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INSOLVENCY FORUM SHOPPING – WHAT CAN BE LEARNED FROM THE ECJ AND US SUPREME COURT CASE LAW ON INTERNATIONAL COMPANY LAW AND INSOLVENCY PROCEDURES?

Abstract:
The recast of the European Insolvency Regulation, which has been applicable from 26 June 2017, implements a philosophy of Euro universalism, according to which insolvency proceedings opened in a Member State where the debtor has its centre of main interests (COMI) should have a universal scope and encompass all the debtor's assets situated throughout the EU.

The wording of the Recast Regulation is intended to comply with the ECJ case law concerning COMI, such as Interedil, Eurofood, Bank Handlowy or Mediasucre judgments. Nevertheless, it is now questioned whether the Recast Regulation strengthens or rather weakens the COMI/registered office rebuttable presumption and opens the gate for insolvency forum shopping.

As far as international company law is concerned, the issue of transfer of seat as well as forum shopping has been widely discussed. So far the ECJ has issued a series of judgments in which it has explained the European freedom of establishment and the cross-border activities of companies in the internal market.

Similarly, the US Supreme Court has issued several significant decisions, such as CTP Corp. v. Dynamics Corp. of America, Edgar v. MITE Corp., and International Shoe Co. v. State of Washington, in which the limits of acceptable forum shopping are better delineated.

Based on the aforementioned, it may be concluded that European harmonization measures facilitating cross-border mobility should additionally assist in achieving predictability and efficiency, as well as the economic viability and security of the operations under consideration. This contribution analyses and expounds on the lessons that can be learned from both the ECJ case law as well as US Supreme Court's decisions on international company law, including an examination of their effect on insolvency forum shopping. There is no doubt that, if successful, harmonized legislation on these matters would be a great asset for the internal market.

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INTRODUCTION

The capital market and the economic operations of international companies seem to be constantly a step ahead of the latest legal regulations, as well as political storms. What is taking place in politics exercises a great impact on the various world economies, but there is also no doubt that multinational, global companies themselves are perfectly prepared to withstand these trends and pursue their established goals. Their business assumptions may encompass a wide array of goals, such as a specific percentage of global revenue increase or strengthening of the brand. However, it may also include a transfer of the company's central place of administration, in order to find the best forum for either doing business or for insolvency.

Based on a comparative analysis of the results from the period 2007-2016, we can see that the financial crisis has created new obstacles for businesses all over the world.[1] It has highlighted the existing weaknesses and changed the priorities of companies in various regions and at all stages of development. One of the most serious problems for business, as a consequence of the global financial crisis, is their access to insolvency and restructuring procedures.

The European Union (EU) market has proven to be a predictable and desirable place for doing business. Functioning as a single market with – still so far – 28 Member States, the EU remains an important world trading power. In order to maintain that position and to overcome the recent severe recession, the European Commission has identified insolvency and restructuring proceedings as an important factor and one of its top priorities for creating a strong capital market.[2]

As the European Commission noted with respect to its Action Plan on building a Capital Markets Union, "despite progress in recent decades to develop a single market for capital, there are still many obstacles that stand in the way of cross-border investment."[3] These include obstacles that have origins in national law, such as substantive insolvency law. Therefore, the European Commission held consultations on the key insolvency barriers and put forward a legislative initiative on business insolvency, addressing the

[1] The Global Competitiveness Index 2016-2017 (The World Economic Forum), available at: https://www.weforum.org/reports/the-global-competitiveness-report-2016-2017-1/; Doing Business Index (The World Bank), available at: http://www.doingbusiness.org/rankings (both accessed 30 June 2018).

[2] *Action Plan on Building a Capital Markets Union*, COM (2015) 468 Final, 30 September 2015.

