The Concept of center of main interests under the EU Insolvency Law

ABSTRACT

This article consists of three parts: 1) examines the concept of COMI under EIR, 2) deals with the criteria of which rebut the general presumption of COMI, 3) analyzes the concept of COMI in case of group of companies insolvency.

KEYWORDS: EU insolvency law, center of main interests, forum shopping

Introduction

Center of main interests (thereinafter “COMI”) has been a central notion in EU insolvency law. The practical problems of this concept has triggered scholars’ attention in recent years. It is a seminal criterion for the establishment of jurisdiction in a cross-border insolvency dispute when it concerns more than one EU Member State. The proper assessment of debtor’s COMI serves for legal certainty and foreseeability of the jurisdiction of insolvency proceedings. The court analyzes proprio motu whether the location of debtor’s COMI (or establishment) is within its jurisdiction. The location of COMI determines not only the court which deals with the main (universal) insolvency proceedings, but implies other consequences to the whole judicial proceedings such as the applicable law (lex concursus) and possibility

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2 R. Bork, K. van Zwieten, Commentary on the European Insolvency Regulation, Oxford University Press 2016, p. 120.
4 CJEU judgment (C-341/04), para. 33: “[…] legal certainty and foreseeability concerning the determination of the court with jurisdiction to open main insolvency proceedings”.
5 Recital 27 of EIR.
to open secondary insolvency proceedings. Once the location of COMI is established, it must be recognized in all Member States\(^6\).

COMI rules are crucial for combating unlawful forum shopping in insolvency law. Since COMI determines the applicable law in the main insolvency proceedings, the debtor may seek to take advantage of more favorable insolvency regime. Such situation may confuse the creditors and hamper effective insolvency proceedings. Unsurprisingly the combat against unlawful forum shopping has been one of the main goals of the new EU insolvency reform\(^7\).

The regulation No 2015/848 on insolvency proceedings\(^8\) (thereinafter the “EIR”) has introduced significant changes in cross-border EU insolvency disputes, such as the extension of insolvency proceedings which fall under the scope of this regulation, insolvency proceedings of group of companies regulation, special undertakings by insolvency practitioners in secondary insolvency proceedings, insolvency registry and increased the communication between insolvency practitioners and courts within the EU Member States. Comparing with the previous insolvency regulation, these changes may have significant alterations in cross border insolvency disputes. The notion and rules for the establishment of COMI have been also amended. Some of the proposed changes and development of the ECJ case law have been codified in EIR.

### I. COMI under EIR

Jurisdiction rules have at least three basic goals: to ensure transparent and predictable place of debtor’s insolvency proceedings; to discourage debtors to manipulate insolvency rules; to exclude situations when the jurisdiction lays in more than one state\(^9\). Also a proper regulation of insolvency jurisdiction rules is significant not only for the existing but also for the future creditors. The creditors shall ascertain in advance the jurisdiction of debtor’s insolvency proceedings before entering into legal relationship\(^10\). The notion of COMI as a principal jurisdiction rule in cross-border EU insolvency cases shall fulfill these goals.

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\(^6\) CJEU judgment (C-327/13), para. 28: “It follows that the decision taken by the court of a Member State to open main proceedings in respect of a debtor company, and the finding, at least by implication, that the centre of the debtor company’s main interests is situated in that Member State, cannot, in principle, be called into question by the courts of the other Member States\(^8\).”

\(^7\) Recital 29 of EIR.


On 26 June 2017 EIR came into force and replaced regulation No. 1346/2000 on insolvency proceedings (thereinafter the “EIR 2000”)\(^\text{11}\). The previous regulation of COMI was under some criticism. One of the main arguments was that COMI concept is rather vague and its interpretation lacks sufficient guidance to provide a reliable test in practice\(^\text{12}\). Though the Court of Justice of the European Union (thereinafter the “CJEU”) analyzed this concept in some cases, it was primarily oriented to deal with the question what is not COMI, rather than establishing criteria which may help to assess it. The wording of the EIR codifies the main findings of the ECJ case law and reflects the existing EU insolvency law policy. COMI is the basis for the commencement of the main insolvency proceedings\(^\text{13}\). For the application of the EIR, COMI must be located in the EU Member State\(^\text{14}\).

The basic principle of cross-border insolvency case jurisdiction of companies remains the same, since Article 3(1) of EIR almost identically repeats the wording of Recital 13 of EIR 2000. The previous regulation employed the wording “should correspond to the place”\(^\text{15}\), meaning that it is probable, but not a certain criterion (instead of using words such as “is”, “must be” or “shall be”)\(^\text{16}\). In contrast EIR employs the term “shall be the place”\(^\text{17}\) which seems to be more straightforward than the previous one. Also the definition of COMI has changed its place in the text of the regulation. In EIR the definition is transferred from the recital (preamble) to Article 3(1). This may also reveal the importance of definition of COMI since recitals in contrast to articles of the regulation lack binding force, though they form a part of the legislation and are important to the interpretation\(^\text{18}\).

Under EIR, COMI is primarily coupled with the place where the debtor administers the main interests on a regular basis and which is ascertainable by the third parties\(^\text{19}\). In other words the “center” under Article 3(1) reflects debtor’s main interests is the place (Member State): 1) where the “administration” of debtor’s main interests is materialized (on a regular basis) and 2) which is ascertainable as a place of the “administration” of debtor’s main interests – by third parties, especially by the creditors. The term “administration” reflects the management and control of the interests\(^\text{20}\).

