Comments to the new EU regulation on insolvency proceedings

Presumed COMI and registered office of company subject to insolvency proceedings under the new EU regulation on insolvency proceedings

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Presumption, time limit for change of registered office and rationale behind the rule

1. Pursuant to art. 3(1) of Council Regulation (EC) No 1346/2000, the courts of the Member State within the territory of which the debtor's centre of main interests (COMI) is situated shall have jurisdiction to open insolvency proceedings.

   Under Regulation (EU) 2015/848 (the Regulation) the place of the registered office is still presumed to be the debtor's COMI, but now such presumption "shall only apply 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".

2. According to recital (5), the amendment arises from the desire to avoid incentives for parties to transfer assets or judicial proceedings from one Member State to another, "seeking to obtain a more favourable legal position to the detriment of the general body of creditors (forum shopping)". This idea is repeated in recital (29), according to which the Regulation "should contain a number of safeguards aimed at preventing fraudulent or abusive forum shopping".

3. Both this and the preceding provision are underpinned by abuse of law (*frau legis*) assumptions that the CJEU has not only not shared, but in fact cannot be shared as explained below.

Abuse versus legal presumption rebutted by proof to the contrary

4. A person interested in rebutting the presumption need not call to his aid the specific technique of abuse of law, but only provide facts showing evidence of the COMI not matching the registered office[1]. That is, without even going into the issue of the relocation time limit, wanting the presumption of COMI to be "rebutted" by way of allegation and proof of would-be abuse of law is a vicious legal process. On the contrary, the allegation and proof should fall on the facts which aver that the centre of main interests is still not found in the territory of the new registered office. But neither in 2000 nor in 2015 has it sufficed to prove that the debtor changed his registered office to alter his COMI and for that alone, since that purpose is not only legitimate, but is the very purpose that is sanctified as typical by the rule.

5. It could be the case, however, that the COMI and registered office go together and that it is not possible to rebut the presumption of art. 3(1) of the Regulation. Can jurisdiction be opposed on the basis of abuse of law or can jurisdiction over the COMI be disaggregated on the basis of abuse of law? First I will refer to the original version of the Regulation.

6. According to EIDENMÜLLER, there has been an abuse of rights or of law where the debtor has moved its COMI driven by simple distributive considerations rather than concerns

[1] Cf. Judgment of the CJUE of 20 October 2011, C-395/09.

for efficiency or maximization of the assets available to all creditors; consequently, "*if a COMI shift is effected evidently in order to enrich the person initiating it - or some creditors at the expense of OTHERS- at the expense of other stakeholders, the shift is abusive*"[2]. This strikes me as a mistake, one made by attempting to assign to the anti-circumvention technique functions that legal systems have traditionally and peacefully assigned to other legal institutions. There can *never* be abuse if this shift is effective, that is, if it involves a real change of the debtor's centre of main interests. And if not involved, because the centre of main interests does not match the registered office, there is no abuse either, but admissible counterevidence as to a relative presumption of validity.

7. The reason behind a change of registered office should be of no consequence and may well be shopping for a more favourable jurisdiction or right. If the change is not real but - using the terminology of the CJEU - a "wholly artificial arrangement", we are then faced with a case of simulation rather than abuse, and the COMI will not have changed[3]. Although simulation where not the case, it is true that the debtor may have sought to strip his assets, defraud its creditors, appropriate assets that would otherwise have been allocated to liquidation, etc. But to attack such conduct all systems harbour avoidance mechanisms for fraud or prejudice to the interests of the insolvency proceedings, as well as methods of impugning company resolutions which change the registered office.

8. The simulated change of COMI does not produce the desired effects, but the strategic change does, as evidenced by pragmatic English case law on strategic changes of COMI to conclude a scheme of arrangement in the English insolvency jurisdiction[4]. Another example of the differences in substance - irreducible to canons of interpretation - between "continental" substantive assessment and the tout court pragmatism of legal certainty which characterizes the British *stylus curiae*.

Minimum period of new registered office and abuse

9. The new wording of art. 3(1) of the Regulation in force demonstrates the truth of the view expounded. For the purposes that follow, we will round off to 90 days the three months of "waiting period" for the presumption to operate. Now the provision states that the COMI = registered office presumption does not apply if the registered office has been relocated to another Member State within the 3-month period prior to the request for opening insolvency proceedings.

10. The 90 days represent a threshold, with all the positive and perverse characteristics of legislative thresholds. Accordingly, the presumption shall apply - which does not mean that proof to the contrary is not still possible - if the registered office was transferred 91 days before the opening of proceedings. No one can say that abuse of law precludes the presumption, which shall continue to apply; at most, the proximity of the threshold - that is exceeded by one day only - may serve to more easily rebut the presumption that the registered office is the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties. That is, in terms of the presumption, the presumption based on 90 days shall be easier to rebut than one based on a more than one year old relocation.

The perversion of the temporal (time-related) threshold

11. But, as I said, the threshold is also perverse, because it raises a question of limits and because it will affect in a surprising way the rules on evidence.

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[2] "Abuse of Law in the Context of European Insolvency Law", in LA FERIA /VOGENAUER, The Prohibition of Abuse of Rights. A New European Principle?, 2011, p. 147. The author cites a judgment of the German Federal Court of 13 December 2007.

[3] Cf. The case of the German notary who "changed" his residence to the UK for more favourable bankruptcy proceedings (High Court, Chancery Division, 29 August 2012, in www.baili.org).

