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***Forum shopping in the  
context of the European  
Insolvency Regulation and  
Freedom of Establishment  
post Interedil – C 396/09***

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# Contents

<b>Summary</b>	<b>1</b>
<b>Preface</b>	<b>3</b>
<b>Abbreviations</b>	<b>4</b>
<b>Introduction</b>	<b>5</b>
<b>A) The European Insolvency Regulation – an instrument of regulative competition and conflict of law rule</b>	<b>8</b>
I) Purpose	8
II) International jurisdiction and applicable law – The COMI concept	9
1) Article 3 (1) EIR	10
2) Article 4 EIR	11
3) COMI concept	12
a) Definition and scope of the notion COMI – general aspects	12
b) COMI - Jurisdiction of the CJEU	14
aa) Staubitz-Schreiber	15
bb) Eurofood	17
cc) Interdil	20
dd) Rastelli	25
4) Conclusion	25
<b>B) Forum Shopping in the landscape of cross-border insolvency procedures</b>	<b>26</b>
I) The notion forum shopping – general approach	26
II) Forum shopping in the context of insolvency matters	27
1) Admissibility of COMI shifts and time aspects	38
2) Is shopping for the best insolvency forum “good” or “bad”?	30
a) Abuse vs. use of rights in EU law – Forum shopping as combating abuse of the Insolvency Regulation?	30
b) Conclusion	33
<b>C) Insolvency forum shopping from a company law perspective - Corporate mobility and freedom of establishment</b>	<b>33</b>

I) Freedom of establishment of companies, Article 49, 54 TFEU	34
1) Concept of “establishment”	35
2) Forum shopping with regards to the freedom of establishment and abuse of rights	37
II) Transfer of COMI from a company law perspective and in consideration of the jurisdiction of the CJEU	40
1) General thoughts regarding corporate mobility, establishment and transfer of a company’s registered or real seat	41
2) Traditional approaches of the Member States	42
a) Incorporation Theory	42
b) Real Seat Theory	43
3) Development of the case law of the CJEU and its influence on the freedom of establishment and transfer of a company’s registered office or real seat	44
<b>D) Conclusion</b>	<b>47</b>
<b>Bibliography</b>	<b>48</b>
<b>Table of cases</b>	<b>54</b>

# Summary

One of the key principles of European law is to ensure the proper functioning of the internal market. The past two decades are characterised by an increasing economic mobility, removal of a wide range of trade barriers to free movement and an increasing trend towards globalization. The economic fabric of the internal market is affected by cross-border insolvency cases as well as by tendencies to transfer a company into another Member State for bankruptcy purposes only.

Council Regulation (EC) No. 1346/2000 on Insolvency Proceedings<sup>1</sup> was adopted by the European legislator to coordinate national insolvency proceedings with a link to cross-border bankruptcy matters in the European landscape and to harmonize procedural rules by leaving the substantive domestic insolvency laws untouched. The Insolvency Regulation seeks to establish a common framework of Private International Law rules on insolvency by containing rules regarding international jurisdiction, applicable law, recognition of insolvency proceedings, and coordination of parallel proceeding guided by the objective to ascertain that insolvency proceedings operate efficiently and effectively and to promote herewith the proper functioning of the common market. Core element of the Regulation is the debtor's "*centre of main interests*" or abbreviated "*COMI*" functioning as the connecting link to the Member State of jurisdiction and the applicable law according to Article 3 and Article 4 EIR: the law follows the venue and the venue follows the *COMI*.

The notion "*forum shopping*" has been discussed in the judicial European and International landscape in different connotations and with a different substantive and/or normative content. It is associated with the famous debate on regulatory competition issues in the United States and tied to the State "Delaware" and the expression "race to the bottom".<sup>2</sup>

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<sup>1</sup> Hereafter 'Insolvency Regulation' or 'Regulation' or 'EIR'

<sup>2</sup> See John A.E. Pottow, The Myth (and realities) of Forum Shopping in transnational Insolvency, Brooklyn Journal of International Law, Vol. 32 (2),2007, pp. 785-817;

Where debtors seek to open proceedings in a country having more favourable insolvency legislation it is referred to as “*forum shopping*”. Shopping for the best forum and law respectively requires that the *COMI* is located in or had been transferred to the Member State of (the most suitable) choice. In the area of company law in Europe free choice of the applicable company law regime forms an integral part and expresses the exercise of the freedom of establishment. Cross-border insolvency “*forum shopping*” and related choice of law by transferring the *COMI* has a special dimension in particular with regards to creditor interests, the effectivity and efficiency of insolvency proceedings and regulatory competition. Subject to the present examination is the interplay between the *COMI*-concept with particular consideration to the recent case law of the CJEU, its rulings in *Interdil* and *Rastelli*, the notion forum shopping, abuse of rights and the freedom of establishment.

# Preface

During my work as a lawyer and legal expert at a bank in Germany and at a debt collection agency in Sweden I was dealing with insolvency matters and debt collection. My work experience but also the “*Centros*” decision of the Court of Justice of the European Union that attracted my attention inspired me to choose a subject in the overlapping area of the European Insolvency Regulation and Freedom of Establishment.

Firstly, I would like to thank my supervisor at the University Lund, Dr. Sanja Bogojevic for her support and encouraging words and secondly, I would like to thank my children Lara and Julian Ober who gave me the strength to continue and my husband Michael Ober for his patience.

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Katja Ober

# Abbreviations

AG	Advocate General
Colum. J. Eur. L	Columbia Journal of European Law
COMI	Centre of main interest
CJEU	Court of Justice of the European Union
DG Justice	Directorate-General for Justice
ECR	European Court Reports
OJ	Official Journal of the European Union
OJEC	Official Journal of the European Community
OUP	Oxford University Press
UK	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law
US	United States
ZGR	Zeitschrift für Unternehmens- und Gesellschaftsrecht

# Introduction

Since *Centros*<sup>3</sup> impediments to corporate cross-border mobility has been reduced by introducing a free choice of the best suitable corporate law as exercise of the freedom of establishment, even in case of circumvention of national law. The choice of the most benefiting company law after having been established is much more difficult and requires the fulfillment of certain requisites.

The notion “*forum shopping*” is – without going deeper into a thorough analysis – a choice between different alternative venues and laws immanent and in the case of cross-border insolvency procedures in particular between different insolvency regimes. As the insolvency laws in the Member States are not harmonized there are huge differences between the insolvency regimes and some are known for investor friendly regulations and/or good insolvency law and efficient debt recovery system<sup>4</sup>.

This situation and the natural need to exploit advantages attract “forum shoppers” and parties have as *McCormack*<sup>5</sup> has expressed it an incentive to “forum shop”. In the UK the phenomenon is with regards to personal insolvency procedures well-known under the metaphorical expression “bankruptcy tourism”<sup>6</sup>. Not only the English company law which has proved to be the most competitive law jurisdiction in Europe but also its insolvency regime ranks among the “top” in relation to other European countries. Three advantages are attributed to the restructuring and insolvency proceedings in the UK: the company can be reorganized out of court, creditors remain active in the process and contractual certainty is maintained. In particular German companies have been attracted by the

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<sup>3</sup> Case C-212/97 *Centros Ltd v Erhervs- og Selskabsstyrelsen* [1999] ECR I-1459

<sup>4</sup> See Commission Staff Working Document, Impact assessment on the Directive on the cross-border transfer of registered office from 12.12.2007, p. 13

<sup>5</sup> Gerard McCormack, Jurisdictional competition and forum shopping in insolvency proceedings, *Cambridge Law Journal*, 68(1), March 2009, p. 169 (196)

<sup>6</sup> David Pomeroy, Bankruptcy Tourism, <http://www.ashfords.co.uk/news/Cross+Border+Restructuring+and+Insolvency+Update+-+November+2011>

system in the UK and landmark cases such as *Deutsche Nickel* and *Schefenacker* document the interest.<sup>7</sup>

According to Article 4 EIR the law applicable to insolvency proceedings and their effects are (with some exemptions) determined by the Member State within the territory of which such proceedings has been opened (cf. Article 3 (1) EIR). To this extent, the 1968 Brussels Convention<sup>8</sup> and connecting conflict-of-law-rules have been superseded. At this point the key element of the Regulation comes into play: the determination of the notion “*center of main interest*”. As the Regulation does not provide a definition of this term, guidance can be found only in recitals 13, 14 in the preamble and in the case law of the European Court of Justice. The landmark decisions *Staubitz-Schreiber*<sup>9</sup> and *Eurofood*<sup>10</sup> have recently been supplemented by two cases *Interedil Srl*<sup>11</sup> and *Rastelli*<sup>12</sup> in which the CJEU provides further guidance on the interpretation of the notion “*COMI*”.

The definition of the term “*centre of a debtor’s main interest*” and the determination of its scope is of particular significance for determining the extent of “*forum shopping*”.

It seems that a successful choice of the preferred insolvency regime requires a - in a legal way - successful establishment of the “*COMI*” or in cases where a company already has been established a successful transfer of the “*COMI*” according to Article 3 (1) EIR in compliance with national and (primary and secondary) EU-law.

The aspect of “compliance” is of crucial significance in cases of *forum shopping* by transferring the COMI. The opportunity to *COMI* shifts gives

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<sup>7</sup> Rachel Evans, UK insolvency in mind, <http://www.iflr.com/Article/2166673/UK-insolvency-reform-Mind-over-matter.html>

<sup>8</sup> OJ 1978 L 304, p. 36; As of 1 March the Brussels Convention has been replaced by Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

<sup>9</sup> Case C-1/04 [2005] ECR I-9611

<sup>10</sup> Case C-341/04 [2006] ECR I-3813

<sup>11</sup> Case C-396/09 [2011] ECR I-0000

<sup>12</sup> Case C-191/10 [2011] ECR I-0000

the debtor the possibility to transfer it away from the place where its creditors are located. Abusive conduct on the one hand and facilitating corporate mobility by exercising the right of freedom of establishment on the other hand, creditor protection, efficiency of the cross-border insolvency proceedings or regulatory competition are some of the conflicting interests affected in the case of *forum shopping*.

This thesis aims at examining to what extent *forum shopping* in the landscape of cross-border insolvency procedures by transferring the centre of main interest with regards and limited to companies<sup>13</sup> is possible and admissible.

The thesis has been divided into four chapters and will focus on three main issues. The first chapter deals with the *COMI*-concept as connecting link to the applicable jurisdiction and law in insolvency matters. Special emphasis is given to the examination of the jurisprudence of the CJEU with regards to the *COMI*-concept in *Staubitz-Schreiber*, *Eurofood*, *Interedil* and *Rastelli*. The second chapter deals with the notion *forum shopping* and focuses on the question whether *forum shopping* has to be regarded as abusive conduct in the context of the Insolvency Regulation. Subject to the third chapter is the interaction between *forum shopping*, corporate mobility and freedom of establishment. It will be analyzed whether *forum shopping* falls within the ambit of the freedom of establishment and to what extent *forum shopping* from a company law perspective is possible. The last chapter contains a final conclusion.

