The unavoidable persistence of forum shopping in European insolvency law

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Abstract

One of the goals of the EU Insolvency Regulation, confirmed by recent reform proposals of the European Parliament and the Commission, is to limit forum shopping. The real world, however, looks quite different, as forum shopping is becoming increasingly common in the EU. The reason for the increase in forum shopping cases is hidden in the mechanisms of the Insolvency Regulation. It is well known that 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. Nowadays, however, companies can often transfer their registered office throughout the European Union. Additionally, pursuant to ECJ case law, the reference date to assess the insolvency competence is the date of filing, with the consequence that, if a company relocates its registered office abroad before the filing, 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 cannot be rebutted if a company actually relocates its headquarters alongside its registered office in a way ascertainable by third parties. Creditors’ protection against opportunistic forum shopping, therefore, depends exclusively on the “ascertainability” criterion. 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 its headquarters 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

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1. Potential creditors and the value of law

Insolvency laws differ from jurisdiction to jurisdiction with respect to significant issues, such as creditors’ priorities, avoidance actions or the continuation of executing contracts. As a result of these differences, creditors receive different payoffs according to which jurisdiction will govern their debtors’ default, so that insolvency law influences the magnitude of the specific risk carried by creditors. Potential creditors try to anticipate the effects of the applicable insolvency law in the contractual conditions or in the price of credit; therefore, insolvency law must be foreseeable and predictable. Any legal uncertainty would produce adverse selection, as potential creditors would not know in advance what their risk is and, therefore, what is the value of the their investment. 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.

Even if the applicable insolvency law was certain at the date in which debts were incurred, debtors may change (or try to change) the competent insolvency venue and law before their debts are entirely paid. These types of decisions are usually labelled as “forum shopping”, although debtors primarily aim at changing substantive law, not only the competent court. A forum shopping decision may have some commonalities with business decisions taken on the verge of insolvency that shift an investment’s risk onto creditors.

A typical example is when a company replaces its original investments with more risky ones that have a higher expected return. If the new investments pay off, shareholders gain the entire upside. If the investment fails, however, creditors are not paid, despite the fact that shareholders, who are protected by limited liability, lose only their equity. If insolvency approaches, shareholders have a clear incentive to ‘gamble’ at the expense of creditors by increasing their investments’ riskiness. As a consequence, the creditors’ risk in relation to that specific company also becomes higher.

A decision to change the applicable insolvency law is not different, since insolvency law is a component of creditor risk. Forum shopping alters the payoff that creditors receive in case of default thereby altering the risk that they bear with respect to a specific debtor. A change of insolvency venue and law may produce positive and efficient outcomes and the debtor could

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believe in good faith that the new jurisdiction will increase the value of the firm and the workout likelihood. The very possibility of forum shopping prevents potential creditors from calculating their risks.

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. 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)». 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, 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». This rationale relies upon the idea that creditors must know in advance which insolvency rules and proceedings will apply in the event of a debtor’s default.

Recent projects to reform the Insolvency Regulation confirm the aim of EU institutions to limit forum shopping with a view to achieve legal certainty. At the end of 2011, the European Parliament approved a motion to recommend a partial harmonization of insolvency law in the European Union. 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; [...]” and that “[...] steps must be taken to prevent abuses, or any spread, of the phenomenon of forum shopping”.

More recently, the European Commission has presented a comprehensive proposal to reform the Insolvency Regulation, which confirms the general goal to limit forum shopping stated in Recital 4.

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7 EC Regulation 1346/2000 (hereinafter, the “Insolvency Regulation”).

8 Recital 13, Insolvency Regulation.


10 Virgos – Schmit Report, § 75.

11 European Parliament resolution, with recommendations to the Commission on insolvency proceedings in the context of EU company law (2011/2006(INI)), 15.11.2011 (hereinafter, the “European Parliament Resolution”)

12 European Parliament Resolution, Recital A.

13 European Parliament Resolution, Recital B.


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The Insolvency Regulation and all proposals to amend it, therefore, clearly aim at banning forum shopping at the creditor’s expense. Nonetheless, as we shall see in the following sections, forum shopping has become a permanent element of the insolvency law landscape in the EU.

2. Transfer of registered office

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. 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 on the place of the debtors’ central administration; such a central administration, in order to be considered as a debtor’s COMI, must be clearly ascertainable by third parties as the place from which the debtor regularly conducts its affairs. The relevance of these criteria to the legal strategy of avoiding forum shopping is confirmed by the Commission Proposal, which includes them in the very definition of COMI. The criteria of time-continuity and ascertainability are meant to prevent companies from transferring their headquarters from one Member State to another before filing for insolvency with the aim of selecting a different insolvency law.

