

Edimcomprint SRL

[*Edimcomprint SRL Cass. civ., Sez. Unite, Ordinanza, 03/10/2011, n. 20144*](#)

Italian jurisdiction; United States

Supreme Court of Italy

Key Words

Jurisdiction; COMI; presumption; registered office; abusive conduct; forum shopping; COMI shifting.

Summary of Facts of the Case

Edimcomprint s.r.l. was a limited liability company registered in Italy, which was a subsidiary wholly owned by D.G. Holding s.r.l., an Italian company operating in the graphics field. In February 2009, Edimcomprint was incorporated into D.G. Holding s.r.l., according to a resolution of December 2008; whereas most of the business activities of D.G. Holding occurred in Southampton in the United Kingdom, where it carried out its activity of graphic arts, had its administrative headquarters, and where all its employees worked, and where arguably it had its real centre of main interests.

In March 2009, D.G. Holding s.r.l. transferred its registered office abroad to Delaware in the United States. Consequently, in June 2009, D.G. Holding was removed from the Rome Companies' Register. In September 2009, various creditors brought involuntary bankruptcy proceedings in the District Court of Rome against (both) Edimcomprint and D.G. Holding.

Having transferred the registered office of the Company to Delaware, before filing the bankruptcy petitions, D.G. Holding claimed that such a transfer would exclude the jurisdiction of the Italian judge pursuant to Article 9, paragraph 5 of the Italian Bankruptcy Law and Article 3 of the EIR 1346/2000 which states the presumption of COMI as being the place of registered office.

Thus, D.G. Holding submitted with the Italian Supreme Court (via a specific procedural instrument, "*Regolamento di giurisdizione*", reserved to such matters) a petition to declare the lack of jurisdiction of the Italian court.



Cooperation and/ or Coordination Issue

The resistant (i.e. the I.P. of the Italian insolvency proceeding) claimed that the Italian court had jurisdiction because the registered office was moved to the United States and was de-registered in Italy only shortly before the filing of the petition for bankruptcy, with the probable intent of having a more favourable court to handle the company's insolvency.

According to the defendant, the presumption identifying the COMI where the main registered office is located could not apply in the case at issue because of the suspect timing of the transfer of registered office (a few months before the beginning of the judicial liquidation) and due to the fact that the main activities and interests of the company were in the UK (thereby ascertainable by third parties as the centre of main interests).

The court determined that the company had transferred its registered office to the United States (Delaware) with no other (apparent) reason other than to gain access to a more favourable insolvency regime. As a result, the court denied recognition of primary jurisdiction in the United States in the case and, therefore, the coordination of proceedings between those in Italy and in the United States failed.

Because the COMI shift to the United States was in the end allowed to occur and the proceedings were run there, the case was taken outside of the European jurisdiction, and outside of its cooperative framework under the EIR Recast.

Resolution

The Italian Supreme Court pointed out that the presumption linking the COMI to the place of registration applies as long as there is no abuse.

Accordingly, it declared that the Italian court should have jurisdiction on the bankruptcy case, denying the recognition of the foreign procedure.

Applicability to Preventive Restructuring

This case takes into consideration an abusive COMI shift and a court refusal to recognise a different jurisdiction due to that reason.

Recognition is a pillar of cooperation in the context of preventive restructuring, since it lays the basis to structure a channel for communications and coordination between judges and insolvency practitioners in a cross-border insolvency or restructuring scenario.

Therefore, the refusal to recognise the American proceedings might negatively impact any potential coordination between different insolvency procedures and would represent an obstacle to an effective implementation of court-to-court coordination and communications.

Applicability of Existing Rules and Guidelines

EIR Recast:

Pursuant to Article 3(1) of the EIR Recast, "The courts of the Member State within the territory of which the centre of the debtor's main interests is situated shall have jurisdiction to open insolvency

proceedings ('main insolvency proceedings'). The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.

In 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. That presumption shall only apply if the registered office has not been moved to another Member State within the 3-month period prior to the request for the opening of insolvency proceedings”.

That said, the provisions set by the EIR Recast are compatible with the decision examined *supra*, since the Regulation 848/2015 still requires the court to verify the COMI of the debtor, potentially rebutting the presumption in Article 3(1) that the centre of the debtor's main interests is situated in the country where the debtor has its registered office by examining objective factors that are ascertainable to third parties.

Guidelines and principles:

The EU COCO Principle 12 (“Abusive or Superfluous Filings”) provides that “where there is more than one insolvency case pending with respect to a debtor, and the court determines that an insolvency case pending before it is not a main proceeding and that the forum state has little interest in the outcome of the proceeding pending before it, the court should consider to dismiss the insolvency case, if dismissal is permitted under its law and no undue prejudice to creditors will result”.

This principle can be helpful in those situations, as the one at issue, where the debtor has adopted an abusive conduct and, as a consequence to it, the court chosen by it would have no interest in deciding the case.