\(^{12}\) R. Bork, K.van Zwieten, Commentary…, p. 126.
\(^{13}\) Recital 23 of EIR. Similarly as under EIR 2000, secondary proceedings are opened in any other Member State(s) in which an establishment is found.
\(^{14}\) Recital 25 of EIR.
\(^{15}\) Fr. “devrait correspondre au lieu”, Gr. “sollte der Ort gelten”, Lt. “turėtų būti vieta”.
\(^{16}\) Nevertheless some authors pointed out that “The use of the conditional “should” does not detract force from the definition when compared with other alternative wordings”.
\(^{17}\) Fr. “correspond au lieu”, Gr. “ist der Ort”, Lt. “ta vieta”.
\(^{19}\) Article 3(1) of EIR.
Thus, COMI consists of objective and subjective criteria which both must be met to establish the location of COMI. The travaux préparatoires of EIR suggest that COMI shall be located in the place in which the debtor has a genuine connection rather than in the one chosen by the incorporators21.

The general presumption of the location of COMI is based on the rationale that debtor’s registered office (or in case of an individual exercising an independent business or professional activity – individual’s principal place of business and in case of other persons – the place of habitual residence) determines the location of COMI22. In practice a “registered seat” shall mean the official address of the company23 which is announced in public. Thus this criterion is a prima facie connecting factor for the determination of the place of debtor’s central administration24. Nevertheless EIR does not distinct neither capacity nor the nature of the debtor (for instance, whether it is a trader or non-trader, public or private) or its structure (association, company with limited/unlimited liability)25. Since no distinction in this regard is set, the general presumption of the location of company’s COMI is applicable. The situation is different when the debtor is an individual exercising an independent business or professional activity or other national person26. The place of a “registered seat” shall mean the place of “directing centre”. In private international law the notion of directing center is crucial in case the company has two (or more) places of management. It shall include the place in which a debtor has relationships with other creditors, makes strategic decisions, conducts and supervises general business, has central treasury management and provides services27.

Another reason in favour of the “registered seat” presumption is because each company in the EU needs to have a legal place where it is registered with a public record28. For instance, Article 2 of Directive 2009/101/EC requires the Member States to ensure that each company discloses any change of the registered office of the company. Thus the location of COMI shall be found in public registries. Some authors believe that in general the place of the register office corresponds to the place of debtor’s head29.

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22 Art. 3(1)
23 R. Bork, K. van Zwieten, Commentary…., p. 129.
26 In such cases EIR establishes that the presumption of COMI is based on the place of assets or habitual residence accordingly.
27 M. Virgós, F. Garcimartin, The European…., p. 42.
28 R. Bork, K. van Zwieten, Commentary…., p. 129.
office\textsuperscript{29}. In other words the place of the “registered office” is the place where the debtor conducts the main business activities. Moreover, company’s address of communication with the third persons (creditors) often is the address of a registered seat. In contrast to the previous regulation, EIR establishes a non-exhaustive list of circumstances which shall show whether the creditors are aware of COMI: change of address in commercial relations, public information about the new location\textsuperscript{30}. Both criteria are objective and shall not be difficult to prove. However, in each case a company has to act diligently and in good faith. Even if both EU and national laws require a company to notify the creditors and the public registries about the change of its registered address, a debtor can manipulate this information.

The general presumption of the location of COMI becomes even stronger when the registered seat and debtor’s actual business activities are in the same place\textsuperscript{31}. Article 3(1) of EIR codifies the Interedil findings in which the ECJ established that the presumption of the “registered office” is irrebuttable in case the “registered office” is at the same place where the bodies responsible for the management and supervision of a company are situated and management decisions of the company are taken\textsuperscript{32}. This approach has been also codified as the basis for the rebuttal of the general presumption of the location of COMI.

EIR 2000 did not address a prior (particularly immediate) transfer of COMI problem (when the debtor often acting in bad faith transfers COMI from one place to another before or immediate after lodging claim for the commencement of insolvency proceedings). Although it may be a flagrant breach of creditor’s predictability of the location of COMI, it was silent what period of time has to pass for the transfer of COMI. Some authors suggested a “reality test” which basically means that the new transfer of COMI has to be genuine (based on real facts on a normal basis)\textsuperscript{33}. In other words, it was argued that the transfer of COMI may be justified if it is based on genuine reasons and the debtor has acted in good faith. One could argue that the lack of certain regulation in this case diminishes creditor’s predictability and open doors for unlawful forum shopping.

The combat against unlawful forum shopping has been in the EU legislator’s agenda for some time\textsuperscript{34}. Though the chance of moving COMI from one Member

\textsuperscript{30} Recital 28 of EIR.
\textsuperscript{31} R. Bork, K. van Zwieten, \textit{Commentary…}, p. 130.
\textsuperscript{32} CJEU judgment (C-396/09), para. 50.
\textsuperscript{33} M. Virgós, F. Garcimartin, \textit{The European…}, p. 50.
\textsuperscript{34} European Parliament, Resolution of 15 November 2011 with Recommendations to the Commission on Insolvency Proceedings in the context of EU Company Law (2011/2006(INI)): „whereas steps must be taken to prevent abuse, and any spread, of the phenomenon of forum shopping, and whereas competing main proceedings should be avoided“ see: <http://www.europarl.
State to another depends on various circumstances. For instance, a company with only one basic entity would have less chances to move COMI smoothly comparing to companies having immaterial assets (factories) or many employees\(^{35}\). However, under EU insolvency law regime it had been unclear how to distinguish an unlawful forum shopping from lawful actions, such as a transfer of COMI to ensure more creditors’ beneficial reorganisation procedure or merge with another company. The European Commission proposed that a new insolvency regulation should reduce the cases of forum shopping through abusive and non-genuine relocation of COMI\(^{36}\). Thus, it did not propose to restrict any forum shopping of COMI, but rather sought to establish criteria which would allow to distinct a lawful transfer of COMI from an abusive and non-genuine transfer.