Nonetheless, it is not uncommon to see companies shifting their COMI from one Member State to another. To achieve this goal, companies take advantage of the presumption that their COMI coincides with their registered office, unless creditors rebut the presumption by proving that it is still in the State of origin. The drafters of the Insolvency Regulation assumed that companies’ registered offices could not be easily transferred throughout the European Union. This assumption, however, is no longer valid, since the EU secondary law of the last decade has provided legal mechanisms that allow companies to transfer the registered office from one Member State to another. First, the European Companies (SE) can transfer their registered office from one Member State to another, thereby changing the applicable law. Second, a directive on cross-border merger was enacted in 2005 granting EU companies the right to merge with companies from another Member State. As a result, companies can now transfer their registered office from one Member State to another, thereby changing the applicable law.

15 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.

16 Commission Proposal, para 22, replacing article 3 of the Insolvency Regulation.


18 Art. 3(1) Insolvency Regulation.


consequence, companies that want to relocate their registered office can incorporate a fully-owned subsidiary in the targeted jurisdiction and then merge with it: as a result, assets, plants and activities will belong to the incorporating company. It is still uncertain whether freedom of establishment grants companies the right to directly transfer their registered offices from one Member State to another\(^{22}\). Many jurisdictions, such as the UK and Germany, do not allow these transactions (although German legal practitioners have discovered a strategy to implement cross-border conversions nonetheless)\(^{23}\), while other Member States, such as France, Spain, Italy and 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. When a company transfers its registered office abroad and then files for insolvency with a court in the new Member State, the question arises as to 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”).

3. The reference date to determine the COMI

As we have seen above, a decision to transfer the COMI in the vicinity of insolvency alters creditors’ risks in a manner similar to opportunistic decisions taken in the “twilight zone”. A simple solution to avoid opportunistic relocation of COMI may be to “freeze” the international competence on 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 after the company has transferred its registered office abroad\(^{24}\).

As we have seen above, when insolvency is approaching, forum shopping may produce on creditors effects that are similar to those produced by other opportunistic decisions taken in the “twilight zone”, such as continuing to trade when insolvency has become unavoidable. Consequently, legal mechanisms aimed at avoiding opportunistic behaviour at the creditors’ expense in the vicinity of insolvency, which are provided for in many Member States, may be reasonably extended to the reference date as to when to determine the COMI. A good example of these mechanisms is the wrongful trading provision contained in article 214 of the British Insolvency Act 1986, according to which directors may be held liable \(\text{vis-à-vis}\) the company if, before the opening of the insolvency proceeding, “they knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation” and they didn’t take every step in order to minimize the potential loss of the company’s creditors\(^{25}\). In other words, if there is no reasonable prospect of recovering

\(^{22}\) 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].


the company, directors should stop trading in order to minimize a creditor’s losses. To avoid opportunistic forum shopping at the creditor’s expense, this solution could be applied to the reference date to determine the COMI, with the consequence that the jurisdiction of the Member State in which the COMI was located on the date when there was no reasonable prospect to save the company should be the one to govern its insolvency. On paper, this strategy should prevent all cases of opportunistic forum shopping at the creditor’s expense; yet it has the significant downside to raise uncertainties as to the precise reference date to determine a company’s COMI. With respect to wrongful trading, for instance, it is debated whether directors’ liability is triggered only if insolvency is more likely, on the balance of probabilities, to occur and to what extent courts can second-guess directors’ judgements and business decisions.26

This solution, applied to determine a court’s international competence and the applicable law, would reduce legal certainty and would increase litigation with respect to jurisdiction. Domestic courts of Member States, therefore, seek for precise reference dates to determine companies’ COMI. The fundamental alternative is between the date of the filing and the date of the opening of the insolvency proceeding. The European Court of Justice addressed this question for the first time in the Staubitz-Schreiber case, in which a self-employed German transferred her residence from Germany to Spain after filing for insolvency with a German court, but before its opening decision.27 The ECJ maintained that German courts were still competent despite the transfer. This decision seeks to curtail forum shopping, according to recital 4 of the Insolvency regulation.28 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 the case of a COMI transfer before the filing for insolvency.29

This issue was clarified in the Interedil decision, of 2011.30 In that case, an Italian company (Interedil) decided to transfer its registered office to London and was as a result removed from the local register. Interedil, however, still held some assets and a bank account in Italy.