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<sup>13</sup> Natural persons and corporate groups with its peculiar problems are not subject to the examination

## **A) The European Insolvency Regulation – an instrument of regulative competition and conflict of law rule**

Council Regulation (EC) No 1346/2000, of 29 May 2000 on Insolvency Proceedings came into effect on 31 May 2002.<sup>14</sup> After one decade of application, the Regulation has recently become the subject of considerable attention. According to Article 46 EIR the Commission shall no later than 1 June 2012 present to the European Parliament, the Council and the Economic and Social Committee a report on the application of the Insolvency Regulation. The review of the Regulation has been declared one of DG Justice’s priority files for year 2012<sup>15</sup> and is linked to the “Europe 2020” strategy, set out at the European Council meeting on 26 March 2010, to improve the competitiveness of the EU and to promote sustainable growth and employment.<sup>16</sup>

This chapter focuses on defining the scope of the notion “*centre of main interest*” as connecting link to the appropriate jurisdiction and applicable law with particular consideration of the rulings of the CJEU in *Staubitz-Schreiber*<sup>17</sup>, *Eurofood*<sup>18</sup>, *Interedil Srl*<sup>19</sup> and *Rastelli*<sup>20</sup>. The determination of the scope of the notion “*centre of main interest*” is of particular significance for determining the extent of “*forum shopping*”.

### **D) Purpose**

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<sup>14</sup> OJ L 160, 30.06.2000, p. 1-18; The Insolvency Regulation is with the exception of Denmark directly applicable in all European Member States.

<sup>15</sup> The Revision of Council Regulation (EC) 1346/2000 on insolvency proceedings, p. 2, see [http://ec.europa.eu/justice/newsroom/contracts/files/2012\\_expert-group-insolvency/terms\\_of\\_reference\\_group\\_insolvency\\_en.pdf](http://ec.europa.eu/justice/newsroom/contracts/files/2012_expert-group-insolvency/terms_of_reference_group_insolvency_en.pdf)

<sup>16</sup> Further Information regarding „Europe 2020“ strategy, see [http://ec.europa.eu/europe2020/index\\_en.htm](http://ec.europa.eu/europe2020/index_en.htm)

<sup>17</sup> Case C-1/04 [2005] ECR I-9611

<sup>18</sup> Case C-341/04 [2006] ECR I-3813

<sup>19</sup> Case C-396/09 [2011] ECR I-0000

<sup>20</sup> Case C-191/10 [2011] ECR I-0000

*Virgós/Garcimartín* identify three basic goals of the Insolvency Regulation: “(1) to provide for legal certainty in cross-border insolvency (2) to promote efficiency of insolvency proceedings by favouring those solutions which facilitate their administration and improve ex-ante planning of transactions (3) to eliminate inequalities among community- based creditors with regard to access and participation in such proceedings”.<sup>21</sup>

## **II) International jurisdiction and applicable law – The *COMI* concept**

Key elements of the Insolvency Regulation are Article 3 EIR which determines the venue in cross-border insolvency procedures in conjunction with Article 4 EIR that defines the applicable law. The establishment of a special – exclusive - jurisdiction<sup>22</sup> was necessary with regards to the conflict-of-law-rules provided by the Brussels Convention because ‘bankruptcy, proceedings relating to winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings’ has been due to Article 1, point 2 of the 1968 Brussels Convention exempted from the scope of the Convention.

The determination of the international jurisdiction has a fundamental effect on the law applicable in cross-border insolvency procedures and follows as a rule the Member State of jurisdiction. With these two elements and the *COMI* standard as central feature the Regulation has made regulatory competition between different insolvency regimes possible<sup>23</sup>.

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<sup>21</sup> Miguel Virgós/Francisco Garcimartín, *The European Insolvency Regulation: Law and Practice*, p. 7

<sup>22</sup> Alexander J. Bělohávek, Center of main interest (COMI) and jurisdiction of national courts in insolvency matters (insolvency status), *International Journal of Law and Management*, 2008, Vol. 50, p. 56, for a differentiated view, see AG Ruiz-Jarabo Colomer, opinion from 16 October 2008 in Case C-339/07 Rechtsanwalt Christopher Seagon als Insolvenzverwalter über das Vermögen der Frick Teppichboden Supermärkte GmbH v Deko Marty Belgium NV, [2009] ECR I 767, paras. 4 ff.: For the opening, conduct and termination of the proceedings, and for actions deriving directly from the proceedings this jurisdiction is exclusive, whereas jurisdiction for preservation measures is alternative in nature. Actions in the context of an insolvency to set a transaction aside is relatively exclusive.

<sup>23</sup> See on this issue Horst Eidenmüller, Free Choice in International Company Insolvency Law in Europe, *European Business Organization Law Review* 6, p. 428

## 1) Article 3 (1) EIR

Article 3 (1) sentence 1 provides: “The courts of the Member States within the territory of which the *centre of a debtor’s main interests* is situated shall have jurisdiction to open insolvency proceedings. 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.”

The term “*centre of a debtor’s main interest*” builds the cornerstone element of the Regulation<sup>24</sup> and represents as a connecting factor a new and entirely specific type of determining link for defining international jurisdiction<sup>25</sup>.

According to the CJEU the notion of a debtor’s *centre of main interest* has been considered as an autonomous concept<sup>26</sup> peculiar to the Insolvency regulation. This concept determines where the international jurisdiction within the European Union in cross-border insolvency proceedings is situated and defines herewith the extent of national jurisdiction.<sup>27</sup> In contrast, local jurisdiction is determined pursuant to national law<sup>28</sup>.

The court of the Member State in which the debtor’s *centre of main interest* is located is empowered to open insolvency proceedings with the character of “main proceedings”<sup>29</sup>. From Article 3 EIR in conjunction with Article 16 EIR it follows that a company can only have one *centre of main interest*<sup>30</sup> and therefore only one “main” proceeding can be opened. Main insolvency proceedings have universal scope and the universality principle means that decision to open insolvency proceedings takes binding effect in all States of

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<sup>24</sup> AG Colomer, opinion in Case C 1/04 Staubitz-Schreiber, delivered on 6 September 2005, para. 21

<sup>25</sup> Alexander J. Bělohávek, Center of main interest (COMI) and jurisdiction of national courts in insolvency matters (insolvency status) International Journal of Law and Management, 2008, Volume 50, Issue 2, p. 63

<sup>26</sup> An “autonomous concept” is understood to mean a concept peculiar to a text of uniform law (whether substantive, procedural or relating to Private International Law), which given the international origin of the rule and the unifying function which it fulfils, must have a meaning which is also uniform and independent of the national law where this text is inserted. Virgós/Garcimartín, Ibid, p. 37

<sup>27</sup> Alexander J. Bělohávek., Ibid, p. 55

<sup>28</sup> Overview of local jurisdiction in the various Member States, see Pannen, European Insolvency Regulation, Article 3, para. 14

<sup>29</sup> Virgós/Schmit Report on the Convention on Insolvency Proceedings (‘Virgós/Schmit Report’) in Virgós Soriano, M. and Garcimartín Alférez, F.J., *Comentario al Reglamento Europeo de Insolvencia*, Civitas, Madrid, 2003, point 73; Virgós/Garcimartín, Ibid. p. 37

<sup>30</sup> Opinion of AG Jacobs delivered on 27 September 2005 in Case C 341/04 Eurofood IFSC Ltd.[2006] ECR I-3813, para. 100

the European Union and encompasses all the debtor's assets on a world-wide basis by affecting all creditors, wherever located <sup>31</sup>. Parallel to a main insolvency proceeding the court of the Member State other than the Member State where the debtor's *centre of main interest* is situated is enabled to open territorially limited proceedings pursuant to Article 3 (2-4) EIR. One type of territorial proceedings are secondary proceedings which are dependent on the main proceeding.

## **2) Article 4 EIR**

Article 4 (1) EIR stipulates: "Save as otherwise provided in this regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened, hereafter referred to as the "State of the opening of proceedings". " This provision defines the law applicable to insolvency proceedings, *lex fori concursus*, and replaces, within its scope of application, national rules of private international law according to recital 23 of the preamble of the Regulation. Insolvency proceedings are as a rule subject to the law of the Member State which has opened the insolvency proceeding. The *lex fori concursus* determines all the effects of the insolvency proceedings, both procedural and substantive, on the persons and legal relations concerned and governs all the conditions for the opening, conduct and closure of the insolvency proceedings. Exemptions to this rule on conflict of laws are defined under Articles 5-15 EIR.

## **3) COMI-concept**

### **a) Definition and scope of the notion COMI – general aspects**

Beside the European insolvency regime the concept of the *centre of main interest* is inherent in the UNICITRAL Model Law on Cross-Border

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<sup>31</sup> Article 16 EIR, see Virgós/Schmit Report on the Convention on Insolvency Proceedings ('Virgós/Schmit Report') in Virgós Soriano, M. and Garcimartín Alférez, F.J., *Comentario al Reglamento Europeo de Insolvencia*, Civitas, Madrid, 2003, point 73; Virgós/Garcimartín p. 37

Insolvency<sup>32</sup> as connecting factor for determining international jurisdiction. The UNICITRAL Model Law on Cross-Border Insolvency deals with insolvency matters extending beyond a Member State of the European Union into a non-member State and fulfills insofar a complementary function. It took the *COMI* notion from the European Insolvency Convention for reason of consistency<sup>33</sup>. Neither the Insolvency Regulation nor the UNICITRAL Model Law on Cross-border Insolvency provides a definition of the term but a rebuttable presumption with regards to entities<sup>34</sup>. Article 3 (1) sentence 2 EIR stipulates: “In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of main interest in the absence of the proof of the contrary. “

Guidance provides recital 13 of the preamble of the Regulation which stipulates: “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.”

Further clarification on the rationale can be found in the *Virgós/Schmit* report: “The 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 rationale of this rule is not difficult to explain. Insolvency is a foreseeable risk. It is therefore important that international jurisdiction (which, as we will see, entails the application of the insolvency laws of that Contracting State) 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

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<sup>32</sup> UNICITRAL Model Law on Cross-Border Insolvency with Guide to Enactment, UN Sales NO E.99.V.3; Article 2 (b), 16 (3) UNICITRAL Model Law on Cross-Border Insolvency; Although the concepts in the two texts are similar, they serve different purposes. The determination of “centre of main interests” under the EC Regulation relates to the jurisdiction in which main proceedings should be commenced. The determination of “centre of main interests” under the Model Law relates to the effects of recognition, principal among those being the relief available to assist the foreign proceeding; see Guide to Enactment, para. 103, available at <http://www.uncitral.org/pdf/english/texts/insolven/insolvency-e.pdf>

<sup>33</sup> See Guide to Enactment, Ibid, para. 31

<sup>34</sup> See Article 16 (3) of the UNICITRAL Model Law on Cross-border Insolvency which also contains a presumption concerning individuals

calculated. By using the term "interests", the intention was to encompass not only commercial, industrial or professional activities, but also general economic activities, so as to include the activities of private individuals (e.g. consumers). The expression "main" serves as a criterion for the cases where these interests include activities of different types which are run from different centers. In principle, the centre of main interests will in the case of professionals be the place of their professional domicile and for natural persons in general, the place of their habitual residence. Where companies and legal persons are concerned, the Convention presumes, unless proved to the contrary, that the debtor's centre of main interests is the place of his registered office. This place normally corresponds to the debtor's head office.”<sup>35</sup>

According to the preamble and the explanatory report the determination of the *COMI* consists of a twofold test relying on an objective element and a subjective one. The objective element refers to the localisation of the place of interest which is the “place where the debtor conducts the administration of his interests on a regular basis” or “the place of his registered office [... which] normally corresponds to the debtor's head office”. The subjective element ties the determination to the ascertainability for third parties.