Some authors argued that the unlawfulness of the transfer of COMI shall be assessed relying on general principle “abuse of EU law” which the ECJ formed in *Emsland-Stärke*: first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved\(^{37}\); a subjective element consisting in the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining it\(^{38}\). Therefore, the abuse of EU law (unlawful transfer of COMI) shall be based on objective and subjective criteria. Also, some authors proposed the “efficiency test” whether the transfer of COMI abuses EU law. If the transfer of COMI is based on the maximisation of debtor’s assets to satisfy creditors value, it does not abuse EU law and \textit{vice versa}\(^{39}\).

In order to address the previous concerns of transfer of COMI, EIR establishes certain suspension limits for the removal of COMI from one Member State to another (depending on the nature of the debtor). Article 3(1) of EIR sets suspension periods or the transfer of the location of COMI for companies, an individual exercising an independent business of professional activity and other individuals (not exercising an independent business or professional activity):

- companies or legal persons – registered office (if it has not been moved to another Member State within 3 months period prior to the request for the opening of insolvency proceedings);

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\(^{36}\) EC Proposal for a Regulation…

\(^{37}\) CJEU judgment (C-110/99), para. 52.

\(^{38}\) Ibidem, para. 53.

\(^{39}\) R. J. de Weijs, M. Breeman, *Comi-migration…*, p. 12.
The suspension periods reflect one of the major goals of EIR to combat fraudulent and abusive forum shopping and the ECJ findings in Staubitz-Schreiber. In this case the ECJ dealt with the situation when the debtor (a natural person) filled for the commencement of insolvency proceedings and during the time the court considered the opening of bankruptcy case, moved the registered office from one Member State to another. The debtor had moved COMI after submitting the request to open proceedings but before the judgment was delivered. The ECJ ruled that such transfer is contrary to the objective of the insolvency regulation, efficient and effective cross-border proceedings. Thus, if a debtor transfers COMI to another Member State after lodging the request but before the proceeding is opened, the territory of which COMI is situated at the time when the debtor lodges the request to open insolvency proceedings retains jurisdiction to open those proceedings. Interpreting jurisdiction rules in a different way may harm the “efficient operation of cross border insolvency proceeding”. The date of lodging a claim to the court to open insolvency proceedings has been accepted in scholars’ teachings too.

Suspension periods shall promote creditors’ trust and predictability since they may be aware of the place of debtor’s COMI: “It is therefore logical in such a situation to attach greater importance to the location of the last center of main interests at the time when the debtor company was removed from the register of companies and ceased all activities”. Also it may discourage bad-faith creditors to engage in forum shopping. Nevertheless, the suspension periods do not apply in the case only the head office moves to another Member State (without relocating the registered office). Thus the relocation of head office can still lead to forum shopping. In order to apply the suspension period, a creditor has to prove that the “registered office” was registered in another Member State. Thus, the practical value of suspension periods may be questionable since the debtor may move the actual place of administration without registration of the registered seat.

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40 Recital 29 of EIR.
41 CJEU judgment (C-1/04).
42 Ibidem, para. 29.
43 CJEU judgment (C-1/04), Opinion of Advocate General Ruiz-Jarabo Colomer, para. 75.
44 M. Virgós, F. Garcimartin, The European…, p. 50.
45 R. Bork, K.van Zwieten, Commentary…, p. 135.
46 Ibidem p. 142.
The wording of COMI (“is situated”) under Article 3(1) of EIR and the suspension periods stipulate that COMI is a “moving criteria”\(^{47}\). The Advocate General in Seagon v Deho Marty Belgium NV\(^{48}\) pointed out that forum shopping does not contradict with the EU insolvency regulation per se: “As the [R]egulation intimates, forum shopping is not a completely unlawful practice. The Community legislation counters the opportunistic and fraudulent use of the right to choose a forum, which is very different to the demonization for the sake of it of a practice which on occasions it is appropriate to encourage”.

According to EIR, forum shopping is unlawful (abusive and/or fraudulent) only when the transfer of a registered office breaches the suspension period. In contrast, this provision is not breached when a claim to open insolvency proceedings is filed within three months after the relocation of COMI. It shall not be interpreted as a static, but rather “moving criterion”, which may be transferred from time to time and namely the conditions of such transfer must be compatible with legal certainty and creditors’ predictability. The EIR does not restrict the transfer of COMI unless it violates the rule of suspension period. Thus, EIR acknowledges only an objective criterion to analyse whether the EU law was (was not) abused by the transfer of COMI. If the transfer of COMI is not in accordance with the suspension periods set out in EIR, it means the abuse of EU insolvency law (unlawful transfer of COMI).