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

28 “[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.


31 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
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’s 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 to determine the COMI always coincides with the date of the filing for insolvency. As a result, relocations before the filing would also shift the insolvency competence32.

Despite their apparent continuity, a closer look reveals a hidden discrepancy between the opinion in Staubitz-Schreiber and that of Interedil. While the former decision was underpinned by the need to avoid forum shopping, the latter paves the way for it. According to Interedil, a company’s COMI is to be determined having regard exclusively to factual elements existing at the day of the filing, irrespective of the previous location of a company’s headquarters 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 date of filing is the only relevant reference date. Consequently, the COMI is in the Member State of the new registered office, unless there is proof to the contrary. The burden to prove the contrary is shifted to dissenting creditors, who have to show that this company’s headquarters is still in the original Member State and that this location was the only one that third parties can ascertain as the company’s management centre. Providing this evidence is not an easy task, as we shall see in the following sections33.

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

In the Eurofood decision, the European Court of Justice clarified what evidence can rebut the presumption that a company’s COMI is in the Member State of its registered office. The question arose as to whether the COMI of Eurofood, an Irish subsidiary of the Parmalat group, was located in Ireland or in Italy. The ECJ’s judgement was in favour of the competence of the Irish court. It stated inter alia, 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.”34 In other words, to overcome the presumption that a company’s COMI coincides with its registered office, creditors must give evidence that third parties would ascertain that the company’s headquarters was in another Member State. The decision is significant in that the ECJ dismissed the notion that a debtor’s COMI is in the place of its

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32 Interedil, para 56.

33 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 Lid 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.

34 European Court of Justice, Eurofood IFSC Ltd, C-341/04 [2006] ECR-I 1078.
central administration, where the internal head office functions are carried out on a regular basis. The drawback of the “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 insolvency law will apply in case of default. The solution endorsed by the Eurofood decision, by contrast, grants a high degree of legal certainty as to the location of the COMI, while making it more difficult to overcome the presumption that it coincides with a company’s registered office, unless the company is a mere “letterbox” – that is, the company carries out no activities in the member state of incorporation.

The Eurofood decision was related to a “static” case, where the insolvent company didn’t relocate its registered office and headquarters. The Interedil decision applied the principles of the Eurofood decision in the event of a registered office’s relocation before the filing for insolvency, by specifying what evidence is required to rebut the presumption of coincidence between COMI and registered office. 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 liabilities constituted sufficient evidence that Interedil’s 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”36. However, the ECJ also holds that if a company’s headquarters actually coincides with its registered office in a way ascertainable by third parties, “the presumption in that provision can not be rebutted”37.

It is interesting to note that the Commission Proposal entirely upholds the principles stated in the Interedil decision. According to the Commission Proposal, the presumption of coincidence between registered office and COMI 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”. At the same time, according to the Commission Proposal “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”38.

In other words, both the ECJ and the Commission Proposal distinguish “fictive” COMI transfers, where the headquarters is not transferred together with the registered office, from “real” COMI transfers, when a company transfers its headquarters’ functions together with its registered office before filing for insolvency. If a transfer of COMI is “real” and third parties


36 Interedil, 53.

37 Interedil, Para 59.

38 Commission Proposal, paragraph 11 (adding a new Recital 13a to the Insolvency Regulation).
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 in two cases: first, if the transfer of COMI is “fictive”, and second, if the insolvent company transfers its headquarters together with its registered office and does not sufficiently publicize this transfer, so that the new headquarters was not ascertainable to third parties. Creditors’ protection against opportunistic forum shopping, therefore, lies primarily with the “ascertainability” criterion, according to which a company’s COMI is where creditors reasonably believe that its headquarters is located. One could even conclude that creditors can not be deceived, since the belief of actual creditors as to the location of a debtor’s central administration is the COMI of this debtor. As we shall see in the following sections however, the criterion of “ascertainability” is not really capable of achieving the goal to avoid opportunistic forum shopping and to protect all creditors of companies that relocate their registered office and headquarter from one Member State to another.