In legal scholarship and doctrine the *COMI*-concept has been criticised for being too vague and unpredictable<sup>36</sup> and even more for manipulable<sup>37</sup>. In particular, *Eidenmüller*<sup>38</sup> and *Ringe*<sup>39</sup> have proposed to amend the Insolvency Regulation. *Eidenmüller* suggests that the *COMI*-concept shall be abandoned and the rebuttable presumption transformed into an un rebuttable presumption. Decisive as connecting factor shall only be the

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<sup>35</sup> Virgós/Schmit Report, Ibid, para. 75

<sup>36</sup> See Gerard McCormack, Jurisdictional competition and forum shopping in insolvency proceedings, Cambridge Law Journal, 68(1), March 2009, p. 196; Irit Mevorach, Jurisdiction in Insolvency: A study of European Courts' Decision, p. 327-328, 333

<sup>37</sup> See Gerard McCormack, Ibid, p. 196; Horst Eidenmüller Wettbewerb der Insolvenzrechte? ZGR 2006, 467 (475) takes the view that the concept is manipulable when relying on “head office function” or “mind of management” as connecting factors (real seat standard) for determining the *COMI*.

<sup>38</sup> Horst Eidenmüller, Wettbewerb der Insolvenzrechte? ZGR 2006, pp. 469-470

<sup>39</sup> Wolf-Georg Ringe, Forum Shopping under the EU Insolvency Regulation, available at SSRN: <http://ssrn.com/abstract=1209822>, p. 31

place of incorporation and the choice of the preferred insolvency forum and law shall be made in combination with the choice of the preferred company law.<sup>40</sup>

Which factors are decisive is on national level subject to varying approaches. Criteria such as head office function, mind of management or place of strategic controlling decisions are relied on.<sup>41</sup>

That the national level and interpretation cannot be used and referred to for the purpose of interpreting or determining the meaning of European Union Law is settled case law und follows from the need for autonomous and uniform interpretation and application of Union law and from the principle of equality<sup>42</sup>. This principle has recently been confirmed by the CJEU in *Interdil* with reference to the Eurofood case stating that the *COMI*-concept is “peculiar to the Regulation, thus having an autonomous meaning, and must therefore be interpreted in a uniform way independently of national legislation”.<sup>43</sup>

## **b) *COMI* - Jurisdiction of the CJEU**

In the past years, the CJEU has not had many opportunities to deal with the notion “*centre of main interest*” and the development of European Union law in this relation.

The *Staubitz-Schreiber* case was the first reference for preliminary ruling on the interpretation of the European Insolvency Regulation the CJEU had to face with<sup>44</sup>, followed by the *Eurofood* decision regarding interpretation and

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<sup>40</sup> Horst Eidenmüller, Wettbewerb der Insolvenzrechte? ZGR 2006, pp. 469-470

<sup>41</sup> The varying approaches on national level will not be covered by the present analysis, see on this, dedicated study by Irit Mevorach, Jurisdiction in Insolvency: A study of European Courts' Decision, pp. 327 ff.; Eidenmüller, Wettbewerb der Insolvenzrechte, Ibid, pp. 474-476; Pannen, European Insolvency Regulation, Article 3 paras. 34 ff.

<sup>42</sup> Case C-195/06 Österreichischer Rundfunk ECR [2007] I-8817, para. 24 with further reference to Case C-327/82 Ekro [1984] ECR 107, para. 11; Case C-287/98 Linster [2000] ECR I-6917, para. 43; Case C-170/03 Feron [2005] ECR I-2299, para. 26; and Case C-316/05 Nokia [2006] ECR I-12083, para. 21

<sup>43</sup> *Interdil*, Ibid, para. 43; *Eurofood*, Ibid, para. 31

<sup>44</sup> AG Colomer, opinion in Case C 1/04 *Staubitz-Schreiber*, Ibid, para. 5

scope of the *COMI* notion. Over a half decade later at the end of 2011 the CJEU delivered its decisions in *Interedil* and *Rastelli* by providing further guidance on definition and scope of the term “*centre of main interest*”.<sup>45</sup>

**aa) *Staubitz-Schreiber***<sup>46</sup>

On 17. January 2006 the CJEU delivered its judgement in the *Staubitz-Schreiber* case. Although this case concerned cross-border insolvency proceedings of a natural person it contains general assumptions concerning the transfer of the centre of main interests and its time limits<sup>47</sup> which are applicable on *COMI*-shifts in the case of a company, too.

Susanne Staubitz-Schreiber was resident in Germany and operated there as a sole trader. On 6 December 2001 she requested the opening of insolvency proceedings regarding her assets before the Amtsgericht-Wuppertal in Germany. Four month after her request, on 1 April 2002, but before the proceedings were opened, Staubitz-Schreiber transferred her place of residence to Spain in order to work and live there. By order of 10 April 2002, the Amtsgericht Wuppertal refused the application to open insolvency proceedings due to lack of assets.<sup>48</sup>

This decision was contested by Staubitz-Schreiber and the case ended up at the Federal High Court (Bundesgerichtshof) which stayed the proceedings and referred the following question to the CJEU for preliminary ruling:

“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

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<sup>45</sup> David Pomeroy, *Debtor's Centre of Main Interest (COMI)* available at <http://www.ashfords.co.uk/news/Cross+Border+Restructuring+and+Insolvency+Update+-+November+2011>; EC Insolvency Regulation restricts the operation of national laws <http://www.ashfords.co.uk/news/Cross+Border+Restructuring+and+Insolvency+Update+-+January+2012>;

<sup>46</sup> Case C-1/04 *Staubitz-Schreiber* [2006] ECR I-701

<sup>47</sup> See on this, ruling of the CJEU in *Interedil*, Case C-396/09, [2011] ECR I-0000, para. 55

<sup>48</sup> *Ibid*, paras. 15-16

proceedings are opened, or does the court of that other Member State acquire jurisdiction?’<sup>49</sup>

The Court ruled that Article 3(1) EIR must be interpreted as meaning that the court of the Member State within the territory of which the *centre of the debtor's main interests* is situated at the time when the debtor lodges the request to open insolvency proceedings retains jurisdiction to open those proceedings if the debtor moves the *centre of his main interests* to the territory of another Member State after lodging the request but before the proceedings are opened.<sup>50</sup>

In order to reach that conclusion the CJEU relied mainly on the objectives pursued by the Regulation in the second, fourth and eighth recital in the preamble and points out that Article 3 (1) EIR does not expressly stipulate whether the court originally seised retains jurisdiction if the debtor moves the centre of his main interests after submitting the request to open proceedings but before the judgment is delivered.<sup>51</sup>

The Court submits that a transfer of jurisdiction from the court originally seised to a court of another Member State would be contrary to the objective pursuant to the fourth recital in the preamble of the Regulation 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, in other words but not expressly referred to by the Court the intention of avoiding “*forum shopping*” in the meaning of recital 4 of the preamble of the Regulation. The Court proceeds by pointing out that this 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.<sup>52</sup>

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<sup>49</sup> Ibid, paras. 17-20

<sup>50</sup> Ibid, paras. 15-16

<sup>51</sup> Ibid, paras. 21-28

<sup>52</sup> Ibid, para. 25

The Court continues by emphasizing the special role of creditors and the legitimate purpose of creditor protection combined with the avoidance of procedural inefficiencies:

“Such a transfer of jurisdiction would also be contrary to the objective, stated in the second and eighth recitals in the preamble to the Regulation, of efficient and effective cross-border proceedings, as it would oblige creditors to be in continual pursuit of the debtor wherever he chose to establish himself more or less permanently and would often mean in practice that the proceedings would be prolonged. 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 centre of his main interests was situated when they entered into a legal relationship with him.”<sup>53</sup> Finally, the Court pointed out the importance of the universal scope of the main insolvency proceedings and connected effects including creditor guarantees such as securing or preserving measures concerning the debtor's assets, particularly where the *COMI* was moved between request to open and the opening of the proceedings.<sup>54</sup>

It can be concluded from this ruling that according to the CJEU the important time factor for determining the *COMI* is the lodging of the request to open insolvency proceedings and decisive the place where the *centre of main interests* was situated before the request to open insolvency proceedings was lodged.

#### ***bb) Eurofood***<sup>55</sup>

Only a few months later on 2 May 2006, the CJEU delivered its decision in the *Eurofood* case. Even if the case concerned cross-border insolvency proceedings of a corporate group and the relation between parent company and subsidiary general conclusions can be drawn with regards to

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<sup>53</sup> Ibid, paras. 26-27

<sup>54</sup> Ibid, para. 28

<sup>55</sup> Case C-341/04 [2006] ECR I-3813

interpretation and scope of the notion *centre of main interest* in relation to companies.

Eurofood IFSC Ltd. (Eurofood) was a wholly owned subsidiary of Parmalat SpA, a company incorporated in Italy, and its objective was the provision of financing facilities for companies in the Parmalat group. Eurofood was incorporated in Ireland with its registered office in Dublin. The relation between Parmalat as the parent company and its subsidiary Eurofood was characterised by a controlling position of Parmalat by virtue of its shareholding and power to appoint directors with regards to Eurofood's policy<sup>56</sup>. In December 2003 Parmalat was admitted to extraordinary administration proceedings by the Italian Ministry of Production and an extraordinary administrator appointed.<sup>57</sup> In January 2004 insolvency proceedings were opened against Eurofood by the Irish High Court and a provisional liquidator appointed.<sup>58</sup> In February 2004, the Italian Minister for Production Activities admitted Eurofood to the extraordinary administration procedure and an application for a declaration that Eurofood was insolvent lodged before the Italian District Court.<sup>59</sup> The Italian District Court took the view that Eurofood's *centre of main interest* was located in Italy whereas the Irish High Court considered the *centre of main interest* in Ireland and initiated proceedings as "main" insolvency proceedings.<sup>60</sup> The Italian extraordinary administrator appealed against the judgement of the Irish High Court. The Supreme Court stayed the proceedings by referring five questions to the CJEU concerning, inter alia, the principles of priority and mutual trust and the notion public policy in Article 26 EIR.<sup>61</sup>

By its fourth question, which the CJEU considered first, the Supreme Court asked "what the determining factor is for identifying the centre of main interests of a subsidiary company, where it and its parent have their

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<sup>56</sup> Ibid, para. 27

<sup>57</sup> Ibid, para. 18

<sup>58</sup> Ibid, paras. 19-20

<sup>59</sup> Ibid, paras. 21-22

<sup>60</sup> Ibid, paras. 22-23

<sup>61</sup> Ibid, para. 24

respective registered offices in two different Member States”.<sup>62</sup> Furthermore, the Supreme Court asked for guidance on which relative weight should be given as between on the one hand side the fact that Eurofood regularly administered its interests, in a manner ascertainable by third parties, at the location where the registered office was located, and on the other hand that the parent company Parmalat was in a controlling position.