Nevertheless, some authors have pointed out criticism regarding the suspension periods: first, such rules may discourage beneficial forum shifts that are agreed between the debtor and all creditors; second, it may in some situation prove unfair to the new creditors, that is to say creditors who acquired their claims against the debtor after the COMI shift had been effected; third is may restrict the freedom of establishment\(^{49}\). Though Article 3(1) of EIR reflects Staubitz-Schreiber findings and lays down concrete time periods, it may be disputable whether it is a proportionate instrument to combat unlawful forum shopping in insolvency cases. Since the wording of Article 3(1) of EIR does not provide any rules for deviation from these terms (assessment of reason for the transfer), they shall be applicable without no derogation. Another dilemma may appear when the debtor and some principal creditors agree to move debtor’s COMI from one member state in order to take advantage of more favorable insolvency (restructuring) regime\(^{50}\). It seems that such agreements shall be contrary with the principle pari passu and protection of all creditors’ interests in case of creditor’s insolvency (restructuring). In such case the relocation of COMI shall result in abusive or fraudulent forum shopping. Noteworthy, the abusive and

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\(^{47}\) G. Moss, I. Fletcher, S. Isaacs, *The EU Regulation…*, p. 54.

\(^{48}\) CJEU judgment (C-339/07).

\(^{49}\) R. Bork, K. van Zwieten, *Commentary…*, p. 142-143.

fraudulent forum shopping is decreased since any debtor’s creditor may challenge the decision opening the main insolvency proceedings.

Similarly as its predecessor EIR does not address the *ratione temporis* of the establishment of COMI from the creditors’ perspective. For instance, it may be possible that when the debtor and the creditors had entered into agreement the creditor may have assessed the location of debtor’s COMI differently than at the time when the insolvency proceedings is commenced. The ECJ found that when determining creditors’ perception of debtor’s COMI the court shall take into account when they entered into a legal relation: “*Furthermore, retaining the jurisdiction of the first court seised ensures greater judicial certainty for creditors who have assessed the risks to be assumed in the event of the debtor’s insolvency with regard to the place where the center of his main interests was situated when they entered into a legal relationship with him*”51.

In *Schmid* case the ECJ found that COMI must be foreseeable for the defendant who may assess it when concludes the contract with the debtor in case the insolvency proceedings against the debtor is commenced: “*The criterion, established by the Regulation, for determining the court which has jurisdiction to decide that action, namely the criterion of the centre of the debtor’s main interests, is normally foreseeable for the defendant, who may take it into account at the time when he participates, with the debtor, in an act liable to be set aside in insolvency proceedings*”52. Therefore the court has to look for creditors’ perception even long before the insolvency case is commenced. On the one hand such interpretation is well founded since the creditors are likely to be concerned with the place of possible insolvency proceedings before entering into legal relationship with the debtor. On the other hand, this rule may be ambiguous when the debtor and the creditor have long term legal relationship deriving from one agreement or conclude agreements from time to time.

To sum up, the development of the ECJ practice in EU insolvency law has been codified in EIR. A few steps towards more predictable COMI establishment have been made. First, the notion of COMI (the general presumption of COMI’s location) reflects the ECJ findings in *Interedil* and *Eurofood*. Second, EIR aims to protect the predictability and certainty of debtor’s creditors. The new rules of suspension periods show the goal to combat abusive and fraudulent forum shopping. However, EIR does not provide definition of both terms. Due to the scarce legal regulation the fact that the transfer of COMI is fraudulent and abusive depends whether it falls under the suspension period or not.

**COMI and non-corporate debtors.** Although EIR 2000 was applicable to all persons (legal entities and natural persons), it was primarily designed for companies (legal entities). In order to harmonize the cross-border proceedings within the EU, and

51 CJEU judgment (C-1/04), para. 27.
52 CJEU judgment (C-328/12), para. 35.
clarify the assessment of COMI, EIR sets certain presumptions for the location of individuals COMI. EIR is applicable to insolvency proceedings irrespective whether the debtor is a natural person or a legal person, a trader or an individual. Article 3(1) of EIR employs the wording individuals exercising and independent business or other professional activity and other persons. In contrast, EIR 2000 used terms “trader or an individual” for non-corporate entities.

Regarding non-corporate debtors EIR makes a substantial distinction between an individual exercising an independent business or professional activity (trader) and any other individuals. Therefore, if a person does not fall under the former group, he or she will fall under the latter. In case the court deals with individual’s insolvency, it shall first check whether a person exercises an independent business or professional activity or not. Individuals exercising and business or other professional activity shall mean self-employed persons or entrepreneurs (or a trader). The term self-employer shall mean a person who is free of control when carrying working activities. Individuals exercising “professional activity” shall refer to ‘liberal’ or ‘free professions’. The notion of a liberal profession is established in EU secondary legislation. Such professions, for instance, are doctors, pharmacists, lawyers, engineers, architects, accountants.

In order to determine the location of COMI of an individual exercising an independent business or professional activity EIR employs wording “principal place of business” rather than “central administration”. This is a general presumption. However, the concept of an „independent business or professional activity“ is not completely clear. It seems to the regulation aims to distinguish an individual carrying business or professional activities from an employee of an enterprise. It also excludes activities with are merely facets of the debtor’s personal life (such as managing his own financial activities). Similarly as for the assessment of COMI for companies, this criterion shall be primarily interpreted from the creditors’ perspective. In such case the suspension period is applicable in order to combat forum shopping. For other persons the general rule of the location of COMI is the place of habitual residence. The rationale of this rule is that if an individual does not exercise and independent business or professional activity is the most likely that the creditors would know the place of the address of such person. Also, EIR establishes different regulation of

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53 Recital 9 of EIR.
54 Recital 9 of EIR 2000.
55 R. Bork, K. van Zwieten, Commentary…, p. 152.
56 Ibidem, p. 152.
60 Recital 30 of EIR.
the disclosed information and register of individuals not exercising an independent business or professional activity\textsuperscript{61}.

