

The center of main interests of the debtor in the insolvency proceedings at the European Union level differences between the EU Regulation no. 1346/29.05.2000 and EU Regulation no. 848/20.5.2015

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Abstract

In this paper we will present the notion of Center of Main Interests (COMI) of a debtor in the insolvency proceedings at the European Union level in the light of EU Regulation No. 1346 / 29.05.2000 and the EU Regulation No. 848 / 20.05.2015 with constant reference to the European jurisprudence. The concept of center of main interests of a debtor has a particular importance in the cross border bankruptcy cases as its location determines the court which is competent to open the insolvency proceedings. Although at the European level adopting the EU Regulation No. 1346 / 29.05.2000 was considered a legislative progress in bankruptcy proceedings, in the end it had relatively few applications as it was unable to cover large factual aspects. The mentioned regulation was offering a rigid and abstract definition and interpretation of the COMI concept which resulted in important legal application divergences that lead in the end to a legislative reform. This legislative reform was concluded with the adoption of EU Regulation No. 848 / 20.5.2015

Keywords: *center of main interests, insolvency proceedings, EU Regulation no. 1346/29.05.2000, EU Regulation no. 848/20.05.2015, Eurofood, Interedil.*

JEL Classification: K33

1. Introduction

In this paper we will focus on the notion of Center of Main Interests (COMI) of a debtor in the event of its insolvency, when the assets and/or the creditors of this debtor (company) are located in several EU Member States (cross border bankruptcy). This has become increasingly common in the context of fluctuations of international financial markets and the trade globalization, leading inevitably to legal developments in the field in order to avoid subjecting the creditors to different and disadvantageous procedures within the states where the debtor owns property.

At European level, after 30 years of attempts to standardize and harmonize the regulations on cross-border insolvency proceedings by adopting several

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international conventions³, real progress was made in coordinating legislative process by adopting a unique EU regulation that applies to these kind of proceedings.

2. The EU Regulation no. 1346/29.05.2000

The EU Regulation no. 1346/29.05.2000 entered into force on 31st May 2002 and was applicable to all EU Member States except Denmark⁴.

This normative act aimed at harmonizing rules of legal and administrative competence by introducing a coherent legal system which regulated cross-border insolvency proceedings involving companies, merchants and/or individuals and by enabling the adoption of coordinated measures on the property of a debtor insolvent in different EU Member States. It established common rules on the competent courts; the applicable law; the recognition of insolvency proceedings.

Article 3 paragraph 1 of the EU Regulation no. 1346/29.05.2000 provides that the courts of the EU Member State in whose territory is located the debtor's center of main interests have jurisdiction to open main insolvency proceedings. According to the same article, COMI is presumed to be the place of the registered office of the company in the absence of proof to the contrary.

However, in practice, determining the location of the COMI proved to be problematic and the concept itself an abstract one. Therefore, in Case C-341/04 (Eurofood IFSC Ltd), the European Court of Justice (ECJ) has been called to interpret clearly Article 3 of the said Regulation.

Taking into consideration the recital No. 13⁵ of the Regulation's Preamble according to which "*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*" the Court by its sentence of 2 May 2006, in the above mentioned case, offered an original interpretation. According to the Court's decision, the simple presumption concerning the COMI referred to in Article 3 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.*"⁶.

³ European Convention on Certain International Aspects of Bankruptcy Istanbul 1990, Brussels Convention 23 November 1995 and UNCITRAL Model Law on Cross-Border Insolvency (1997). For more information see Sitaru, D.A., *Dreptul Comertului International – Tratat- Partea generala*, Lumina Lex, Bucharest, 2004, p. 448.

⁴ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3A133110> (visited on. 17.08.2017).

⁵ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000R1346&from=EN> (visited on. 17.08.2017).

⁶ <http://curia.europa.eu/juris/showPdf.jsf?jsessionid=9ea7d2dc30d58412398fa62647d087cdacfcc0970a03.e34KaxiLc3qMb40Rch0SaxuSbhz0?text=&docid=56604&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=124707> (visited on. 17.08.2017), paragraphs 34 "It follows 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."

In other words, if the company does not carry out any activity within the territory of the EU Member State in which the company has its headquarters registered, being actually a "mailbox" company⁷, the presumption referred to in Article 3 paragraph 1 of the above mentioned Regulation is considered to be overturned.

The notion of COMI gave birth to another legal dilemma on which ECJ was called to decide in Case C-396/09 (Interedil). The Court considered among other issues if the concept of COMI should be interpreted under the light of EU law or according to national law. The Court came to the conclusion that the notion of the debtor's center of main interests must be interpreted independently of the national legislation⁸. In other words, it should be interpreted under the light of EU legislation.

Another ambiguity that emerged in practice regarding the concept of COMI related to the possibility of the debtor to move the COMI anytime to another State. This issue could have serious jurisdictional and legislative consequences on the insolvency proceedings⁹.

The Case C-1/04 (Susanne - Staubitz-Schreiber) shed light on the situation when the ECJ was asked to answer the following legal dilemma '*Does the court of the Member State which receives a request for the opening of insolvency proceedings still have jurisdiction to open insolvency proceedings if the debtor moves the centre of his or her main interests to the territory of another Member State after filing the request but before the proceedings are opened, or does the court of that other Member State acquire jurisdiction?*'¹⁰

In the said Case the Court noted that Article 3 of Regulation 1346 / 2000 does not specify whether the initially notified court has jurisdiction or not when the debtor transferred its main center of interests after filing the request, but before the proceedings are opened. However, the Court concluded that a transfer of jurisdiction from the court originally appointed to a court of another Member State on the basis of the transfer of COMI, would be contrary to the objectives pursued by the Regulation and set out in recitals 2, 4, 8 of the Regulation's Preamble¹¹.