[3] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Action Plan on Building a Capital Markets Union; COM/2015/0468 final.

most important barriers to the free flow of capital and building on those national regimes that work well.[4]

More integrated EU capital markets and removal of some of the deep-rooted barriers which discourage investors from diversifying their worldwide investments would produce significant benefits to the EU economy as a whole and increase the attractiveness of the EU Member States as investment destinations for third country investors. The convergence of insolvency and restructuring proceedings would promote legal certainty for cross-border investors and encourage the appropriate restructuring of companies in temporary financial distress.

The Recast of the European Regulation on Insolvency, which entered into force on 26 July 2017, is a great tool of a procedural nature and one of the major advantages of the EU internal market. While it does not harmonize substantive national insolvency laws, it co-ordinates the different procedures of insolvency.[5] The centre stage is given to the State where the debtors' centre of main interests (COMI) is located, which gives that State exclusive authority to open main insolvency proceedings. This automatically requires its full recognition throughout the EU.[6]

In more general terms, based on the freedom of establishment companies properly established in one Member State can freely choose to incorporate in any other Member State to conduct business activities there. Therefore, freedom of establishment also covers situations where a company transfers its COMI abroad and, in consequence, changes the applicable law with respect to insolvency procedures.[7] The ECJ has appeared to emphasize this in the preliminary questions referred to it on the right of establishment and insolvency law, aimed at clarifying its position on the Member States' choice-of-law policies.[8] In *Centros*, *Cartesio*, *Vale, Cadbury*, *Bank Handlowy*, and *Interedil*, a line of case law has been developed upon which a correlation can be built between forum shopping in international company law and forum shopping in insolvency law within the EU.[9]

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[4] Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions. Capital Markets Union – Accelerating Reform, COM (2016) 601 Final, Brussels 14 September 2016.

[5] *E.g.*, based on the Regulation all creditors have to submit to the same procedure that concerns a common debtor. Since this principle is concerned with substantive insolvency law, it requires the additional application of relevant national rules.

[6] G. McCormack, *Reforming the European Insolvency Regulation: A Legal and Policy Perspective*, 10(1) Journal of Private International Law 41 (2014).

[7] D. Latella, *The "COMI" Concept in the Revision of the European Insolvency Regulation*, 11(4) European Company and Financial Law Review 484 (2014).

[8] J. Meeusen, M. Myszke-Nowakowska, *International Company Law in the European Internal Market: Three Decades of Judicial Activity*, XI Anuário brasileiro de direito internacional 92 (2016).

[9] ECJ, C-212/97 *Centros Ltd v. Erhvervs-og Selskabsstyrelsen* [1999], ECR I-1459; C-210/06 *Cartesio Oktatóés Szolgáltatóbt* [2008], ECR I-9614; C-378/10 *VALE Építésikft* [2012], ECR-00000; C-196/04 *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue* [2006], ECR I-07995; C-116/11 *Bank Handlowy w Warszawie SA and PPHU 'ADAX'/Ryszard Adamiak v. Christianapol sp. z o.o.* [2012], ECLI:EU:C:2012:739; C-396/09 *Interedil Srl, in liquidation v. Fallimento Interedil Srl and Intesa Gestione Crediti SpA* [2011], ECR I-09915.

Similarly, the US Supreme Court has already issued several significant decisions in this regard: *CTP Corp. v. Dynamics Corp. of America*,[10] *Edgar v. MITE Corp.*,[11] *International Shoe Co. v. State of Washington*,[12] *Yukos Oil*,[13] and *Avianca*,[14] based on which the limits of acceptable changes of applicable insolvency laws are better delineated.