In general the differences between individual exercising an independent business or professional activity (trader) and any other individual shall be made for a few reasons: first, different basic presumptions of COMI are applicable for these persons; second, different suspension periods are applicable. Other articles of EIR are applicable to both groups of individuals, irrespective to which group they fall in.

II. Rebuttablity of general presumption of COMI

The general presumptions of the location of COMI set out in Article 3(1) of EIR can be rebutted. EIR 2000 provided poor assistance which factors may rebut this presumption\textsuperscript{62}. Unsurprisingly the lack of factors allowed some authors to conclude that COMI is perceived as having “open charter”\textsuperscript{63}, meaning that any relevant factors may be considered. COMI presumption is strong\textsuperscript{64}. Nevertheless, the wording of EIR suggests certain permanence, meaning that business must have COMI which has some element of stability\textsuperscript{65}. Following \textit{Eurofood} the possibility to derogate from the general presumption shall be interpreted strictly.

For companies the general presumption of the location of COMI can be rebutted if company’s center of administration and its statutory seat (a registered seat) are not situated at the same place\textsuperscript{66}. In order to establish that COMI is in a different state than the registered office, one must “demonstrate that the head office functions were carried out in that other state”\textsuperscript{67} since in this place the main governing functions such as accounting, information technology, corporate marketing, branding are performed. Also the objective factors for the assessment of COMI shall be ascertainable by third parties (creditors). In other words the general presumption of the location of COMI is based on “registered seat” and can be rebutted by “real seat theory”\textsuperscript{68}.

EIR codifies \textit{Interedil} approach and establishes that the general presumption can be rebutted only where a comprehensive assessment of all the relevant factors establishes, in a manner that is ascertainable by third parties, that the company’s \textit{actual}

\begin{itemize}
\item \textsuperscript{61} Recitals 79-80 of EIR.
\item \textsuperscript{62} Art. 3(1) of EIR 2000: 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.
\item \textsuperscript{63} M. Virgós, F. Garcimartin, \textit{The European…}, p. 38.
\item \textsuperscript{64} B. Vessels, \textit{International…}, p. 485
\item \textsuperscript{65} \textit{Ibidem}, p. 455
\item \textsuperscript{66} CJEU judgment (C-396/09), para. 51.
\item \textsuperscript{68} G. Moss, I. Fletcher, S. Isaacs, \textit{The EU Regulation…}, p. 52-53.
\end{itemize}
centre of management and supervision and of the management of its interests is located in that other Member State. Such wording stipulates that EIR accepts that COMI has “open character” meaning that for assessment of COMI any relevant factors shall be taken into account. Also the court shall look for the relevant factors which would help to assess place in which company has its actual place of management and supervisions and management of its interests.

Relevant factors. Only the relevant factors can be employed to rebut the general presumption of the location of COMI. In Interedill case the ECJ followed the findings in Eurofood and concluded that the basic “relevant factors” are the place of debtor’s economic activities: „The factors to be taken into account include, in particular, all the places in which the debtor company pursues economic activities and all those in which it holds assets, in so far as those places are ascertainable by third parties“70. Recital 30 of EIR codifies Eurofood and Interedil findings. The wording of this provision itself allows to conclude that in case the factor lacks one of these criteria, it shall not be applicable to rebut the general presumption of the location of COMI. Such interpretation also reflects the predominant approach in private international law in insolvency cases that jurisdiction to hear an insolvency case must be attributed to the court which has the closest link with the case which is primarily determined by the economic activities71. However, none of these factors alone suffice to establish the location of COMI.

Similarly to EIR 2000, EIR is silent which factors may be relevant for the assessment of COMI in order to rebut the general presumption. In general, it would be reasonable to look for the location of COMI at the place where the debtor possesses the majority of assets, employees and business premises. For instance, for manufacturing companies, the place of factories or warehouses shall be particularly relevant72. In Interedil ECJ found that the place of the company’s immovable property (owned through leasing agreements) cannot alone rebut the general presumption of COMI in the absence of other elements, ascertainable by the third parties: „In that context, the location, in a Member State other than that in which the registered office is situated, of immovable property owned by the debtor company, in respect of which the company has concluded lease agreements, and the existence in that Member State of a contract concluded with a financial institution – circumstances referred to by the referring court – may be regarded as objective factors and, in the light of the fact that they are likely to be matters

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69 Recital 30 of EIR.
70 CJEU judgment (C-396/09), para. 52
71 J. Garasić, What is Right and What is Wrong in the ECJ’s Judgment on Eurofood IFSC Ltd., „Yearbook of Private International Law“, 2006, Vol. VIII, p. 92: “[…] the closest connection with the insolvency proceedings will be that in which the majority of the debtor’s assets and creditors are located and where the debtor’s economic activity, i.e. activity or which the debtor is registered, is carried out”.
72 R. Bork, K. van Zwieten, Commentary…, p. 133.
in the public domain, as factors that are ascertainable by third parties.\textsuperscript{73} However, the mere existence of company’s assets and contracts for financial exploitation cannot rebut the general COMI presumption unless other ascertainable relevant factors exist\textsuperscript{74}. This rationale was also confirmed in \textit{Rastelli} case in which the ECJ concluded that when assessing the assets of two intertwine companies, the mere existence of assets does not rebut the general presumption of the location of COMI\textsuperscript{75}.