[4] For which, cf. S. PHILIPS, European Revolution vs. English Evolution, International Corporate Rescue 2014, no. 5, pp. 323-326 and the Apcoa Parking Holdings GmbH & Ors case [2014] EWHC 3849 (Ch), in International Corporate Rescue 2015, no. 3, pp. 189-192.

12. If on day 89 the relocation has occurred, there will be no presumption. But there will be if the relocation reaches 90 days. To begin with, the limit is banal. The transfer date is that recorded in the entry of the register of companies in the State *ad quem*. But the registration formalities may have been lengthened for reasons beyond the debtor's conduct (for instance, the 90th day before the insolvency proceedings was a holiday!). Moreover, it would be absurd to say that in that case the debtor bears the risk of time. What would happen in a court dispute? The debtor will claim its registered office, the 89 days, the reasons for the delay, etc. To establish a *judicial presumption* (or factual or man-made presumption, as it is also called) the judge shall not require in this case more than what the legislator has approved for the *legal presumption*. In real terms, the assignment and density of the burden of proof does not differ in either case. In fact, a registered office changed only 30 days before the opening of insolvency proceedings may make a case for judicial presumption as strong as a legal presumption. By this we mean that the *burden of proof* that the other party must put on the table is essentially the same in both cases: in both cases it must be proven that the COMI does not match the registered office. Because it cannot be true that a change of registered office just 40 days back does not serve to establish a prima facie factual presumption that such registered office is the COMI.

13. Moreover, the 90-day threshold may pervert the intentions expressed by the EU legislature. Note that the presumption based on the prior 90-day relocation period is, as is any relative presumption, rebuttable by proof to the contrary. However, if we want to be consistent with the rules, the rebuttal "effort" required from the opposing party should not be the same when the move has reached 90 days or only 89 days. That is, by establishing a legal presumption based on a time threshold, but leaving unaffected the judicial presumptions that can and must be built with more limited time vectors, the rule should have explained that the presumption of 90 days is not rebutted by the simple proof that the COMI is not the registered office. *Something more* need be proven. But what more?

14. In my opinion, the paradoxes to which the positions of legal presumptions based on temporal thresholds always lead to show that, as in many other places in the new Regulation, the European legislative solution is flawed. It seems clear to me that if playing and speculating with shortcuts against "abuse" was what was sought, then it should have been laid down that a registered office relocated for at least 90 days would be an irrebuttable presumption of COMI. Any other solution is senseless, making no significant differences. This irrebuttable presumption could not be rebutted by proof to the contrary, provided the registered office relocation *had not been simulated*. If the registration of company seat is "authentic", there would be no room for further speculations. Doubtless, there would be no room to reintroduce the technique of abuse of rights or of law as it is essential to a legislative threshold that the interested party can always *lay back if it has reached, even de minimis, the threshold limit*. And if questioned or rebuked for doing this or that, such party may unapologetically answer: *precisely for this*. Abuse of law would be but a crude mechanism of judicial discretion used to rewrite rules. Because the waiting period is a *niche* and there is no niche if the applicant can be evicted by merely proving that it acted with no other motive than the pursuit of the niche.

15. Lastly, a pragmatic criticism. The new Regulation is riddled with provisions evidencing the painful infantilism of the EU legislator or the extreme shallowness of his understanding of the reality that is being regulated. The new waiting period of the presumption of art. 3(1) II is one of such provisions. Clearly, if the debtor or its advisers are sufficiently informed about the time limit of the COMI presumption, they can manipulate without difficulty the procedure, through the expedient of requesting the opening of insolvency proceedings the moment 90 days have elapsed. Clearly, any debtor interested in forum shopping will avoid submitting the request on the 89th day, because in fact any debtor interested in opening collective proceedings usually has wide discretion as to when it wishes to commence the same. Therefore, once more the provision becomes superfluous: *all well, wait a few days to pass*, but the strategy of forum shopping (which is not fraudulent, but fully adapted the provision!) need not be altered by this.

Presumption period and informal renegotiation procedure

16. The 90-day period must predate the "request to open insolvency proceedings". But in Regulation 2015/848 this concept has a broader

scope than in Regulation 1346/2000. No longer are collective insolvency proceedings that entail the divestment of the debtor and the appointment of a liquidator required. Under the new text, "public collective proceedings" in which a temporary stay of individual enforcement proceedings is granted by a court or "by operation of law", in order to allow for negotiations between the debtor and its creditors, provided that the proceedings in which the stay is granted "provide for suitable measures to protect the general body of creditors, and, where no agreement is reached, are preliminary to one of the proceedings", are also included [art. 1(1)(c)].

17. That is, the 4th additional provision of the Spanish Insolvency Act (IA) not only contains "insolvency proceedings", but also the "pre-negotiations" under art. 5 bis IA; although not the "collective proceedings" under art. 71 bis. We believe it makes no sense to establish a presumption of COMI in a given temporal threshold for informal proceedings such as those of art. 5 bis. In fact, in such proceedings there is no "request to open", but simply notice of negotiations (already initiated) to the appropriate judicial body. And no one knows when the negotiations began, nor does anyone care. Besides, it is clear that one can negotiate for the purposes of art. 5 bis regardless of where the debtor has its COMI or registered office. In fact, the legal provision does not even provide for a "decision" from an authority that can produce the effects of a "recognition" of court judgments.