The important question which will be examined below is whether this case law differentiates between international company law forum shopping and insolvency forum shopping; and consequently whether the applicable choice of law rules indeed discourage opportunistic cross-border reorganizations and protect creditors. Additionally, in the context of conflict of law rules for insolvency law, the present contribution is meant to introduce the reader to the problematic questions surrounding the definition of the "centre of main interest" (COMI). It will be argued that the Insolvency Regulation provides only facilities for the effective administration of cross-border insolvencies rather than attempting to harmonize the insolvency procedures of the Member States.[15]

1. CHOICE OF LAW RULES IN INTERNATIONAL COMPANY LAW AND INSOLVENCY LAW

The EU system of corporate law and that of the US differ significantly insofar as the scope of the applicable law is concerned. Within international company law in the EU, up till now both the "incorporation" and the "real seat" theories are predominant in the Member States' systems of private international law.[16] According to the former theory, a company is governed by the law of the State where it was incorporated; while according to the latter a company is governed by the law of the state where its head office (real seat) is located. In practice, a number of Member States adhere to a mixed system, containing elements of both approaches.[17]

The US does not follow either the place of incorporation or real seat theories, but rather applies an "internal affairs" doctrine. Therefore, the scope of applicable rules differs significantly. The American internal affairs doctrine focuses first of all on the regulation of board's fiduciary duties and its liability towards shareholders, whereas creditors' protection (important from the insolvency law point of view) is either federalized or left

[10] *CTP Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987).

[11] *Edgar v. MITE Corp.*, 457 U.S. 624 (1982).

[12] *International Shoe Co. v. State of Washington*, 326 U. S. 310 (1945).

[13] *Yukos Oil Co.* (2005) 321 BR 396.

[14] *Aerovias Nacionales de Colombia SA Avianca* (2004) 303 BR 1.

[15] G. McCormack, *Bankruptcy Forum Shopping: The UK and US as Venues of Choice for Foreign Companies*, 63 International & Comparative Law Quarterly 817 (2014).

[16] Commission's staff working document, *Impact assessment on the Directive on the cross-border transfer of registered office*, SEC (2007), 1707, p. 9.

[17] P. Paschalis, *Freedom of Establishment and Private International Law for Corporations*, Oxford University Press, Oxford: 2012, pp. 4-14.

out of the doctrine.[18] Obviously this doesn't mean that there is no form of protection for creditors. Rather, the creditors' protection in the U.S. relies on important mechanisms that fall outside the scope of the internal affairs doctrine but are contained within the American insolvency law (i.e. Federal bankruptcy law), such as the restrictions on distributing dividends,[19] prohibition of fraudulent transfers, equitable subordination, or "piercing the corporate veil." Consequently, it is no wonder that a cross-border transfer of companies is relatively straight-forward insofar as company law is concerned, but rather limited in the domain of insolvency law. The internal affairs doctrine governs the horizontal competences between the states, since companies transferring their centre of main interests also change the relevant applicable law.

This issue was addressed by the U.S. Supreme Court in *CTS Corp. v. Dynamics Corp. of America*,[20] where the Court confirmed that States cannot discriminate against interstate commerce by treating in-State and out-of-State corporations differently. It determined that the Indiana law in question, intended to prevent hostile takeovers of Indiana corporations, did not differentiate between in-state and out-of-state corporations. Therefore, the Court concluded that Indiana law might result in fewer bids to take over Indiana companies. However, since companies are creations of State law, that law did not stop them from making a takeover bid, but only provided procedures for better protection of the shareholders.[21] This approach was confirmed also in *Amanda Acquisition Corp. v. Universal Foods Corp.*[22] *and Tyson Food Inc. v. Mc Reynolds*.[23] In contrast, in *Edgar v. MITE Corp*., the US Supreme Court held that the Illinois Business Take-Over Act imposed impermissible burdens on interstate commerce by requiring a tender offeror to notify the Secretary of State and the target company of its plan to make a tender offer and its terms 20 days before the offer becomes effective. During that time the target company, but not the offeror, was free to disseminate information about the offer to the target company's shareholders. The Court stated that the burden was excessive and would give the power to the State whether to proceed with a tender offer or not, even if it concerned a company established and having its main centre of interest outside of Illinois. Therefore, Illinois's interest in protecting resident security holders was deemed insufficient to outweigh the burdens imposed on interstate commerce.