Looking for the examples of national case law such factors have been regarded as relevant: the place of headquarters, the place of the meetings of the board of company\textsuperscript{76} and place where board decisions were taken, management, accounting and administrative functions\textsuperscript{77}, the place of business in an ascertainable manner (despite that strategic business decisions and headquarter were carried out in another member state), the place where the main governance decision are taken (such as appointment and instruction of director, approval of accounting system, requirement of financial statements to be sent every three months). In \textit{El-Ajou v Dollar Land (Manhattan) Ltd} the court found that factors like the location of board meetings, nationality and residence of director, the location of assets and the place of most employees cannot rebut the general rule\textsuperscript{78}. Such factors may allow to establish where is the place of the “real seat” of a debtor.

In some cases the place of interaction between a debtor and creditors can be regarded as a „strong factor“ to determine the location of COMI. For instance, in \textit{Re Hellas Telecommunications}\textsuperscript{79} case the debtor was incorporated under the law of Luxembourg. Though the court took into account the fact that the company moved the head office to London, where is the principal operating address, the justice emphasized that „one of the most important features of the evidence, which is the feature I mention next, is that all negotiations between the company and its creditors have taken place in London”\textsuperscript{80}. Such finding reflects the “creditor perspective” approach, since the place of the meetings can be easily ascertainable by the creditors as a place where the debtor operates. The creditors shall know where the company is and when they

\textsuperscript{73} CJEU judgment (C-396/09), para. 53.
\textsuperscript{74} Ibidem, para. 53.
\textsuperscript{75} CJEU judgment (C-191/10), para. 39: “[…] where a company, whose registered office is situated within the territory of a Member State, is subject to an action that seeks to extend to it the effects of insolvency proceedings opened in another Member State against another company established within the territory of that other Member State, the mere finding that the property of those companies has been intermixed is not sufficient to establish that the centre of the main interests of the company concerned by the action is also situated in that other Member State”.
\textsuperscript{76} P. R. Wood, \textit{Principles of International Insolvency}, vol. 1 2nd Sweet & Maxwell 2007, 30-024.
\textsuperscript{77} Ibidem, 30-024.
\textsuperscript{78} Ibidem. 30-024.
\textsuperscript{79} Re Hellas Telecommunications (Luxembourg) II SCA [2009] EWHC 3199 (Ch).
\textsuperscript{80} Ibidem, para. 5.
can deal with it\textsuperscript{81}. Nevertheless, this factor would be ambiguous since it is unclear how many debtor’s creditors shall participate in such negotiations (meetings). Also, the court assessed the place of physical meeting. Nowadays companies hold various meetings via Internet communication tools. In such case the place of the meeting cannot be a “strong criteria” to rebut the general presumption of COMI.

\textit{Interedill} and Recital 30 of EIR suggest that for companies the main factor is the place of management and supervision and the management of interests. Recital 30 of EIR incorporates two major criteria. First, the court shall look for the place in which the actions of corporate governance are being made (principal decisions and supervision). Since it must be actual it shall be doubtful whether the mere fact of registration of the company and/or place of the director(s) and/or the board are strong enough. Thus the court shall analyze in which Member State the actual actions for the corporate governance are conducted. Second, the debtor must manage its interests at the same place. The wording of this criteria seems to be more vague that the first one. Following the ECJ case law and legal doctrine, the place of management of interests may include any factors which are both objective (administration on a regular basis) and ascertainable by third parties. For instance, the place of assets, the place of employee and place where the debtor makes transactions and pays taxes.

In contrast to EIR 2000, the general presumption of location of COMI for an individual exercising an independent business or professional activity and other persons is established in EIR. In case of an individual not exercising an independent business or professional activity, it should be possible to rebut this presumption, for example, where the major part of the debtor’s assets is located outside the Member State of the debtor’s habitual residence, or where it can be established that the principal reason for moving was to file for insolvency proceedings in the new jurisdiction and where such filing would materially impair the interests of creditors whose dealings with the debtor took place prior to the relocation\textsuperscript{82}.

To sum up, recital 30 of EIR codifies \textit{Interedill} approach. It requires to look for the factors which would allow to find the place where the business is conducted and the main corporate governance decision are made. However, the proposed criteria are rather vague. In such case, it seems that particular importance shall be given to creditors’ perception. The more likely the factor is known to the creditors, the more likely it may efficiently rebut the general presumption of the location of COMI.

\textit{Subjective assessment (ascertainability)} Insolvency is a foreseeable risk\textsuperscript{83}. Following the findings in \textit{Eurofood} and \textit{Interedill}, EIR is interpreted primarily from creditors’

\textsuperscript{81} M. Arnodl, \textit{COMI}…, p. 251.
\textsuperscript{82} Recital 30 of EIR.
\textsuperscript{83} B. Vessels, \textit{International}…, p. 454.
perspective⁸⁴. This case law has been codified in Recital 28 of EIR⁸⁵. The requirement for predictability (foreseeability) is coupled with the principle of legal certainty⁸⁶. The core term in subjective assessment of COMI is term “ascertain”⁸⁷ which shall not mean the actual creditors’ knowledge, but possibility to know information by reasonable inquiries. The court shall assess whether any relevant factors which may be applied to rebut the general presumption of the location of COMI is (may be) known to the debtor’s creditors.

