

Susanne Staubitz-Schreiber[Case C-1/04 Susanne Staubitz-Schreiber \[2006\] ECR I-701](#)17th January 2006

German reference to the ECJ under Article 234 TEU

Reference to the Court of Justice of the European Union

Key Words

Centre of main interests; (COMI) Preliminary Jurisdiction; forum shopping; COMI shifting; [sole trader]; domicile.

Summary of Facts of the Case

This was a reference by the German Court in relation to proceedings brought by Ms Staubitz-Schreiber (the applicant in the main proceedings) for a preliminary ruling on the interpretation of the jurisdiction of the EIR under article 3(1). The applicant operated a telecommunications equipment and accessories business as a sole trader. She ceased trading in 2001, filed under the Insolvenzverfahren in December the same year, and moved to Spain on 1st April 2002 to live and work there [para 15].

The German court refused to open insolvency proceedings on the basis that she had no to administer. This finding was appealed by the applicant in the main proceedings, but this appeal was dismissed by the Landgericht Wuppertal on the grounds the German courts did not have jurisdiction because the COMI of the applicant was in Spain. The applicant appealed to have the orders set aside and submitted that the question of jurisdiction should be examined in the light of the situation at the *time when the request to open insolvency proceedings was lodged*. The request was lodged while she was still domiciled in Germany [paras 16-17].

The Applicant moved COMI to Spain AFTER requesting the opening of proceedings in Germany, but before the proceedings were opened or any effects produced under German law [para 19]. The question referred to the CJEU was:

‘Does the court of the Member State which receives a request for the opening of insolvency proceedings if the debtor moves the COMI to the territory of another Member State after filing the request but before the proceedings are opened, or does the court of that other Member State acquire jurisdiction.’ [para 20]



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Cooperation and/ or Coordination Issue

This question plays in the grey areas of preliminary jurisdiction and the choice of the applicant for an insolvency proceeding and the ability to shift COMI at different stages along the insolvency timeline, i.e. after opening proceedings in this case. Would such a move be contrary to the objective of the EIR? How would such a case be resolved under the EIR Recast? Does it go against the goal of avoiding forum shopping in order to seek a more favourable position?

The question of COMI is an important cooperation issue because it establishes preliminary proceedings, at which time the opening of secondary or territorial proceedings becomes constrained. While this was not the circumstances in this particular case, the question of COMI shifting and the timing of this activity can cause problems for the effective establishment of the correct cooperation parameters of a mult-jurisdictional case.

Resolution

The national court must determine whether it has jurisdiction under Article 3(1) para 22 [EIR 2000] [para 22].

The CJEU observed that the EIR did not specify whether the court originally seized with jurisdiction (Germany) would retain jurisdiction if the debtor moves COMI (to Spain) after the request to open proceedings but before judgment is delivered [para 23]. However, the court observed that such a transfer would be contrary to “the objectives pursued” by the EIR which aims to avoid incentives for the parties (and presumably their advisors) to transfer assets or proceedings from one Member State to another in order to seek a more favourable outcome. Such a transfer would also impede efficiency and effectiveness of cross-border proceedings as it would oblige creditors to continually pursue a debtor where it chose to establish, which would also cause uncertainty in cross-border insolvency processes [paras 24-27].

The court also observed in para 28 that the universal scope of main insolvency proceedings and the possibility to open secondary proceedings and the appointment of professionals to secure and preserve assets in another Member State also constituted guarantees for creditors that ensure “the widest possible coverage of the debtor’s assets” particularly if the COMI has been moved after the request to open proceedings has been made but before proceedings have been opened.

It was held that under art 3(1) the court of the Member State in which the centre of the debtor’s main interests was situated at the time when the debtor lodged the request to open insolvency proceedings retained jurisdiction to open those proceedings when the debtor moved the centre of his main interests to another Member State after lodging the request but before the proceedings were opened.

In terms of cooperation, this judgment adds some certainty to the circumstances under which a notional shift of COMI could result in an actual shift in the appropriate venue for primary proceedings.

Applicability to Preventive Restructuring and Judicial Cooperation

As with all cross-border insolvency or restructuring procedures, the question of COMI is always relevant. Where procedures fall under the EIR Recast, COMI will apply and although this case falls under the original EIR, the decision is relevant should a similar question of jurisdiction arise under a preventive restructuring procedure in the future. To consider: the role of each court in addressing

the applicant's positions. The important reflection on the JCOERE work is that as we have found it seems that parties and their advisors do have preferences for particular jurisdictions, for a variety of reasons, some arising from outcome, some we hypothesise arising from different substantive rules and some we also hypothesises based on our applied research on professional interest in maintaining litigation or causes of action in a particular jurisdiction with which the practitioner is familiar. The case is an early case addressing questions of COMI shift and how these will be addressed by courts.

Applicability of Existing Rules and Guidelines

The findings in this case are interesting to judges as it deals with what could be viewed as capricious applicants seeking to advance their position by avoiding what they perceive as a disadvantageous court position on a matter. As practitioners will tend to want to retain the power in a case, such activities is not necessarily surprising and may well occur in a restructuring context should a practitioner be able to meet the criteria required to establish primary jurisdiction.

EIR Recast:

Under the EIR Recast, Recital 28 emphasises the perception of the creditors in relation to whether a COMI is ascertainable by third parties:

When determining whether the centre of the debtor's main interests is ascertainable by third parties, special consideration should be given to the creditors and to their perception as to where a debtor conducts the administration of its interests. This may require, in the event of a shift of centre of main interests, informing creditors of the new location from which the debtor is carrying out its activities in due course, for example by drawing attention to the change of address in commercial correspondence, or by making the new location public through other appropriate means.

Applied in this case, the creditors would be familiar with the German domicile and as noted in the decision to allow such shifts would 'oblige creditors to be in continual pursuit of the debtor wherever he chose to establish himself' [para 26]. Recital 31 refers specifically to preventing abusive forum shopping, which could be ascribed to the actions taken in this case had creditors been adversely affected. The presumption that the COMI is in the place of the principal place of business and habitual residence, moved to Spain in this case, can be rebutted if it has been relocated within the three month period prior to the request of opening insolvency proceedings. This applies equally to an individual exercising an independent business or activity even as a sole trade, such is the case here. Although the move was made shortly *after* the request to open proceedings, the intention of this Recital is to prevent the shift of COMI in close proximity to insolvency, therefore such a move should equally not be valid to shift COMI under the circumstances.

Moving on to the operative provision in Article 3(1), the COMI in Spain would not be ascertainable to third parties under the circumstances of this case due to the quick move following the request to open proceedings and should therefore not be considered valid COMI shift in a case such as this.

Guidelines and Principles:

The rules and guidelines provided in the European context for assisting in cross-border insolvency and restructuring matters do not really help with regards to the establishment of jurisdiction, therefore it is sufficient to rely upon the Recitals and Articles of the EIR Recast in relation to the rules that would govern this case were it heard today.

That said, the AIL-III Global Principles does offer some guidance on this matter under Principle 13.1, which states that:

For the purposes of these Global Principles the courts or other authorities of a state should have jurisdiction to open an insolvency case in respect of a debtor when either:

- (i) the debtor's centre of main interests is situated within that state's territory; or
- (ii) the debtor has an establishment within that state's territory.

In addition, Principle 13.3(I) echoes the ascertainability criteria set out in the EIR Recast, requiring that COMI should be determinable 'on the basis of objective factors which are known to or are readily ascertainable by third parties'.