[18] L. Ribstein, E.A. O'Hara, *Corporations and the market for law*, University of Illinois Law Review 661 (2008), p. 694.

[19] In many states dividends are allowed to be distributed only provided that it would not result in insolvency and may not be paid out of states' capital. The Revised Model Business Corporation Act, Section 6.40, provides that: "directors can pay a dividend if there is a surplus of assets over liabilities, but only if, after the distribution, the corporation would be still able to pay its debts when they fall due."

[20] *CTS Corp. v. Dynamics Corp. of America* 481 U.S. 69 (1987)

[21] *Ibidem*, p. 89: "[s]o long as each State regulates voting rights only in the corporations it has created, each corporation will be subject to the law of only one State. No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations, including the authority to define the voting rights of shareholders."

[22] *Amanda Acquisition Corp. v. Universal Foods Corp.* 877 F. 2d 496 (7th Cir. 1989).

[23] *Tyson Food Inc. v. Mc Reynolds* 865 F.2d 99 (6th Circ. 1989).

It is clear that the internal affairs doctrine displays a number of similarities to the "incorporation" principle applied in some Member States of the EU. The most recognizable is that companies do not have to keep their main centre of administration or management in the state of their incorporation in order to be validly incorporated. According to the Model Business Corporation Act and the law of most states of the US, reincorporation should be implemented by way of a cross-border merger.[24] Therefore, US companies are free to choose the applicable company law regardless of the location of their main centre of business.

It should be noted that freedom of reincorporation allows companies initially incorporated in one State to transfer their headquarters to any other State. However, in contrast to the EU, the scope of competence of the state of incorporation is limited to the relations between shareholders and managers, exclusive of the weaker parties' protections, such as creditors or minority shareholders (the internal affairs doctrine). The latter issues belong to federal law (including federal bankruptcy law) rather than state law. As a result, the state of incorporation is competent to regulate the cross-border companies' reincorporation and the other states must recognize validly formed companies.[25] In such case, there is no need for the company to liquidate.

It is often postulated that the incorporation theory, which is said to promote private autonomy and commercial freedom, best satisfies the requirements of the internal market and enhances business mobility.[26] In contrast, the real seat theory is generally considered to be more autonomy restrictive by being principally centred on the State instead of private and commercial interests.[27]

The main argument is based on the fact that the incorporation theory, in contrast to the real seat theory, enhances mutual recognition of companies by accepting the localization of the registered office of a company and its real seat in two different States. Therefore, a cross-border transfer of the company's head office is possible without the dissolution of the company and the establishment of a new company in the state of destination.

So far, the ECJ has been able to develop a consistent interpretation of freedom of establishment when adjudicating on Member States' rules of international company law.[28] In spite of the many pleas to the ECJ to condemn the real seat theory as

[24] Model Business Corporation Act, 1984, para. 11.02.

[25] Restatement of the Law, Conflict of Law (2nd ed.), para. 296: "[i]n order to incorporate validly, a business corporation must comply with the requirements of the state in which incorporation occurs regardless of where its activities are to take place or where its directors, officers or shareholders are domiciled"; para. 297: "[i]ncorporation by one state will be recognized by other states."

[26] K. Kreuzer, *Zu Stand und Perspektiven des europäischen Internationalen Privatrechts, Wie europäisch soll das Europäische Internationale Privatrecht sein*?, 70 Rabels Zeitschrift 1 (2006).

[27] Ch. Teichmann, *The Downside of Being a Letterbox Company*, 9(3) European Company Law 180 (2012); W.-G. Ringe, *Corporate Mobility in the European Union: A flash in the pan? An empirical study on the success of lawmaking and regulatory competition*, 2 European Company and Financial Law Review 231 (2013).