Analysis of creditors’ perception is a significant guideline for the assessment of COMI. In other words the court shall “step into creditors shoes” and analyze COMI from their perspective. Such approach is reasonable for at least a few reasons. First, the place of insolvency proceedings may be a serious concern before entering into legal relations. Second, namely, the creditors usually suffer most from the opening of insolvency proceedings since they face irresolvable common pool problem. Third, all creditors have to participate in the single insolvency proceedings (main and/or secondary) meaning that they may take into account the possible place of dispute resolution if the debtor becomes insolvent. Fourth, EIR aims to maximize “returns for the creditors”⁸⁸ and litigation in a predictable jurisdiction may increase the success of this goal. Also this “creditors’ perspective” approach reflects the need to protect the interests of “weak” (“involuntary”) creditors, for instance, employees and small business since they are likely to be the resident of the same Member States as the debtor’s registered office. In such case they are more likely to be aware of the national legal system and recourse to legal defence⁸⁹. The opening of insolvency case in another state would reduce their right to effective legal protection. However, in practice business is often borderless (for instance, outsourcing, subsidiaries) and operate in various Member States (and event in the third states), meaning that “weak” (“involuntary”) creditors may not take advantage of this principle.

Though EIR emphasizes creditors’ perception of the debtor COMI, it is silent how creditors’ perception shall be assessed. For instance, how to solve situation when different creditors may perceive that the location of COMI is in different member states? It may be rather uncomplicated to look for COMI from the perspective of debtor’s employees (if the one workplace is mentioned in the employment contract) or state authorities. However, the problem is how to deal with situation when the

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⁸⁴ CJEU judgment (C-341/04), para. 34.
⁸⁵ R. Bork, K. van Zwieten, Commentary…, p. 132.
⁸⁶ CJEU judgment (C-328/12), para. 27: “Article 3(1) is intended to promote foreseeability and, therefore, legal certainty as regards bankruptcy and liquidation jurisdiction”.
⁸⁷ “Find (something) out of certain; make sure of”, see: Oxford online dictionary <https://en.oxforddictionaries.com/definition/ascertain>, [access: 9 June 2018].
⁸⁸ R. Bork, K. van Zwieten, Commentary…, p. 312.
⁸⁹ Ibidem, p. 126.
debtor has numerous creditors in various member states? Shall the court look for the perception of the majority of the creditors?

The advocate general Kokott in Interedil suggested that those factors must be assessed in a comprehensive manner, account being taken of the individual circumstances of each particular case. In Staubitz-Schreiber case the general advocate Colomer mentioned that looking from the creditor’s perspective the location of COMI can be determined by the place of debtor’s business assets: “<…> there must be a link between a debtor’s business assets and the place of the proceedings, thereby ensuring the best protection for creditors by enabling them to calculate the legal risks they must assume in the event of insolvency”. Following this interpretation the court shall firstly look where the debtor’s assets are situated (particularly in case if information from public registries is available). It seems that Recital 30 of EIR also accepts that the place of debtor’s assets is an important criterion for the assessment of COMI. Thus, since EIR does not specify interpretation of “creditors’ perception”, the court shall take into account how at least the majority of debtor’s creditors would perceive the location of COMI. Such interpretation would be in accordance with the principle of predictability and certainty of the application of jurisdictional rules. Also it would be compatible with the principle of universality of EU cross-border insolvency proceedings.

EIR codified the ECJ case law which factors may rebut the general presumption of the location of COMI. EIR emphasized the importance to creditors’ perception of the location of debtor’s COMI. Due to the lack of regulation how creditors’ perception shall be assessed, the court shall take into account whether the information about the relevant factors to rebut the general presumption of the location of COMI can be found without serious efforts, whether it is announced in public. Also, it seems that the court shall look whether the relevant factors are ascertainable at least by the majority of debtor’s creditors.

III. Group of companies

One of the major novelties of EIR is the regulation of insolvency proceedings of a group of companies. Though the ECJ in Eurofood and Rastelli applied EIR 2000 in the case of insolvency of a group of companies, the lack of statutory regulation had spurred various proposals for the introduction of the regulation of such disputes.

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90 CJEU judgment (C-396/09), para. 52.
91 CJEU judgment (C-1/04), Opinion of Advocate General Ruiz-Jarabo Colomer, para. 64.
EIR aims to provide effective administration and coordination of each member of the group\(^{92}\). Recital 53 of EIR addresses this problem.

The notion of the insolvency of a group of companies does not derive directly from the ECJ case law. It shall be clarified what is the group of companies under EIR. In general, a group of companies means a holding company and its subsidiaries: 

\[\text{\textit{a group of companies consists of a holding company which owns all the shares in several subsidiaries, each of the subsidiaries may own all the shares in further subsidiaries.}}\] \(^{93}\)

The notion group of companies is not alien in EU secondary law. In various EU acts, a group of companies means a parent company (undertaking) and all it subsidiary companies (undertakings). Also it main include companies linked to each other by a certain relationship\(^{94}\). Recital 13 of EIR reflects the prevailing notion of the group of companies in the EU law since it means a parent undertaking and its subsidiaries\(^{95}\). Thus, it is based on the concept of control (direct and indirect)\(^{96}\). Control can be established by various means, for instance, when one company controls the majority of the voting rights in another company or regardless of the amount of control, the agreement of conferring control exist\(^{97}\). Also recital 14 of EIR establishes the notion of the parent company which is based on the direct or indirect control of the parent company over its subsidiaries.

In some EU Member States the prevailing approach to insolvency proceedings of a group of companies is to deal with each member of the group separately. For instance, “\(<\ldots>\) under German law the question whether one or more of the affiliated companies is insolvent proceedings can only be determined on a company-by-company basis. Insolvency proceedings will always be limited to the relevant legal entity.”\(^{98}\) Such regulation allows to apply insolvency criteria to each member of the group individually.

