concludes that although the COMI "*is to be determined in the light of the facts as they are at the relevant time for determination*", "*those facts include historical facts which have led to the position as it is at the time for determination. […] [I]t is important also, to have regard to the need, if the centre of main interests is to be ascertainable by third parties, for an element of permanence*": *Shierson*, para 55 (2) and (3).

[43] AG Celle, 18 April 2004, *Neue Zeitschrift Insolvenzrecht* (2005) p. 410 *et seq.*

courts should consider to determine the COMI and rebut the presumption of coincidence with the registered office.

6. How to make the new headquarter public

As a consequence of the Interedil decision, companies can indirectly change the competent insolvency venue and the applicable insolvency law by transferring their registered office into another Member State, providing that they also transfer its headquarter in a way that makes this fact clear to potential creditors. If the new headquarter gains a sufficient degree of continuity and is ascertainable to new creditors, insolvency law of the state of arrival applies.

The question arises of what a company must do in order to make its new headquarter ascertainable to potential creditors. The registration in the public register of the country of arrival only creates a legal presumption that the COMI is in the same place, yet creditors are allowed to show that the company appeared to be managed from the original State. As we have seen above, according to the European Court of Justice, the fact that, after a transfer of registered office, a company owns properties or has a bank account in the State of origin is not sufficient evidence that its COMI is still in such State. The ECJ stated also that the requirement of "ascertainability" is met "*where the material factors taken into account for the purpose of establishing the place in which the debtor company conducts the administration of its interests on a regular basis have been made public or, at the very least, made sufficiently accessible to enable third parties, that is to say in particular the company's creditors, to be aware of them*". The ECJ, however, does not clarify in which circumstances the fact that a company is still managed from the State of origin is "sufficiently accessible" to potential creditors.

In this regard, two UK cases are good examples of the 'ascertainability' criterion. The first case is the *Stanford* decision, in which Mr Justice Lewinson changed his previous opinion of the *Lennox* case, and fully applied the *Eurofood* doctrine[44]. The financial empire controlled by Mr Stanford, based in the US, included an Antiguan bank. After its default, a U.S. court appointed a receiver, under the assumption that that bank COMI was in the U.S., but a few days later also an Antiguan court appointed a receiver, holding that the COMI was in Antigua, where the bank had its registered office. Both receivers applied for recognition in the UK, under the EU Insolvency regulation. One of the main legal issues what is meant in the Regulation by 'ascertainable'. Two different theories were proposed to the court. The first theory – submitted by the lawyer of the U.S. receiver – was that "*information would count as being ascertainable even if it was not in the public domain if it would have been disclosed as an honest answer to a question asked by a third party*". The second opinion – submitted by the Antiguan liquidator – was, by contrast that "*ascertainable by a third party was what was in the public domain, and what a typical third party would learn as a result of dealing with the company*"[45]. Mr Justice Lewinson agreed with this latter doctrine, by stating that a debtor's COMI is what "*is ascertainable by third*

[44] High Court Chancery Division, 3 July 2009, *Re Stanford International Bank Ltd* (In Receivership) [2009] EWHC 1441 (Ch). This decision was upheld by the Court of Appeal: [2010] 3 WLR 941.

[45] *Stanford*, para 62.

parties is what is in the public domain, and what they would learn in the ordinary course of business with the company one of the important features is the perception of the objective observer."[46]

The second case is the decision *Irish Bank Resolution v Quinn* of the Chancery Division for Northern Ireland[47]. Mr Quinn, a professional resident in the Republic of Ireland, went bankrupt and claimed that his business was based in Northern Ireland, not far from the Republic of Ireland, where he was resident. The Court reversed the bankruptcy order, issued under the law of Northern Ireland, and recognized that Mr Quinn COMI was in the Republic of Ireland. The Court, based upon the decision *Interedil*, by asking under which circumstances the material factors are to be considered as "sufficiently accessible" for third parties. The criterion that the location of the COMI must be ascertainable by third parties "*would indicate something different from being actually notified. If not made public it must be 'sufficiently accessible'.* […] *It should be reasonably or sufficiently ascertainable or ascertainable by a reasonably diligent creditor*"[48]. To this purpose, in the Court's view, it is necessary "[t]*o make the COMI available on the internet or through telephone directories or trade directories or otherwise generally available in the Member State in which he has established his centre of main interest would make it public*"[49]. In that specific case, however, Mr Quinn did not publish his telephone number on a public directory or his web page, hence this location was not sufficiently ascertainable by third parties. In turn, had Mr Quinn made his place of business public through telephone directories or online, the Court would have reached a different conclusion.

What would be the consequence of applying the Interedil decision and the 'ascertainability' criterion to transfers of companies' registered office? If the 'emigrating' company transfers both its headquarter and registered office from one Member State to another and this new headquarter' location is in "public domain", through the internet, telephone directories and its letterheads, this company's COMI is also shifted to the new State of incorporation. Imagine that a company transfers its registered office and headquarter from member state A to member state B, and publicly advertises this transfer on internet, telephone directory and on its letterhead. After the transfer, the company incurs new debts and then it files for insolvency. This company's COMI is located in Member State B, which is competent to govern its main insolvency proceeding. Pre-existing creditors can only react by filing for the opening of a secondary proceeding with territorial effects and liquidation purposes, providing that the company still has an "establishment" in the territory of Member State A. This option, however, does not advantage pre-existing creditors if the assets located in the State of origin are not sufficient to repay them.

7. *Conclusions*

The criterion that the location of the COMI (and therefore its transfer) should be ascertainable by third parties does not entirely prevent forum shopping. In case of

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[46] *Stanford*, para 70.

[47] High Court of Justice in Northern Ireland Chancery Division (Bankruptcy), 10 January 2012, *Irish Bank Resolution Corp Ltd v Quinn* [2012] NICh 1 = [2012] B.C.C. 608.

[48] *Irish Bank*, para 28.

[49] *Irish Bank*, para 28.

transfer of the COMI from one Member State to another, this requisite protects only new creditors, whose debts were incurred after the debtor has relocated its headquarter. In contrast, preexisting creditors, whose debts were incurred before the transfer, are not protected if the company manages to make the new headquarter sufficiently public.

Therefore, potential creditors can never be sure that their debtor will not transfer its COMI abroad and change applicable insolvency law. The new law might damage the interests of certain classes of creditors, as compared with the original one; the new law, for instance, may not allow continuity of contracts or may provide for avoidance rules that are more restrictive than under the original law. Adjusting creditors, such as banks or sophisticated business partners, can protect themselves by requiring specific covenants, which allow creditors to call the debt if the debtor transfers its registered office, or proprietary guarantees, such as a pledge or a mortgage. All "non-adjusting" creditors, however, risk that their debtors will transfer their COMI to another state and that the new applicable insolvency law has negative effects on their interests[50]. Perhaps, such creditors may also free ride on covenants negotiated by adjusting creditors; one can reasonably doubt, however, that adjusting creditors contractual protections will always advantage weak and unsophisticated creditors.

[50] McCormack, 'Jurisdictional Competition and Forum Shopping' at p. 181.

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