5. Pre-existing v. subsequent creditors

The “ascertainability” criterion is ambiguous as to which creditors’ viewpoint is relevant to rebut the presumption in the event of registered office relocation. If a company transfers its headquarters 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 may not be domiciled in the new home state. At the moment when their debts were incurred, the beliefs of these two classes of creditors were both correct: under the viewpoint of pre-existing creditors, their debtor’s headquarters was in the State of origin, while from the viewpoint of subsequent creditors the company was managed from the new Member State. In hindsight, however, these two beliefs do not coincide.

The conflict of pre-existing and subsequent creditors’ beliefs may be resolved by expanding the range of facts that courts consider when determining the location of the COMI. According to the “all facts theory”, both historical facts and pre-existing creditors’ beliefs have relevance in assessing where its COMI is in case of subsequent transfer of registered office and Headquarters. Consequently, if past activities are in the Member State of origin and most debts where incurred before the transfer, the original state is still competent to govern the insolvency. This solution bans forum shopping by requiring courts to consider the location of the COMI at the date on which unpaid debts were incurred.


41 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 maintained that Italian courts were competent to govern this insolvency. The rationale of this decision was that, at the moment of filing, the debtor still had unpaid debts with Italian creditors and a relevant lawsuit was still pending in Italy. For a similar solution see Districht Court Dordrecht, May 12th 2004, quoted by Wessels, International insolvency law, note 41.
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-existing, which happens only when the company interrupts all economic activities and files for insolvency immediately after the relocation of its registered office. This is why most decisions in Member States 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 to clarify this theory.

In the UK, the leading case is *Shierson* of 2005; Mr Shierson divorced his wife and then moved from the UK to Spain. Nonetheless, he maintained a property in the UK and came regularly to visit his children. After Mr Shierson’s 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. The Court of Appeal, by denying that the UK had 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.” Curiously, in the same year the Tribunal (Amtsgericht) of Celle, in Germany, addressed a similar case. The debtor was a dental technician originally based in Bergen who moved to the UK, together with his family, 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, the Tribunal declined competence. 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 were incurred is not relevant.

Eventually, the European Court of Justice’s Interedil opinion supported the snapshot theory. 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 deemed insufficient to overcome the presumption that the COMI is in the State of arrival. The European Court of Justice does not exclude the possibility that pre-existing facts might also influence the determination of the COMI. Pre-existing facts can be relevant 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 the ECJ’s view was not among the factors that

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43 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.

44 *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).

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

6. How to make the new headquarters public

As a consequence of the Interedil decision and of the “snapshot theory”, companies can indirectly change the competent insolvency venue and the applicable insolvency law by transferring their registered office to another Member State, providing that they also transfer its headquarters in a way ascertainable to future creditors.

The question arises of what a company must do to make its new headquarters ascertainable to new creditors after its relocation. 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 seemed 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 the 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 that 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 the circumstances in which the fact that a company is still managed from the State of origin is considered as “sufficiently accessible” to creditors. In this respect, two UK cases deal with this issue and deserve to be discussed.

The first case is the decision in Stanford46, which deals with the insolvency of an Antiguan bank controlled by Mr Stanford’s financial empire, based in the U.S. A U.S. court held that this bank’s COMI was in the U.S. and consequently, appointed a receiver. A few days later an Antiguan court appointed a liquidator, holding that the bank's COMI was in Antigua, where it had its registered office. Both the U.S. receiver and the Antiguan administrator applied to a U.K. court for recognition as “foreign main proceedings”, under the Cross-border Insolvency Regulation 200647, which gives effects to the UNCITRAL Model Law on cross-border insolvencies. It is worth noting that, according to the Guide to Enactment of the Model Law, a debtor’s COMI “corresponds to the formulation in article 3 of the European Union Convention on Insolvency Proceedings”, now part of the Insolvency Regulation 48. Consequently, the court could also apply Recital 13 of the Insolvency Regulation, pursuant to which a debtor’s COMI is where he conducts the administration of his interests on a regular basis and therefore is ascertainable by third parties. According to the U.S. receiver, “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.” By contrast, according to the Antiguan liquidator, “ascertainable by a third party was what was

46 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. With this decision, Mr Justice Lewinson changed his previous opinion, stated in the Lennox decision (above nt. 35), and fully applied the Eurofood doctrine.

47 “Foreign main proceedings” are non UK proceedings “taking place in the State where the debtor has the centre of its main interests”, The Cross-Border Insolvency Regulations 2006, Statutory Instrument 2006 No. 1030, Schedule 1, Article 2(g).

