Rethinking COMI in the Age of Multinational, Digital and Glocal Enterprises

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Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings failed to provide a definition of COMI (centre of main interests), either in Article 2, which was specifically devoted to definitions, or in Article 3, which regulated international jurisdiction.

For its part, Article 3(1) merely provided 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". Article 3(1) further stipulated 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."

Recital 13 specified that "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 third parties", but different views have been expressed as regards, in particular, the relation between the concept of 'administration' and the concept of 'ascertainability by third parties'.

As a result, Article 3 of Regulation No 1346/2000 gave rise a number of disputes and was the object of several requests to the European Court of Justice (ECJ) for preliminary rulings, with *Eurofood* being the first case in point.

Eventually, Regulation (EU) 2015/848 of 20 May 2015 on insolvency proceedings (Recast) laid down new rules on COMI –

a definition of COMI was introduced; the presumption aiming at better ascertaining COMI was extended to individuals as well; the judicial rule of thumb that evaluated negatively a debtor who had moved his/her/its COMI shortly before the request to open insolvency proceedings was incorporated into a mandatory rule; and eleven recitals, aiming at making this framework clearer and more easily applicable, were introduced (Recitals 25 to 34, and 53).

However, one may doubt whether these efforts have succeeded. The many disputes involving NIKI Luftfahrt GmbH are illuminating. NIKI was an insolvent company under Austrian law incorporated in Austria. However, NIKI was also a subsidiary of the Air Berlin PLC & Co. Luftverkehrs KG, better known as Air Berlin. This is a company under German law incorporated in Germany.

Therefore, the crucial question was: which Member State had jurisdiction to open main insolvency proceedings against NIKI? Did Austria or Germany have jurisdiction? The question was clear-cut but the answers to this question were various and contradictory. The NIKI dispute has at long last been settled, but the dynamic of the NIKI case is intriguing because it demonstrates that the new COMI rules still give rise to doubts as regards both the relation between the two elements constituting the COMI definition (*i.e.*between “the place where the debtor conducts the administration of its interests on a regular basis” and the place “which is ascertainable by third parties”), and the relation between the definition of COMI and the presumptions that are provided to make it easier to apply this definition.

Moreover, some legal counsels maintain that the new COMI rules could facilitate fraudulent COMI relocations. A company could move its registered office to another Member State which is less favourable towards its creditors; make the transfer public,*e.g.*by using the new address in correspondence; await the expiration of the three-month period laid down by the time limit to the presumption; and apply for a fraudulent, but a ‘legally authorized’ opening of insolvency proceedings in the new jurisdiction.

Mutatis mutandis, a similar idea is proposed as regards individuals. To our knowledge there is no evidence of cases where these proposals have facilitated fraudulent COMI relocations. However, the proposal to circumvent the new COMI rules deserves attention because it leverages some prescriptions which were conceived precisely to prevent a debtor from circumventing the COMI rules.

The problems with the new COMI rules do not end here, as I have demonstrated in a recent paper titled *The Puzzle of the New European COMI Rules: Rethinking COMI in the Age of Multinational, Digital and Glocal Enterprises*.

In fact, sometimes the investigation about ‘ascertainability by third parties’ could prove problematic. The more complex a business organization is, the more often this situation arises. This is because the more complex a business organization is, the easier it becomes for a firm to be split into many ‘units’ (the term is intentionally non-technical) which, on the one hand, are located in different countries and, on the other hand, are in contact with different groups of creditors: case by case, these groups of creditors may have differing perceptions as to where the firm is located.

Undoubtedly, problems of this nature may arise when insolvency occurs within a group of companies – Recital 53 of Regulation 2015/848 allows one single court to open one single set of insolvency proceedings concerning several companies belonging to the same group. But the investigation about ‘ascertainability by third parties’ could prove equally challenging when a firm conducts its relationships with suppliers and customers through digital networks, and even more so if this firm runs a business which is glocal, in the sense that it is characterized by both global and local considerations. The domain name ".com" gives no indication as to where a business is located and, even where the domain name uses a country code such as ".de" or ".fr", there is no guarantee that the firm is established in that country, since it is relatively common practice to keep web servers geographically separated from the actual location of the enterprise.

It is highly probable that these shortcomings will result again in requests for preliminary rulings; it is also highly desirable that the ECJ provide an interpretation of the COMI rules which would prove crucial in resolving those specific issues that gave rise to such requests.

Arguably, this situation is less serious as regards the flaw affecting the rules which lay down the time limits to the applicability of the COMI presumptions – this flaw could probably be fixed by means of interpretation. However – as regards the flaw concerning the prerequisite of 'ascertainability by third parties'– it is highly improbable that the ECJ will be able to solve this problem at the roots and, consequently, prevent subsequent litigation.

Even the most enthusiastic supporters of ECJ activism must admit that the European Court is not allowed to interpret the new COMI rules in a way that proves to be against both the letter and the spirit of the legal framework, for this power belongs to the regulator alone. To be more precise, this statement implies that the ECJ will be unable either to rule that the prerequisite 'ascertainability by third parties' would be unnecessary whenever this presence was de facto incompatible with that of 'administration on a regular basis', or to rule that the application of the COMI presumptions might disregard the COMI definition. Both rulings would infringe not only the letter of the new COMI rules but also the clearly traceable intention of the regulator.

Further, the ECJ might certainly rule that the COMI of a company X is located in a country Y by putting the COMI of that company into a system of relations with some elements which are considered as relevant to the case. However, since ascertainment of the COMI is case-sensitive and since the one-to-one relation between these factors and the debtor’s exact location cannot be established in a universal way, this ruling will not provide the interpreter with a general criterion that would hold good for any future cases.