Regarding the relation between parent company and subsidiary the CJEU pointed out in its ruling that both have separate legal identities and that debtors constituting a distinct legal entity are subject to its own court jurisdiction.<sup>63</sup>

The CJEU concluded from recital 13 of the preamble of the Insolvency Regulation that the term “*COMI*” must be identified by two criteria that are both “objective and ascertainable by third parties”. In its further findings the CJEU stresses the necessity of these two criteria which has to be fulfilled cumulatively for the purpose of ensuring legal certainty and foreseeability in regards to the appropriate venue and applicable law in insolvency proceedings.<sup>64</sup>

From the above mentioned considerations the CJEU followed that, “in determining the centre of the main interests of a debtor’s 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 the registered office is deemed to reflect”.<sup>65</sup>

The CJEU continues by its famous statement: “That could be so in particular in the case of a ‘letterbox’ company not carrying out any business

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<sup>62</sup> Ibid, paras. 24, 26

<sup>63</sup> Ibid, para. 30

<sup>64</sup> Ibid, paras. 32-33

<sup>65</sup> Ibid, para. 34

in the territory of the State in which its registered office is situated.”<sup>66</sup> This example was taken up and referred to by the CJEU in different contexts concerning e.g. cases of abuse and the fundamental freedoms such as in the case *Cadbury Schweppes*.<sup>67</sup>

The court proceeds by pointing out that the sole fact, in contrast to the mentioned sham companies, that Eurofood can be controlled by its parent company is not sufficient to rebut the presumption contained in Article 3 (1) EIR.<sup>68</sup>

In its ruling the Court does not deliver a list of substantive factors which can be regarded as sufficient or decisive to rebut the presumption laid down in the Regulation but provides pointers regarding the outer limits. If the company does not carry out any business at the place where the registered office is placed e.g. in cases of a ‘letterbox’ - company the presumption is rebuttable. The Court places special emphasis in its findings on the place where the registered office is located, i.e. where the company is “incorporated” rather than functional issues. It seems that the CJEU favours a more formal - statutory seat<sup>69</sup> - approach. That has been criticised and invoked in line with the opinion of AG Jacobs in the Eurofood decision that the focus must be on the “head office functions”<sup>70</sup>.

### cc) *Interdil*<sup>71</sup>

The case *Interdil* concerned an Italian company that transferred its registered office in 2001 from Italy to the United Kingdom where it was registered as a foreign corporation with the United Kingdom register and as

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<sup>66</sup> Ibid, para. 25

<sup>67</sup> Case C-196/04 [2006] ECR I-7995, para. 68: “If checking those factors leads to the finding that the CFC is a fictitious establishment not carrying out any genuine economic activity in the territory of the host Member State, the creation of that CFC must be regarded as having the characteristics of a wholly artificial arrangement. That could be so in particular in the case of a ‘letterbox’ or ‘front’ subsidiary (see Case C-341/04 Eurofood IFSC [2006] ECR I-3813, paragraphs 34 and 35).

<sup>68</sup> Ibid, para. 36

<sup>69</sup> See Irit Mevorach, Ibid, p. 332

<sup>70</sup> Opinion of AG Jacobs, delivered on 27 September 2005 in Case C-341/04 Eurofood IFSC [2006] ECR I-3813, para 110, affirmative: Gerard McCormack, Ibid, p. 189

<sup>71</sup> Case C-396/09, [2011] ECR I - 0000

a consequence removed from the register of companies of the Italian State. At the same time as the transfer of its registered office Interedil sold its undertaking to a third party by way of a business transfer. In July 2002 Interedil was removed from the United Kingdom register of companies while retaining property and assets in Italy. Over a year later on 28 October 2003 a creditor, the Italian company Intesa, filed a petition to open bankruptcy proceedings against Interedil in Italy.<sup>72</sup>

Interedil challenged the jurisdiction of the Italian court on the ground that as a result of the transfer of the registered office only the courts of the United Kingdom had jurisdiction. The Italian Supreme Court of Cassation took the view that the *COMI* still was in Italy by reason and as a result of various circumstances which were according to the court sufficient factors to rebut the presumptions laid down in Article 3 (1) EIR, namely

- the presence of immovable property in Italy owned by Interedil
- the existence of a lease agreement in respect of two hotel complexes and
- a contract concluded with a banking institution.<sup>73</sup>

With regards to the Eurofood decision the Tribunale di Bari had doubts as to the validity of the decision of the Supreme Court of Cassation and decided to stay the proceedings. It referred four questions to the CJEU whereas the first three questions, in essence, concerned the interpretation to be given to the term '*centre of a debtor's main interests*'.<sup>74</sup>

In its ruling the CJEU confirmed the Court's jurisdiction in *Eurofood* that the *COMI* must be identified by reference to criteria that are according to recital 13 of the preamble both objective and ascertainable by third parties<sup>75</sup> and stresses furthermore that the term "*centre of main interests*" meets the need to establish a connection with the place with which, from an objective

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<sup>72</sup> Ibid, paras. 10-12

<sup>73</sup> Ibid, paras. 13-16

<sup>74</sup> Ibid, para. 17

<sup>75</sup> Ibid, para. 49

point of view in a manner that is ascertainable by third parties has the closest link<sup>76</sup>.

The Court tries to fill the requirements for objectivity and possibility of ascertainment by third parties with substance and submits that these criteria “may be considered to be 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.”<sup>77</sup>

In its following findings the Court points out with reference to *AG Kokott*’s opinion<sup>78</sup> and the European Union legislature’s intention that greater importance has to be attached to the place in which the company has its central administration as the criterion and it follows that “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 of the company are taken, in a manner that is ascertainable by third parties, in that place, the presumption in the second sentence of Article 3 (1) of the Regulation that the centre of the company’s main interests is located in that place is wholly applicable”.<sup>79</sup>

The Court concludes in line with the opinion of *AG Kokott*<sup>80</sup> that in cases where registered office and central administration are ascertainable by third parties located at the same place, “it is not possible that the centre of the debtor company’s main interests is located elsewhere”, which means that the presumption is not rebuttable any more.<sup>81</sup>

If registered office and central administration are, from the viewpoint of third parties at different places the presumption laid down in Article 3 (1) EIR can still be rebutted. In this context the ECJ refers again to the *Eurofood* decision and confirms the line of the Court that the presumption

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<sup>76</sup> Ibid, para. 58

<sup>77</sup> Ibid, para. 49

<sup>78</sup> Delivered on 10 March 2011, para. 69

<sup>79</sup> Ibid, para. 48

<sup>80</sup> Ibid, para. 69

<sup>81</sup> Ibid, para. 50

“can be rebutted 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 the registered office is deemed to reflect.”<sup>82</sup>

Then, the ECJ tackles the question which factors are decisive. The factors have to be objective, ascertainable by third parties and sufficient, to rebut the presumption. All relevant factors such as all places in which the debtor’s company pursues economic activities and all those in which it holds assets, provided that those places are ascertainable by third parties, have to be taken into consideration and have in accordance with *AG Kokott’s* observations<sup>83</sup> to be “assessed in a comprehensive manner”.<sup>84</sup>

With regards to the circumstances of the case the Court concluded that immovable property, lease agreements, a contract with a financial institution can be regarded as objective and as matters in the public domain as factors that are ascertainable by third parties. According to the Court these factors “cannot be regarded as sufficient factors to rebut the presumption unless 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 State.”<sup>85</sup>

In its following findings the CJEU deals with the question of the relevant date for the purpose of locating the *centre of main interests*. Concluding from its ruling in *Staubitz-Schreiber* the Court stated that for the purpose of determining the court having jurisdiction to open the main insolvency proceedings the last place in which the COMI was located at the date on which the request to open insolvency proceedings was lodged is relevant.

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<sup>82</sup> Ibid, para. 51

<sup>83</sup> Ibid, para. 51

<sup>84</sup> Ibid, para. 52

<sup>85</sup> Ibid, para. 53

Then the Court points out that this is also valid in cases where the company did not exist anymore.<sup>86</sup>

Unlike *AG Kokott*<sup>87</sup> the Court did not touch the issue of “*forum shopping*”. A reason for this might be that as *AG Kokott*<sup>88</sup> noted that indications for an abusive conduct with regards to recital 4 of the preamble did not exist in the case at hand. On the other hand side it might indicate the Court’s view that moving a *COMI* for the purpose to wind-up in another Member State (here: UK) is accepted behavior even though the debtor takes advantage of another insolvency system.

The Court’s ruling in *Interdil* can be summarized as followed:

The *COMI* is according to Article 3 (1) EIR presumed to be where the registered office is. The Court strengthens the coincidence of registered office and central administration. “Central administration” is defined by the Court as the place where the bodies responsible for the management and supervision of a company are located and management decisions of the company are taken. When registered office and central administration from the viewpoint of third parties based on objective factors coincide the presumption laid down in the Regulation is not rebuttable anymore. If there is a discrepancy between registered office and central administration the legal presumption becomes relevant and the question arises at which place the company’s closest connecting link can be determined. This has to be assessed by objective factors ascertainable for third parties in a comprehensive manner.

The Court’s ruling indicates that a shift from the previous formal statutory approach towards a real seat approach has been taken place.

**dd) *Rastelli***<sup>89</sup>

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<sup>86</sup> *Ibid*, para. 81

<sup>87</sup> *Ibid*, para. 72

<sup>88</sup> *Ibid*, para. 72

<sup>89</sup> Case C 191/10, [2011] ECR I - 0000

In the *Rastelli* case the French company Médiasucre with its registered office in Marseille was put into liquidation by judgement of the commercial Court in Marseille and insolvency proceedings were opened in France. The appointed French liquidator requested that the company Rastelli which had its registered office in Robbio, Italy be joined to the insolvency proceedings against Médiasucre on the ground that the property of the two companies was intermixed.<sup>90</sup> The application for joinder was rejected by the Commercial Court on the ground that it declined jurisdiction. The decision was appealed by the French liquidator. The Cour de Cassation stayed the proceedings and referred two questions both related to issues regarding the action for joinders to cross-border insolvency proceedings pursuant to national law to the Court of Justice for a preliminary ruling.<sup>91</sup> These questions required the CJEU to state where the debtor's *centre of main interests* was situated, in France or in Italy, and which impact the fact that the property of the two companies has become intermixed had on determining the *COMI*.