3. The EU Regulation no. 848/20.5.2015

Ten years after the entry into force of the EU Regulation No. 1346 / 2000 and with the emergence of an acute economic crisis from which European countries are still trying to fully recover, the European Commission came to the conclusion that the above mentioned Regulation presented many interpretative uncertainties and lacunas which also related to the concept of COMI¹² and a reform regarding the cross

⁷ Lupascu, D., Ungureanu D., *Drept international privat*, Universul Juridic, Bucharest, 2012, p. 275.

⁸ <http://curia.europa.eu/juris/document/document.jsf?text=&docid=111587&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1241661> (visited on. 17.08.2017).

⁹ Lupascu D., Ungureanu D., *op. cit.* p. 275.

¹⁰ <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=57812&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=34846> (visited on. 17.08.2017), paragraphe 20.

¹¹ Lupascu D., Ungureanu D. *op. cit.*, p. 275.

¹² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0744:FIN:EN:PDF> (visited on. 17.08.2017).

border insolvency proceedings was needed. Therefore, the Commission started on March 2012 until June 2012¹³ a public consultation on the need for a new Regulation that would solidify the legal procedures of insolvency in the EU.

Thus, following the public consultation and several debates, the European Parliament approved on 20 May 2015 the EU Regulation No. 848 / 20.5.2015 of the European Parliament and Council¹⁴.

The EU Regulation No. 848 / 20.5.2015 will become applicable on 26 June 2017¹⁵ and the EU Member States shall establish and maintain in their territory one or several insolvency registers by 26 June 2018 (Article 92 letter b said Regulation) while the European Commission shall establish a decentralized system for the interconnection of insolvency registers by 26 June 2019 (Article 92 letter c above mentioned Regulation). This new normative will not be applicable to the insolvency proceedings already started under EU Regulation No. 1346 / 2000 and shall apply to all EU Member States except Denmark¹⁶.

The new Regulation maintains the general lines of EU Regulation No. 1346 / 2000 but introduces some changes better adapted to the EU reality. It aims, among other things, at concrete individualization and location of the debtor's center of main interests and plans to effectively combat the phenomenon of "*forum shopping*"¹⁷. Thus, Article 3 point.1 paragraph 1 of the new Regulation stipulates that "*The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties*" in accordance with the relevant ECJ jurisprudence (cases Eurofood, Interdil, Rastelli and Susanne Schreiber Staubitz).

For legal entities, the Regulation provides the presumption that the debtors center of main interests coincides with the place of the registered office in the absence of proof to the contrary.

This presumption can be rebutted by the national court in base of an overall assessment of all objective elements and considering the recognition of the location as being the effective center of the economic interests, management and control of the insolvent company by the third party.

Moreover, the presumption will apply only if "... *the registered office has not been moved to another Member State within the 3-month period prior to the request for the opening of insolvency proceedings.*" (Article 3, point 1 paragraph 2)

¹³ http://ec.europa.eu/justice/newsroom/civil/opinion/120326_en.htm (visited on. 17.08.2017).

¹⁴ http://eur-lex.europa.eu/procedure/EN/2012_360?#2015-05-20_SIGN_byEP_CONSIL (visited on. 17.08.2017).

¹⁵ Article 92 of the EU Regulation 848/2015.

¹⁶ Recital 88 of the EU Regulation 848/2015 Preamble.

¹⁷ Forum-shopping is a specific concept of private international law. A person who takes the initiative of bringing a court action may be tempted to choose his court on the basis of the law applied there. A person starting an action might be tempted to choose a forum not because it is the most appropriate forum but because the conflict of laws rules that it applies will prompt the application of the law that he or she prefers. (http://ec.europa.eu/civiljustice/glossary/glossary_en.htm#ForumShop - visited on. 17.08.2017).

Further the Article 3 point 1 paragraph 3 provides that for an individual exercising an independent business or professional activity, the COMI will be “*presumed to be that individual's principal place of business in the absence of proof to the contrary*”. Moreover, the Article specifies that this “*presumption shall only apply if the individual's principal place of business has not been moved to another Member State within the 3-month period prior to the request for the opening of insolvency proceedings*.”

Concerning other individuals, the new Regulation identify COMI as being the place of the individual's habitual residence in the absence of proof to the contrary.

4. Conclusion

In conclusion, we believe that the changes regarding COMI brought to the cross border insolvency proceedings by the new EU Regulation No. 848 / 2015 aim to ease these proceedings and bring efficiency by fostering the more frequent application of the new normative. Although the EU Regulation No. 1346 / 2000 was considered to be a Community legal progress in bankruptcy, it had relatively few applications due to the many lacunas vis à vis of the factual reality.

The concept of center of main interests of the debtor as defined by the EU Regulation No. 1346 / 2000, was a rigid and abstract notion, bringing important legal divergences that brought the legislative reform. As we can notice the new Regulation takes into consideration the EU jurisprudence and therefore provides a more efficient formulation, covering a broader interpretive palette while offering the possibility to correctly identify COMI and combat in a concrete way the “*forum shopping*” phenomenon.

However, it is also true that the science of law is a field which is submitted to continue reforms as the reality brings always changes and new challenges that law has to cover as much as possible. Although the EU Regulation No. 848 / 2015 is seen to be a complete normative, aimed to cover all possible legal situation, the next reform could be a matter of time as life is a continuous development of new situations.

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