48 Guide to Enactment, paragraph 31.
in the public domain, and what a typical third party would learn as a result of dealing with the company.” 49 Mr Justice Lewinson agreed with this latter doctrine, stating that what is ascertainable by third parties “is what is in the public domain, and what they would learn in the ordinary course of business with the company.” With the consequence that “one of the important features is the perception of the objective observer”. 50

The second case is the decision Irish Bank Resolution v Quinn of the Chancery Division for Northern Ireland 51. 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 a resident. The Court reversed the bankruptcy order issued under the law of Northern Ireland and recognized that Mr Quinn’s COMI was in the Republic of Ireland. The Court tried to clarify the Interedil opinion by asking under which circumstances the new headquarters is to be held as “sufficiently accessible” to creditors. 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” 52. 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” 53. In that specific case however, Mr Quinn did not publish his telephone number in 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.

Following these decisions, if a company transfers both its headquarters and registered office from one Member State to another and this new location is made in the “public domain”, through the internet, telephone directories and its letterheads, this company’s COMI is also shifted to the new State of incorporation. in the event that such a company files for insolvency after the transfer, the new State of incorporation is exclusively competent to govern its insolvency proceeding. Pre-existing creditors can only react by filing for the opening of a secondary proceeding in the original Member State, providing that the company still has an establishment in this jurisdiction 54. In all other circumstances, pre-existing creditors cannot contrast a debtor’ decision to shift its COMI from one Member State to another. Secondary proceedings, however, aim exclusively at liquidating a debtor’s assets located in the Member State of the proceeding, with the consequence that pre-existing creditors do not take advantage of the opening of a secondary proceeding if local assets are not sufficient to satisfy their debts.

7. Conclusions

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49 Stanford, para 62.
50 Stanford, para 62.
52 Irish Bank, para 28.
53 Irish Bank, para 28.
54 Insolvency Regulation Article 3 § 2.
Corporate mobility has changed the face of EU insolvency law by allowing forum shopping through registered office’ relocations, despite the fact that one of the official goals of the Insolvency Regulation and its reform proposals is to avoid or limit forum shopping. Companies can manage to shift their COMI by transferring their registered offices into another Member State and then filing for insolvency in that state. According to the case law of the European Court of Justice, the reference date to determine the COMI is that of the filing for insolvency, with the consequence that the state where the registered office is located on that date is competent, unless creditors provide evidence that its COMI is still in the former state. To this aim, creditors must show that the location of their debtor’ headquarters was “ascertainable” by third parties. The “ascertainability” criterion relies upon creditors’ beliefs and, consequently, one can easily argue that this mechanism is able to prevent forum shopping at creditors’ expense.

In this paper, however, I have shown that this is not the case and that the criterion that the location of the COMI should be ascertainable by third parties does not entirely prevent forum shopping at creditors’ expense. Indeed, if a company transfers its registered office from one Member State to another, the “ascertainability” criterion protects only new creditors whose debts were incurred after the debtor has relocated its headquarters. In contrast, pre-existing creditors, whose debts were incurred before the transfer, are not protected if the company makes the new headquarters sufficiently public.

To be sure, creditors of companies that relocate their registered office enjoy other forms of legal protections. The cross-border merger directive requires Member States to protect creditors of the merging companies and, consequently, in many Member States corporations have to provide a security or to pay in advance credits that have not yet fallen due and some member states extend the application of such mechanisms to direct registered office’s transfers; to take advantage of this provision, creditors are normally required to file a petition or to oppose judicially against the merger.

In this regard, it is useful to distinguish between adjusting creditors, such as banks and sophisticated business partners, and non-adjusting creditors, such as suppliers, customers and tort creditors. Adjusting creditors can require proprietary guarantees or covenants allowing them to call-in their debt if the debtor transfers its registered office, while non-adjusting creditors are not able to require such protections and cannot discount the risk of forum shopping from the price of their services or products. Only non-adjusting creditors, therefore, need legal mechanisms protecting them from opportunistic forum shopping. Non-adjusting creditors, however, are unlikely to be able to take advantage of the legal mechanisms aimed at defending them, for they need to advance legal expenses and to collect evidence to support their claims. Therefore, non-adjusting creditors will entirely suffer the risk of COMI transfers and forum shopping that will damage their interests in case of debtor’s default.

56 This is the case in Norway, Slovak Republic, Poland, The Netherland, Germany, Italy, Estonia, Denmark, Czech Republic, Bulgaria, Belgium, Austria. See: Mucciarelli, supra nt. 23, p. 463.