The CJEU confirmed in its ruling comprehensively the findings of the Court in *Interdil* and *Eurofood*<sup>92</sup> by applying the principles established by the Court in these two decisions on the case at hand and on situations of intermingled accounts: "... the mere finding that the property of those companies has been intermixed is not sufficient to establish that the centre of main interests of the company concerned by the action is also situated in that other Member State. In order to reverse the presumption that an overall assessment of all the relevant factors allows it to be established, in a manner ascertainable by third parties, ..."<sup>93</sup>

#### **4) Conclusion**

It can be concluded from the analysis of the rulings of the CJEU in *Staubitz-Schreiber*, *Eurofood*, *Interdil* and *Rastelli* that the jurisprudence regarding

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<sup>90</sup> Ibid, paras. 8-10

<sup>91</sup> Ibid, paras. 11-12

<sup>92</sup> Ibid, paras. 31-39

<sup>93</sup> Ibid, para. 39

definition and scope of the notion “*COMI*” has developed and the scope has become narrower. A change can be noticed in the Court’s approach towards the importance of the notion “center of administration” and the coincidence of “registered office” and “central administration” has been strengthened. Only in cases where a discrepancy between these two locations exists the legal presumption becomes relevant and the closest connecting link assessed by objective factors ascertainable for third parties has to be determined in a comprehensive manner. Decisive for determining the *COMI* is the place where the *centre of main interests* was situated before the request to open insolvency proceedings was lodged.

## **B) *Forum Shopping* in the landscape of cross-border insolvency procedures**

In this chapter it shall be scrutinized the notion “*forum shopping*” in the context of cross-border insolvency proceedings and of particular interest is the question whether *forum shopping* can be regarded as abusive conduct.

### **I) The notion *forum shopping* – general approach**

The term *forum shopping* is described in *Black’s Law Dictionary*<sup>94</sup> as a conduct that “occurs when a party attempts to have his action tried in a particular court or jurisdiction where he feels he will receive a most favourable judgement or verdict”. The labelling of forum selection as *forum shopping* has been criticised as misleading<sup>95</sup> and pejorative<sup>96</sup> by trivializing and criticising the strategic choices regarding the best forum as “unfair and abusive”<sup>97</sup>.

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<sup>94</sup> Bryan A. Garner, 1999, p. 590, see also Harald Koch, *International Forum Shopping and Transnational Lawsuits*, The Geneva Papers, 2006, p. 294

<sup>95</sup> Debra Lyn Bassett, *The Forum Game*, North Carolina Law Review, 01/2006, Volume 84, Issue 2, p. 333; see also Harald Koch, *Ibid*, pp. 293-294

<sup>96</sup> AG Colomer, opinion in *Staubitz-Schreiber*, *Ibid*, para. 70

<sup>97</sup> Debra Lyn Bassett, *The Forum Game*, North Carolina Law Review, 01/2006, Volume 84, Issue 2, p. 333; see also Harald Koch, *Ibid*, pp. 293-294

By studying the relevant legal literature and jurisdiction, it is noticeable that the term is used in regards to particular areas of law such as patent *forum shopping*, insurer's *forum shopping* or *forum shopping* in insolvency proceedings. It can describe a conduct with implications only for the choice-of law rules on national level or for the forum selection in the "international", "transnational" or "European" judicial area.

From a normative perspective a distinction between "good" and "bad" or "abusive" and "non-abusive" forum shopping is drawn.<sup>98</sup>

## II) Forum shopping in the context of insolvency matters

*Webb/Butter*<sup>99</sup> describe *forum shopping* in the context of the Insolvency Regulation as "identification of the best jurisdiction for the restructuring or insolvency of a given company and the direction of matters accordingly".

The 4<sup>th</sup> recital of the preamble deals with the notion of *forum shopping* and stipulates: "It is necessary for the proper functioning of the internal market 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).“ According to the preamble the term *forum shopping* is tied to the transfer of assets or judicial proceedings with the purpose to benefit from a more favourable legal position. This definition seems to be incomplete and partly misleading and does not comprise expressly the transfer of the *COMI*. The transfer of assets is in most of the cases part of a *COMI* transfer but not a mandatory component – it might be conceivable that the debtor remains or transfers bank accounts in a Member State other than the Member State of the *COMI*. On the other hand it has to be considered that the transfer of assets in case of natural person very often - in contrast to companies or legal entities - coincide with a transfer of the

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<sup>98</sup> See Louise Webb/Matthew Butter, Insolvency proceedings, Shopping for the best forum, p.38 available at [http://www.bakermckenzie.com/files/Publication/7bc7b207-1f7c-47ab-8e16-8c7f48e3b652/Presentation/PublicationAttachment/65546aa3-0f81-4843-b31c-b4540f565846/ar\\_london\\_insolvencyproceedings.pdf](http://www.bakermckenzie.com/files/Publication/7bc7b207-1f7c-47ab-8e16-8c7f48e3b652/Presentation/PublicationAttachment/65546aa3-0f81-4843-b31c-b4540f565846/ar_london_insolvencyproceedings.pdf)

<sup>99</sup> Webb, Louise/Butter,Matthew, Ibid, p.37

*COMI*<sup>100</sup>. The *Virgos/Schmit* report does not entail an answer to this discrepancy and states with regards to the aspect of *forum shopping* (p. 12): "Unlike contracts, insolvencies do not form an area of the law where private spontaneous cooperation can compensate for the lack of a common legal framework at the international level. Institutional co-operation is needed to provide a certain legal order to avoid incentives for the parties to transfer disputes or goods from one country to another, seeking to obtain a more favorable legal position ("forum shopping"), or to realise their individual claims independently of the costs which this may entail for the creditors as a whole or to the going concern value of the debtor's firm."

It seems most likely that recital 4 of the preamble refers to assets and associated judicial proceedings which are according to Article 5 – 15 EIR exempted from Article 3 (1) EIR in conjunction with Article 4 EIR and from the applicability of the law of the *lex fori concursus*.

It can be concluded from the above that *forum shopping* in the meaning of the preamble does not explicitly refer to cases of *forum shopping* where a company transfers its *COMI* into a another Member State for the purpose to benefit from another insolvency regime. In this wider sense, the term is understood and used in the context of this examination.

### **1) Admissibility of COMI-shifts and time aspects**

A requisite of "*forum shopping*" is the transfer of the *COMI*. It has to be pointed out that a *COMI* shift not always is carried out for the purpose of "shopping for the best insolvency forum". A *COMI* shift can occur as a logical consequence of a company's transfer into another Member State e.g. for economical reasons only. In *Staubitz-Schreiber* Ms Staubitz-Schreiber had transferred her residence after her request to open insolvency proceedings to Spain of private reasons and not for the purpose to change the appropriate jurisdiction. For this reason AG Colomer has stated in his opinion in *Staubitz-Schreiber*<sup>101</sup> that this case actually did not concern

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<sup>100</sup> Situation in *Staubitz-Schreiber*

<sup>101</sup> *Ibid*, para. 77

forum shopping, “since Ms Staubitz-Schreiber herself argues for the jurisdiction of the court with which she filed the request for the opening of the proceedings”. It can be agreed with the view of *AG Colomer* as the notion “*forum shopping*” is a subjective element inherent directed on the purpose to benefit.

In this case and in the following cases *Eurofood*, *Interdil* and *Rastelli* the CJEU did not call into question whether or not a transfer of the *COMI* is admissible or not but evidently assumes that a change of the *COMI* location is in general legally admissible.<sup>102</sup> *AG Kokott* points out in her opinion in *Interdil*<sup>103</sup> that the legislator when adopting Article 3 EIR accepted deliberately that subsequent *COMI* shifts are possible and admissible. To strengthen her statement *AG Kokott* refers to Article 6 of the draft 1980 EEC-bankruptcy convention (1980)<sup>104</sup> which stipulated expressly that the debtor was not allowed to transfer the *COMI* during a period of six month before the opening of the insolvency proceedings. With the decision not to adopt Article 6 of the Draft 1980 EEC Bankruptcy Convention the European legislator intended to allow (subsequent) *COMI* shifts. It has to be pointed out that a different outcome obviously would contravene the freedom of establishment.

Of crucial importance in *Staubitz-Schreiber* was the point of time of the *COMI* shift and according to the CJEU a *COMI*-shift is not possible and legally admissible with regards to the objectives of the Insolvency Regulation after the request for opening insolvency proceedings has been lodged. The Court’s approach which has been confirmed in *Interdil* cannot be called into question with regards to in particular the fundamental goal of the Regulation to promote that cross-border insolvency proceedings operate efficiently and effectively.

Thus, it has to be concluded that *COMI* shifts (generally) are possible before the lodging of the request to open insolvency proceedings.

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<sup>102</sup> See in particular: *Interdil*, *Ibid*, para. 56

<sup>103</sup> *Ibid*, para. 47

<sup>104</sup> Published in Gerhard Kegel/Jürgen Thieme, *Vorschläge und Gutachten zum Entwurf eines EG-Konkurrenzverfahrens*, p. 48

## 2) Is *shopping* for the best insolvency *forum* “good” or “bad”?

AG Colomer takes in his opinion in *Staubitz-Schreiber* the view that *shopping* for the best insolvency *forum* cannot - *per se* - be considered as abusive conduct that is illegal and that has to be avoided by Community law. Instead, the effects of the conduct has to be scrutinised and where it leads to unjustified equality between the parties it has to be evaluated as unlawful. AG Colomer submits: “If forum shopping is defined as the search by the plaintiff for the international jurisdiction most favourable to his claims, there is no doubt that, in the absence of legal uniformity in the different private international law systems, that phenomenon must be accepted as a natural consequence which is not open to criticism”. Forum shopping is merely the optimisation of procedural possibilities and it results from the existence of more than one available forum, which is in no way unlawful. However, where forum shopping leads to unjustified inequality between the parties to a dispute with regard to the defence of their respective interests, the practice must be considered and its eradication is a legitimate objective”.<sup>105</sup>

### a) Abuse vs. use of rights in EU law - Forum shopping as combating abuse of the Insolvency Regulation?

The concept of abuse<sup>106</sup> of law is well known in many democratic legal systems and has attracted increasingly attention in the European judicial landscape concerning different areas of Union law such as in the field of tax law<sup>107</sup>, social security matters<sup>108</sup> or in the agricultural policy<sup>109</sup>, regarding

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<sup>105</sup> AG Colomer, opinion in Case C-1/04 *Staubitz-Schreiber* para. 71-73

<sup>106</sup> See in general, Takis Tridimas, Abuse of Right inn EU-Law: Some reflections with particular Reference to Financial Law, available at <http://ssrn.com/abstract=1438577>, pp. 1 ff.

<sup>107</sup> Case C-255/02 *Halifax plc, Leeds Permanent Development Service Ltd and County Wide property Investments Ltd v Commissioners of Customs Excise* [2006] ECR I-01609; Case C-196/04 *Cadbury Schweppes, OLC v Commissioners of Inland Revenue* [2006] ECR I-7995

<sup>108</sup> Case C-206/94 *Palletta* [1996] ECR I-2357

<sup>109</sup> Case C-8/92 *General Milk* [1993] ECR I-779; Case C-110/99 *Emsland-Stärke* [2000] ECR I-11569.

freedom to supply services<sup>110</sup>. In European company law the quaternary *Centros*, *Überseering*, *Inspire Art* and *Cartesio*<sup>111</sup> are of particular importance. The first reference to abusive practices labelled as “avoidance” has been made by the CJEU in the context of free movement of services in the case *Van Binsbergen*<sup>112</sup>.