\(^{94}\) For instance, Art. 3(15) of Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 establishes that ‘group’ means a group of undertakings which consists of a parent undertaking, its subsidiaries, and the entities in which the parent undertaking or its subsidiaries hold a participation, as well as undertakings linked to each other by a relationship within the meaning of Article 22 of Directive 2013/34/EU; Art. 2(11) of Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 establishes that „group“ means a parent undertaking and all its subsidiary undertakings.
\(^{95}\) Recital 13 of EIR ‘group of companies’ means a parent undertaking and all its subsidiary undertakings;
\(^{96}\) G. Moss, I. Fletcher, S. Isaacs, \textit{The EU Regulation…}, p. 498.
\(^{97}\) Ibidem, p. 499.
In general insolvency means inability to pay not of an organization (group of companies) but a distinct person (legal entity). Following Eurofood approach, when the court is presented with the insolvency of some members of a group of companies, COMI must be assessed individually “for each legal entity and apply the presumption at each place of registered office separately.” In Eurofood case the parent company was incorporated in Italy and hold a subsidiary in Ireland. Which had its registered office in Dublin. The ECJ concluded that the key element is the place from which the subsidiary regularly administers its interests. Thus, since the Eurofood IFSC Ltd had the registered office in Dublin and it carried out business in the territory of Ireland, the COMI was found this state. The ECJ has established an important criteria for the place in which only economic decisions cannot rebut the general presumption of the location of COMI: “the mere facts that its economic choices are made or can be controlled by a parent company in another Member state is not enough to rebut the presumption.” The court rejected the idea of a common group jurisdiction. The rationale of such reasoning this appears to be the reliance of creditors on the insolvency framework of the individual subsidiary that they have been dealing with and the corresponding ranking of their claims in distribution of debtor’s assets. In other words, the ECJ found that each debtor constitutes a distinct legal entity subject to its own court jurisdiction. Thus, if the court is seized to commence insolvency proceedings in relation to a member of an insolvency group, the COMI of each subsidiary must be assessed separately. Some authors consider that such approach protect the interests of each member’s creditors.

Another relevant case in ECJ’s docket which dealt with the insolvency proceedings group of companies is Rastelli case in which a French company with its COMI in Marseille was under liquidation procedure. The liquidator submitted a claim against a company incorporated in Italy (which had COMI in Italy). The liquidator asked to join the latter insolvency proceedings that had been opened against the French company on the ground that the property of the two companies intertwined. The ECJ rebutted this argument and found that the COMI of each company must be assessed individually: “<…> a court of a Member State that has opened main insolvency proceedings against a company, on the view that the centre of the debtor’s main interests is situated in the territory of that Member State, can, under a rule of its national law, join to those proceedings a second company whose registered office is in another Member State.

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100 R. Bork, K. van Zwieten, *Commentary…*, p. 149.
101 CJEU judgment (C-341/04), para. 30-36.
102 R. Bork, K. van Zwieten, *Commentary…*, p. 149.
104 R. Bork, K. van Zwieten, *Commentary…*, p. 149.
only if it is established that the centre of that second company’s main interests is situated in the first Member State”\textsuperscript{105}. Also, the fact that the assets of these companies intertwine is not enough to rebut the general presumption of the location of COMI\textsuperscript{106}.

When dealing with the group of companies the court has to deal with insolvency of each member of the group separately. There indication in EIR for the derogation of the development of the ECJ case law in such disputes. The location of COMI of each member must be established. Thus, the court of one Member State can deal with more than one company only when the COMI of each member is established in that Member States. Also, the general rules for the assessment of the location of COMI (the general presumption of location, rebuttability) shall be applicable dealing with the group of companies.

**Conclusions**

One of the main goals of EIR is to combat unlawful (fraudulent and abusive) forum shopping. EIR establishes certain suspension periods of the transfer of COMI (objective periods) which shall be the essential criteria to separate unlawful forum shopping from lawful actions (for instance, mergers and acquisitions; maximisation of company’s assets). However EIR does not provide any exceptions to the application of these suspension periods. Thus, EIR employs only objective criteria for the assessment the transfer of COMI. Although EIR does not address the transfer of COMI after the claim to open bankruptcy proceedings is lodged in the court, EIR shall be interpreted in accordance with ECJ findings in \textit{Staubitz-Schreiber}. In contrast to EIR 2000, the new regulation of EU insolvency proceedings makes a substantial distinction of jurisdictional rules and assessment of COMI between an individual exercising an independent business or professional activity (trader) and other individuals.

The general presumption of the location of COMI can be rebutted. EIR has codified the CJEU practice in \textit{Interedil} and \textit{Eurofood}. Furthermore EIR emphasizes the creditors’ perception of the location of debtor’s COMI. Thus, the national courts have to ascertain the relevant factors for the rebuttal of the general presumption of the location of COMI from the creditors’ perspective. The COMI dealing with insolvency of a group of companies shall be interpreted following \textit{Eurofood} and \textit{Interedil} approach (analyzing national insolvency criteria of each member of the group). The main rule for the assessment of COMI in insolvency proceedings of a group of companies is based on the rule that insolvency of each member of the group has to be assessed individually.

\textsuperscript{105} CJEU judgment (C-191/19), para. 29.
\textsuperscript{106} CJEU judgment (C-191/19), para. 39.
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