The concept of abuse of rights as a general principle has been developed primarily on national level in the private laws of continental Member States<sup>113</sup>. By examining the case law of the CJEU it is noticeable that the abusive approach of the CJEU is far from being clear or can be considered as a “general (European) legal concept”<sup>114</sup>. In *Koefoed*<sup>115</sup> the CJEU referred for the first time to abuse as a general principle of Community law and in *Kefalas* the Court stated that Community law cannot be relied on for abusive or fraudulent ends<sup>116</sup>.

First steps towards defining the elements of abuse established the CJEU in the case *Emsland-Stärke*<sup>117</sup> by providing a combined formula consisting of an objective and a subjective element: “A finding of an abuse requires, 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. It requires, second, a

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<sup>110</sup> Case C-33/74 *Van Binsbergen v Bedrijfsvereniging Metaalnijverheid* [1974] ECR 1299, paragraph 13, and Case C-23/93 *TV 10 v Commissariaat voor de Media* [1994] ECR I-4795, paragraph 21

<sup>111</sup> See C) I) 2)

<sup>112</sup> Case C-33/74 *Van Binsbergen* [1974] ECR 1299

<sup>113</sup> Horst Eidenmüller, *Abuse of Law in the Context of European Insolvency Law*, available at SSRN: <http://ssrn.com/abstract=1353932>, p. 7; Takis Tridimas, *Ibid*, pp. 1ff.

<sup>114</sup> Horst Eidenmüller, *Abuse of Law in the Context of European Insolvency Law*, *Ibid*, p. 7

<sup>115</sup> Case C-321/05 *Kofoed v Statteministeriet*, [2007] ECR I-5795 88

<sup>116</sup> Case C-367/96 *Kefalas and Others v Greek State and Others* [1998] ECR I-2843, paragraph 20 with reference to, in particular, regarding freedom to supply services, Case 33/74 *Van Binsbergen v Bedrijfsvereniging Metaalnijverheid* [1974] ECR 1299, paragraph 13, and Case C-23/93 *TV 10 v Commissariaat voor de Media* [1994] ECR I-4795, paragraph 21; regarding the free movement of goods, Case 229/83 *Leclerc and Others v 'Au Blé Vert' and Others* [1985] ECR 1, paragraph 27; regarding freedom of movement for workers, Case 39/86 *Lair v Universität Hannover* [1988] ECR 3161, paragraph 43; regarding the common agricultural policy, Case C-8/92 *General Milk Products v Hauptzollamt Hamburg-Jonas* [1993] ECR I-779, paragraph 21; and regarding social security, Case C-206/94 *Brennet v Paletta* [1996] ECR I-2357, paragraph 24).

<sup>117</sup> Case C-110/99 *Emsland-Stärke* [2000] ECR I-11569

subjective element consisting in the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining it.”<sup>118</sup>

It has to be pointed out that the CJEU hasn't had to deal with a case of abuse in the context of cross-border insolvency proceedings yet. Neither the situation in *Staubitz-Schreiber* was characterized by an abusive conduct nor in the *Interdil* case as AG Kokott observed. On the other hand it has to be stressed that as mentioned before in the *Cadbury Schweppes* case which dealt with the question of abuse in the field of tax law a reference was made of the CJEU to the *Eurofood* case to underline that wholly artificial arrangement such as letterbox companies do not fall within the ambit of the freedom of establishment (see chapter C on this).

By applying the twofold test of the CJEU it has to be determined the objectives of the legal provision (see A) I ) which is supposed to be misused. Questionable is whether the purpose of avoidance of “*forum shopping*” with regards to recital 4 of the preamble is one of the main objectives of the Regulation. According to *Eidenmüller* “*forum shopping*” is “not the paramount goal”<sup>119</sup> of the Regulation and adds that preventing *forum shopping* by applying the abuse of law concept introduces legal uncertainty. It has to be considered, too, that *forum shopping* in the US judicial field and also according to the Brussels Convention is legitimate and contains admissible strategic choices.

From this, it can be concluded that the concept of abuse is not applicable and “*forum shopping*” cannot be regarded as combating abuse of the Insolvency Regulation.

## **b) Conclusion**

Moreover, in accordance with the view of AG Colomer it has to be decided on a case-by-case basis whether the debtor's conduct leads to an unjustified

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<sup>118</sup> Ibid, paras. 52-53

<sup>119</sup> Abuse of law in the Context of European Insolvency Law, pp. 12-13

inequality with regards to the main goals of the Insolvency Regulation. Furthermore it has to be stated that *forum shopping* seems to be abusive and a transfer of the *COMI* impossible in cases where the construct which has been formed in the Member State of destination is “wholly artificial” such as in the case of letterbox companies. Intrinsically, it does not necessarily need the concept of abuse for denying a successful transfer of the *COMI* and the jurisdiction of the Member State of destination as the artificial construct does not fulfill the requirements of a *centre of main interest*.

### **C) Insolvency *forum shopping* from a company law perspective – Corporate mobility and Freedom of establishment**

In this section two main issues shall be scrutinized: Firstly, it shall be examined whether insolvency “*forum shoppers*” when transferring its *COMI* are beneficiaries of the freedom of establishment with the consequence that the transferring company (in distress) can invoke the fundamental freedom. It might be questionable if the transfer of *COMI* for the purpose to go bankrupt or to wind-up in another Member State is covered by the concept of establishment, or to put it more precisely, if – in cases of re-incorporation the newly formed company fulfils the requirement of an establishment due to Article. 49, 54 TFEU. The next issue which is of crucial importance is the question whether a *COMI* transfer for the purpose to benefit from a more advantageous insolvency regime render it impossible to benefit from the freedom of establishment. In this context the concept of abuse in relation to the freedom of establishment for companies plays a significant role.

Secondly, it shall be scrutinized to which extent insolvency “*forum shopping*” from a company law perspective is possible.

### **D) Freedom of establishment of companies, Article 49, 54 TFEU**

The freedom of establishment, set out in Article 49 (ex Article 43 TEC) of the Treaty on the Functioning of the European Union is one of the fundamental principles of Union Law<sup>120</sup> which is of central importance to the effective functioning of the Internal Market.

Article 49 TFEU read in conjunction with Article 54 (ex Article 48 TEC) TFEU confers on companies or firms<sup>121</sup> who have “their registered office, central administration or principal place of business within the Union” and who have been “formed in accordance with the law of a Member State” the right of free establishment within the European Union as for natural persons who are nationals of a Member State<sup>122</sup>. In order to establish a genuine internal market and to ensure corporate mobility Article 49 TFEU aims to abolish any restrictions on the freedom of establishment.

According to Article 49 TFEU a distinction is drawn between the right of “primary” establishment and “secondary” establishment, and the prohibition of restriction applies equally to both forms of establishment. “Primary” establishment comprises e.g. the incorporation of a company and “secondary” establishment concerns the setting up of agencies, branches or subsidiaries in another Member State. Within the context of Article 54 TFEU, in defining the companies which enjoy the right of establishment, the Treaty “placed on the same footing, as connecting factors, the registered office, central administration and principal place of business of a company”.<sup>123</sup>

## 1) Concept of “establishment”

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<sup>120</sup> Case C-55/94 Gebhard v Consiglio dell’Ordine degli Avvocati e Procuratori di Milano [1995] ECR I-4165; Case C-2/74 Reyners v Belgium [1974] ECR 631

<sup>121</sup> According to Article 54 TFEU, ‘companies or firms’ means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those, which are non-profit-making.

<sup>122</sup> Right of establishment of individuals has been clearly recognised in the Community, see secondary Community legislation such as Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the European Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/22/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (L 158/77, 30.04.2004)

<sup>123</sup> Case C-210/06 Cartesio Oktató és Szolgáltató bt, [2008] ECR I-9641 para. 106

The concept of establishment within the meaning of Art. 49 TFEU involves “the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period.”<sup>124</sup> In *Gebhard* the CJEU points out that – in distinction to freedom to provide services – essential features of the concept of establishment are that the economic activity is carried on a “stable and continuous” basis.<sup>125</sup>

According to the CJEU there is economic activity if the activities concerned are carried out in return for payment and are “effective and genuine” and not “purely marginal and ancillary”.<sup>126</sup> In *Cadbury Schweppes* the CJEU takes the view with reference to the *Eurofood* decision that particular in the case of a 'letterbox' or 'front' subsidiary a genuine economic activity is not carried out and thus the requirement of an economic activity not fulfilled.<sup>127</sup>

According to the ruling of the CJEU if there is an actual establishment must be determined on the basis of “objective factors which are ascertainable by third parties with regard, in particular, to the extent to which the (company in the case at hand: CFC) physically exists in terms of premises, staff and equipment”.<sup>128</sup>

It seems questionable whether these criteria are fulfilled in the case of insolvency *forum shopping* considering that a company might only be transferred for purposes of winding-up in a another Member State whose law is more advantageous. Neither the crucial features of a “stable and continuous basis” nor the element of an “indefinite period” are in this case fulfilled, and *strictu sensu* the answer has to be in the negative.

It has to be pointed out that the jurisdiction of the CJEU with regards to the definition and scope of the fundamental freedom of establishment is characterized by a liberal approach aimed at removing obstacles and abolishing restrictions. The requirements for getting a beneficiary of the

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<sup>124</sup> Case C-221/89 *Factortame* [1991] ECR I-3905, para. 20; Case C-196/04 *Cadbury Schweppes* [2006] ECR I-7995, para. 54

<sup>125</sup> Case C-55/94 *Gebhard* [1995] ECR I-4165, para. 25; see also Case C-2/74 *Reyners v Belgium* [1974] ECR 631 para 21, Case C-196/04 *Cadbury Schweppes*, *Ibid.*, para. 53

<sup>126</sup> Case C-53/81 *Levin v Staatssecretarías van Justitís*, [1982] ECR 1035; para. 17; Case C-176/96 *Lehtonen* ECR I 2681, para. 44

<sup>127</sup> Case C-196/04, *Ibid.*, para. 68

<sup>128</sup> Case C-196/04, *Ibid.*, para. 67

freedom of establishment are low<sup>129</sup>. Cases such *Segers*, *Centros* as well as *Inspire Art* reflect this approach and the Court's tendency to apply a broad scope of the fundamental freedom. In the *Segers* case the ECJ ruled that the application of the freedom of establishment "requires only that the companies be formed in accordance with the law of a Member State and have their registered office, central administration or principle place of business within the Community. Provided that those requirements are satisfied, the fact that the company conducts its business through an agency, branch or subsidiary solely in another Member State is immaterial".<sup>130</sup> This approach has been confirmed in *Centros*<sup>131</sup> and *Inspire Art*<sup>132</sup> and the scope at the same time broadened in respect of cases of abuse (see C) I) 2)). Regarding the time aspects "indefinite period" and "stable and continuous basis" it has to be considered that these criteria have the function to distinguish the exercise of the right of establishment from the provision of services which contains activities of a temporary nature.<sup>133</sup> *AG Kokott* points out in *Interedil* without putting it into question that the transfer of a company in another Member State for purposes of winding-up is also covered by the fundamental freedoms. It can be added that formation and dissolution are inextricably linked to the existence of the company and that the winding-up or liquidation therefore forms part of the company's "activity".

Thus, it can be concluded that the freedom of establishment comprises the transfer of a company for purpose to go bankrupt in another Member State.

## **2) *Forum shopping* with regards to the freedom of establishment and abuse of rights**

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<sup>129</sup> See also Evers/de Graaf, *Limiting Benefit Shopping: Use and Abuse of EC Law*, EC Tax Review, December 1, 2009, Vol. 18, No. 6, pp. 279-298, available at SSRN: <http://ssrn.com/abstract=1537233>, p. 10

<sup>130</sup> Case C-79/85 [1986] ECR 2375, para. 16

<sup>131</sup> *Ibid.*, para. 17

<sup>132</sup> Case C-167/01 *Kamer von Koophandel en Fabriken voor Amsterdam v Inspire Art Ltd.*, [2003] ECR, I-10155, para 95

<sup>133</sup> See also Craig/de Burca, *EU-Law* p. 766, Evers/de Graaf, *Ibid.*, p.5

Since *Centros* the question to what extent companies formed under the law of a Member State may be able to enjoy the right to freedom of establishment has stimulated an intensive academic debate within the field of company law.<sup>134</sup> The *Centros* ruling in 1999 turned out to be a landmark decision on the interpretation of the freedom of establishment<sup>135</sup>, followed by *Überseering*<sup>136</sup>, *Inspire Art*<sup>137</sup> and *Cartesio*<sup>138</sup>. These four major cases illustrate the CJEU's attitude towards abusive conduct in company law and the scope of the fundamental freedom.

The concept of abuse<sup>139</sup> in relation to the freedom of establishment for companies has been developed in *Centros*<sup>140</sup>. In this *Centros* case a Danish couple resident in Denmark formed a limited liability company in England with the sole purpose to carry out business activities in Denmark and to circumvent the Danish rules on minimum share capital. The Danish Authorities refused to register the branch and Centros appealed against the decision.

It is important to note that the CJEU in *Centros* took a very liberal, pro-free market view<sup>141</sup> promoting a free and most suitable choice of company law on the base of a broad scope of the fundamental freedom on the one hand side and, corollary a narrow concept of abuse on the other hand side.

The CJEU pointed out that the incorporation of a company in a Member State “whose rules of company law seem (...) the least restrictive and to set

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<sup>134</sup> C.Gerner-Beuerle and Michael Ibid, pp. 1ff; Eddy Wymeersch, *Centros: A landmark decision in European Company Law*, WP 1999-15, pp. 1 ff; Wulf-Henning Roth, *From Centros to Ueberseering: Free movement of companies, private international law, and Community law*; *The International and Comparative Law Quarterly*, Vol. 52, No. 1, pp. 177 ff; Catherine Holst, *European Company Law after Centros: Is the EU on the Road to Delaware?*, 8 Colum. J. Eur. L. 2002, pp. 323 ff.

<sup>135</sup> Wolf-Georg Ringe, *Sparking Regulatory Competition in European Company Law: The Impact of the Centros Line of Case Law and its Concept of 'Abuse of Law'*, in de la Feria/Vogenauer, *Prohibition of Abuse of Law*, 2011, p. 109

<sup>136</sup> Case C-208/00 *Überseering B.V. v Nordic Construction Baumanagement GmbH [NCC]*, [2002] ECR, I-9919.

<sup>137</sup> Case C-167/01 *Kamer van Koophandel en Fabriken voor Amsterdam v Inspire Art Ltd.*, [2003] ECR, I-10155.

<sup>138</sup> Case C-210/06 *Cartesio Oktató és Szolgáltató bt*, [2008] ECR I-9641

<sup>139</sup> See in general Takis Tridimas, *Ibid*, p. 1ff.

<sup>140</sup> See Wymeersch, Eddy, *Centros: A landmark decision in European Company Law*, WP 1999-15, pp. 7 - 10

<sup>141</sup> Tridimas, *Ibid*, p. 15

up branches in other Member States cannot, in itself, constitute an abuse of the right of establishment". The court emphasized that it is inherent in the exercise of the freedom of establishment to form a company in accordance with the law of a Member State and to set up branches in other Member States. The Courts adds by confirming its ruling in *Segers*<sup>142</sup> that the fact that a company does not conduct any business in the Member State in which it has its registered office and pursues its activities only in the Member State where its branch is established is not sufficient to prove the existence of abuse or fraudulent conduct which would entitle the latter Member State to deny that company the benefit of the provisions of Community law relating to the right of establishment.<sup>143</sup>

In carrying out the proportionality test, the CJEU comes to the conclusion that in the case at hand the freedom of establishment prevails over the reasons put forward by the Danish authorities regarding the purpose of creditor protection and accepted in effect that it was worth favoring the freedom of establishment to the detriment of the creditor's commercial risk<sup>144</sup>.

Finally, the Court pointed out that combating fraud does not justify the host State to refuse to register a branch of a company formed in accordance with the law of the Member State of origin but the host State is not precluded from adopting any appropriate measure for preventing or penalising fraud, either in relation to the company itself or in relation to its members, where it has been established that they are in fact attempting to evade their obligations towards private or public creditors established on the territory of a Member State concerned.

It can be followed from this statement that: firstly, on national level restrictions on the freedom of establishment with regards to abusive or fraudulent behavior are allowed, secondly, that the assessment whether a conduct is abusive or not has to be carried on a case-by-case basis and that

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<sup>142</sup> Case C-79/85 *Segers* [1986] ECR 2375, para. 16

<sup>143</sup> *Ibid*, para. 29

<sup>144</sup> *Tridimas*, *Ibid*, p. 15

(private or public) creditor protection<sup>145</sup> might be a legitimate interest provided that it can be proved that the company attempted to evade their obligation toward creditors.

This tendency of the CJEU to a liberal approach continued and of deciding in favour of the freedom of establishment in cases of allegedly “abusive” behaviour. In *Überseering* the CJEU was confronted with the compatibility of the real seat theory applied in Germany pursuant to which a company that had transferred its head office into Germany could not have legal personality and therefore could not be party to a legal proceeding. The Court ruled that the host Member State has to accept the legal capacity and the capacity to be a party to legal proceedings. Restrictions may be in certain circumstances and subject to certain conditions relating e.g. to the protection of creditors or minority shareholders justified but they are not able to justify the denial of the legal capacity.<sup>146</sup> In *Inspire Art* the CJEU had to deal with a situation of circumvention of national rules similar to the *Centros* case. The company Inspire Art was formed in the United Kingdom for the sole purpose to carry out business activity in the Netherlands and to circumvent the Netherlands’ company law which lays down stricter rules with regard in particular to minimum capital rules and the imposition of personal liability of directors. The Court confirmed its previous ruling and held that Inspire Art was a beneficiary of the freedom of establishment, and stated unequivocally: “The reasons for which a company chooses to be formed in a particular Member State are, save in the case of fraud, irrelevant with regard to application of the rules on freedom of establishment.”<sup>147</sup>

The last decision in the *Centros* – line case law was *Cartesio*<sup>148</sup>. In *Cartesio* the CJEU had to scrutinize a Hungarian rule forbidding the relocation of a company’s real seat, i.e. the central administration to Italy while retaining its status as a company governed by Hungarian law with its compatibility with

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<sup>145</sup> To the concern of creditor protection, see Wulf-Henning Roth., Ibid, pp. 201-202

<sup>146</sup> Ibid, paras. 92-93

<sup>147</sup> Ibid, para. 95

<sup>148</sup> See in general C.Gerner-Beuerle and Michael Schillig, Ibid, pp. 1ff

the freedom of establishment. The Court held that the Member State of origin under which a company is incorporated has the right to hinder the transfer of the company's seat to another Member State whilst retaining its status as a company governed by the law of the Member State of incorporation.<sup>149</sup>

*Ringe* points out that more importantly with regards to the concept of abuse in company law in the context of *Cartesio* is *AG Maduro's* perspective on potential abuse of the freedom of establishment.<sup>150</sup>

*AG Maduro* takes the view that according to the case law of the CJEU the distinction between legal behaviour and abuse can be found in the comparison between the setting up of a company for the mere purpose of benefiting from more favourable legislation on the one hand and "wholly artificial arrangements" on the other.<sup>151</sup>

The case law indicates that choice of law by circumventing of national rules is covered by the freedom of establishment. *Forum shopping* in the sense of benefiting from the best insolvency law regime is an expression of this choice of law rule and therefore covered by Art. 49, 54 TFEU.

## **II) Transfer of COMI from a company law perspective and in consideration of the jurisdiction of the CJEU**

As it had been shown above, due to Article 3 (1) EIR the extent of forum shopping is dependent on the scope of the term "*centre of main interests*". Key elements are the "registered office" and the "central administration". According to the CJEU the presumption is un rebuttable if registered office and central administration coincide. *Forum shopping* by transferring both registered office and central administration is from a company law perspective not problematic. It requires the winding-up of the company in

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<sup>149</sup> Ibid, para. 124

<sup>150</sup> Wolf-Georg Ringe, Sparking Regulatory Competition in European Company Law, Ibid, p. 111

<sup>151</sup> Critical Wolf-Georg Ringe, Sparking Regulatory Competition in European Company Law, Ibid p. 113

the State of origin and the re-incorporation in the host State and is regarded as possible. It has to be pointed out that *forum shopping* in this case of winding-up and re-incorporation is accompanied by high costs as well as administrative burdens and it can be regarded as time-consuming.

Problematic are case constellations where the debtor intends to move the registered office or the real seat understood as the “centre of administration” into another Member State.

### **1) General thoughts regarding corporate mobility, establishment and transfer of a company’s registered office or real seat**

In the *Centros* case the CJEU has introduced free choice with respect to the state of incorporation and hence the substantive company law regime<sup>152</sup> and its ruling, followed by *Überseering* and *Inspire Art* has stimulated cross-border mobility<sup>153</sup>.

Thus, newly formed companies may incorporate in a Member State of choice which has the most favorable company or bankruptcy law regime. The interest among companies to profit from this choice and to establish or to move to a Member State with the best and less restrictive rules is high.

To attract investors and banks this choice is of crucial importance. For instance Member States with a good insolvency law and efficient debt recovery system in bankruptcy and creditor protection gain trust and give better access to finance.<sup>154</sup>

Once incorporated, the choice has been made and the question occurs whether and how this choice might be altered. It has to be differentiated between the choice of the corporate law regime and the choice of the insolvency system which has its connecting factor in Article 3 in conjunction with Article 4 EIR.

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<sup>152</sup> Luca Enriques/ Martin Gelter, Regulatory Competition in European Company Law and Creditor Protection, European Business Organization Law Review (EBOR), 03/2006, Volume 7, Issue 1, p. 418

<sup>153</sup> Joseph McCahery, Creditor Protection in a Cross-Border Context, European Business Organization Law Review 7, 2006, p. 457

<sup>154</sup> See, Commission Staff Working Document, Impact assessment on the Directive on the cross-border transfer of registered office from 12.12.2007, p. 13

Due to the absence of harmonization at EU-level in the field of substantive company law “the legislation of the Members States” as the CJEU in the case *Daily Mail and General Trust*<sup>155</sup> stated “varies widely in regard to both the factor providing a connection to the national territory required for the incorporation of a company and the question whether a company incorporated under the legislation of a Member State may subsequently modify that connecting factor”.

Economic mobility of companies is influenced by the substantive law of the Member States and their approach to what extent “moving out” and “moving in” of legal entities is possible. Two main approaches can be distinguished with regard to the applicable company law including the formation, existence and dissolution of legal entities: the incorporation theory and the real seat theory.<sup>156</sup> These different approaches have a direct impact on the principles governing the transfer of a company's registered office or real seat to another Member State.

## **2) Traditional approaches of the Member States**

### **a) Incorporation Theory**

The objective connecting factor of the incorporation theory is "the place of incorporation". Applicable company law is linked to the country of the company's incorporation (registration), according to which the company is governed by the law of the country where it is incorporated or registered.<sup>157</sup>

The internal affairs of the company such as rules on corporate governance, relation between shareholders or the existence and dissolution of the company are determined and regulated by the law of the State of incorporation.<sup>158</sup> Generally, it can be said that a cross-border transfer of a company's actual centre of administration or head office between Member States applying the incorporation theory is possible and allowed without

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<sup>155</sup> Para. 20, confirmed in *Cartesio* para. 105

<sup>156</sup> Some Member States have adopted a mixed system having the characteristics of both of the mentioned approaches, see even Evers/de Graaf, *Ibid*, p. 4

<sup>157</sup> E.g. applied by DK, IE, NL, UK, MT, SE, CZ, SK, FI, HU, CY

<sup>158</sup> Werner F. Ebke, ‘The ‘Real Seat’ Doctrine in the Conflict of Corporate Laws’, 36 [2002] *International Lawyer* p. 1016

dissolution provided that the registered office remains in the State of incorporation whereas a transfer to a State which applies the real seat theory is not possible because this theory does not recognize a company as an entity with legal personality unless “real seat” and “place of incorporation” coincide.

In contrast, the cross-border transfer of the registered office from the incorporation country results in a change of the company law applicable to that company and is not possible without the winding-up of the company in the State of origin and its re-incorporation in the host Member State. A transfer of the head office to a real seat state will also not be possible and the company needs to be re-incorporated in accordance with the law of the host state.<sup>159</sup>

#### **b) Real Seat Theory**

According to the “real seat theory”<sup>160</sup> the location of the real seat of the company, its centre of administration or head office, is the decisive and objective connecting factor which determines the applicable law<sup>161</sup>. A company is obliged to register or incorporate in the country where it has its centre of administration. The theory is based on the idea that the State where the real seat is situated is usually most strongly affected by the activities of the company and should, therefore, have the power to govern its internal affairs.

Pursuant to the real seat theory a sole transfer of the registered office is not possible and has to be followed by the transfer of the real seat. Otherwise it results in a winding-up or liquidation of the company in the State of origin and a re-incorporation in the State of destination.<sup>162</sup> A transfer of the head office is in principal not possible and requires as the transfer of the

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<sup>159</sup> Commission Staff Working Document, Impact assessment on the Directive on the cross-border transfer of registered office from 12.12.2007, p. 9

<sup>160</sup> It is common referred to as “Sitztheorie” in Germany, “siège réel” or “siège social” in France. See in general Wulf-Henning Roth, *Ibid* pp. 180 ff.

<sup>161</sup> E.g. applied by BE, DE, ES, FR, LU, PT, EL, LT, PL, EE, NO, AT, SL, LV.

<sup>162</sup> Kai F. Sturmfels, „Pseudo-foreign companies“ in German – The Centros, Überseering and Inspire Art decisions of the European Court of Justice, *Key Aspects of German Business Law*, 2009, p. 64

registered office a winding-up and re-incorporation or is restricted by certain requirements imposed by the home Member State<sup>163</sup>.

### **3) Development of the case law of the CJEU and its influence on the freedom of establishment and transfer of the company's registered office or real seat**

The following section is aimed at providing a brief overview of the Court's approach regarding the transfer of a company's registered office or real seat.<sup>164</sup>

In its famous ruling in the *Daily Mail* judgment which concerned the situation of a transfer of the central management from the United Kingdom to the Netherlands while retaining the status as a company incorporated under English law the CJEU pointed out: "In that regard it should be borne in mind that, unlike natural persons, companies are creatures of the law and, in the present state of Community law, creatures of national law. They exist only by virtue of the varying national legislation which determines their incorporation and functioning."<sup>165</sup> As companies are creatures of the law of the Member State it is allowed to impede the "moving out" of a company. This approach has been reiterated by the Court nearly 20 years later in the eagerly awaited *Cartesio* judgement<sup>166</sup>. The period between these two decisions was characterized by - as mentioned before - a liberal approach of the CJEU towards the freedom of establishment and aimed at preventing unnecessary restrictions on the right. Therefore, it was expected that the Court in *Cartesio* might go one step further by expanding the scope of the freedom of establishment. For this reason the Court's fall-back came unexpected.<sup>167</sup>

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<sup>163</sup> E.g. in France

<sup>164</sup> This section is in any case aimed at containing a deep analysis of the jurisprudence or tackles all problematic aspects in the context of transfer issues and freedom of establishment.

<sup>165</sup> *Daily Mail*, Ibid, para. 19

<sup>166</sup> *Cartesio*, Ibid, paras. 104 ff.

<sup>167</sup> See also *Craig/de Burca*, Ibid, p. 784

It has to be pointed out that both *Daily Mail* and *Cartesio* concerned a situation of a company leaving the State of origin ('moving out') whilst *Centros*, *Überseering* and *Inspire Art* was characterized by a situation of 'moving in'. In *Daily Mail* where the Court made clear that freedom of establishment could not be interpreted "as conferring on companies incorporated under the law of a Member State a right to transfer their central management and control and their central administration to another Member State while retaining their status as companies incorporated under the legislation of the first Member State".<sup>168</sup> The ruling in *Daily Mail* was often held to imply that the Treaty provisions on freedom of establishment could not successfully be invoked in order to set aside national rules on primary establishment. Thus, transfer of a company's seat was considered to be outside the scope of the freedom of establishment in relation to both the host Member State and the home Member State.<sup>169</sup> However, the Court does not deny the possibility to transferring the head office or real seat to another Member State but accepted that this possibility can be restricted and vary in the different Member States as company's exists only by virtue of the national legislation<sup>170</sup>. This approach has been confirmed in the *Cartesio* judgement and complemented by distinguishing the situation of moving the real seat to another Member State while retaining incorporated in the State of origin from the situation where a company moves to another Member State in order to convert into a company form provided under the law of that state. In that case the Member State of incorporation has no power to determine the connecting factor for incorporation or for retaining the status.<sup>171</sup> With regards to the line of cases concerning the situation of "moving in" the Court took the view that a company validly incorporated in a Member State must be recognised in any other Member State to which it decides to move its real seat or operations. This made the Court clear in

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<sup>168</sup> Ibid, para. 24

<sup>169</sup> Wolf-Georg Ringe, No Freedom of Emigration, available at SSRN: <http://papers.ssrn.com/abstract=1085544>, pp. 7-8

<sup>170</sup> *Daily Mail*, Ibid, para. 20

<sup>171</sup> Ibid, para. 112; see C.Gerner-Beuerle/Michael Schillig, The Mysteries of freedom of Establishment after *Cartesio*, available at: <http://ssrn.com/abstract=1340964>, p. 10

*Überseering*<sup>172</sup> : “... where a company which is validly incorporated in one Member State ('A') in which it has its registered office is deemed, under the law of a second Member State ('B'), to have moved its actual centre of administration to Member State B following the transfer of all its shares to nationals of that State residing there, the rules which Member State B applies to that company do not, as Community law now stands, fall outside the scope of the Community provisions on freedom of establishment. In other words, the situation where a company is moving its real seat into a Member State has been solved in a way that a host Member State has to accept that a foreign company operates on its territory according to the company law rules of its home Member State.”

It can be summarized that according to the case law of the CJEU the sole transfer of the head office is possible provided that the transfer fulfills all necessary requirements and formalities imposed by the State of origin. Those requirements differ from one country to another.

In contrast, as the Community law stands now according to the jurisprudence of the CJEU a transfer of the registered office is not possible without winding-up and re-incorporation unless the transfer does not fall under the European Company Statute<sup>173</sup> or the European Cooperative Society<sup>174</sup>. These Regulations enable the transfer of the registered office under certain conditions without having to wind-up. This possibility is available only to companies established or converts into as *Societas Europaea* (SE) or a *European Cooperative Society* (SCE for *Societas Cooperativa Europaea*). Under the Cross-Border Merger Directive<sup>175</sup>, companies have the possibility to transfer their registered office by means of a merger in cases of cross-border mergers of limited liability companies.

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<sup>172</sup> Ibid, para. 52

<sup>173</sup> Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European Company (SE)

<sup>174</sup> Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) which established the SCE legal form.

<sup>175</sup> Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies

After the merger, the law of the State in which the registered office of the merged company is located applies.

#### **D) Conclusion:**

As it had been shown under B) II) 2) a) the notion *forum shopping* in the context of insolvency proceedings cannot – *per se* - be regarded as abusive or fraudulent and consequently, inadmissible. It could be demonstrated that *forum shopping* is covered by the free movement of establishment and a clearance with regards to this fundamental freedom would be desirable. Wholly artificial arrangements such as ‘letterbox’ companies fall outside the ambit of Article 49, 54 TFEU and Article 3 (1) EIR. From the *Centros* judgement it can be followed that restrictions on the free movement of establishment on national level in cases of fraudulent or abusive forum shopping by *COMI* shifting might be allowed provided that the assessment whether a conduct is abusive or not has to be carried on a case-by-case basis. Creditor protection is a legitimate interest provided that e.g. it can be proved that the company attempted to evade their obligation toward creditors.

*Post Interedil* it seems that *forum shopping* has become much more difficult and in cases of discrepancy between registered office and centre of administration it will be intricate to argue that the closest connecting link is at a different place as the registered office. *Forum shopping* by transferring the registered office is in principle not possible and the sole transfer of the central administration only to a limited extent.

This development indicates that successful *COMI* shifts for the purpose to “*forum shop*” requires both the transfer of the registered office and central administration. This is costly and for a company in distress not very attractive.

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