[28] G. Mathisen, *Consistency and coherence as conditions for justification of Member States measures restricting free movement*, 47 Common Market Law Review 1021 (2010); K. Hopt, *Europäisches Gesellschaftsrecht*

incompatible with the requirements of the internal market, it is still a legally binding choice-of-law approach for EU-Member States. However, the continued application of the real seat theory has been made subject to a number of strict requirements.[29]

Since the EU does not share a common internal affairs doctrine, but rather permits Member States follow either the incorporation theory or the real seat theory, the scope of the applicable set of rules in international company law by the incorporation state remains much larger than in the US and also includes creditors' protection. There is, however, a visible trend according to which, similarly to the U.S., creditors in the EU are increasingly protected via *ex post* mechanisms or by contracts, as well as instruments embodied in insolvency law or in tort law (such as piercing the corporate veil).[30]

COMI seems to be an expression of the real seat theory in insolvency law, therefore the debate concerning international companies' abusive forum shopping might be very useful in defining the limits of the opportunistic reincorporations in insolvency law as well. COMI is a legal term that is open for interpretation in each particular case. Nevertheless, when searching for a definition, it should be interpreted in a uniform manner, independently of national doctrine and law.[31] The Regulation provides for a rebuttable presumption that the COMI corresponds to the place of incorporation.

As a result, since based on the Insolvency Regulation any reincorporation abroad affects the location of a company's COMI, it also transfers the applicable insolvency to the new state of incorporation.[32] Consequently, even if instruments for creditors' protection are included in insolvency law, due to the lack of European substantive insolvency law rules the reincorporation will result in the amendment of the applicable law to protect creditors. This mechanism is one of the reasons why the transfer of the registered office of a company still carries a significant risk to creditors, taking into account that the transfer will affect the applicable law not only concerning shareholders' value and the value of the firm, but also concerning creditors' protection.

Taken altogether, the aforementioned position of companies characterises an approach which can greatly impact conflict of laws rules and lead to a very specific

im Lichte des Aktionsplans der Europäischen Kommission vom Dezember 2012, 2 Zeitschrift für Unternehmens- und Gesellschaftsrecht 165 (2013), p. 177.

[29] J. Meeusen, *Freedom of Establishment, Conflict of Laws and the Transfer of a Company's Registered Office: Towards Full Cross-Border Corporate Mobility in the Internal Market?*, 13(2) Journal of Private International Law 294 (2017).

[30] E.-M. Kieninger, *The Law Applicable to Corporations in the EC*, 73 Rabels Zeitschrift 607 (2009), p. 614; The decision of the German Bundesgerichtshof, 16 July 2007, NJW 2689 (2007); Rome II Regulation 864/2007 on the law applicable to non-contractual obligations, OJ L 199, 31.7.2007, Article 4.

[31] D. Latella, *The "COMI" Concept in the Revision of the European Insolvency Regulation*, 11(4) European Company and Financial Law Review 479 (2014), p. 481.

[32] The Insolvency Regulation determines, using COMI, both the law to be applied and the *forum concursus*. Migrating companies may be trapped if they apply for insolvency proceedings while transferring their seat abroad. They may be considered to have their COMI in the State of their origin, except where the company indeed was genuinely involved in business dealings in its foreign extensions. *See* S. Rammeloo, *The 14th EC Company Law Directive on the Cross-Border Transfer of the Registered Office of Limited Liability Companies*, 5 Maastricht Journal of European & Comparative Law 359 (2008).

understanding of private international law, its role, and its content. As the Brussels conference on convergence of insolvency frameworks within the European Union proved, there is a room for increasing harmonization of not only company law, but also of insolvency law.[33]

2. FORUM SHOPPING

It should not come as a surprise that forum shopping is in practice used on a daily basis, concerning both international company law as well as insolvency law. However, despite the fact that both these fields of law apply a very similar conflict of law connecting factor, they are aimed at protecting opposite underlying interests. International company law intends to enhance business mobility but also protect the weaker third parties, whereas insolvency law in theory plays typically just the opposite role; it aims at protecting creditors and only secondarily the company undergoing insolvency proceedings. This remains valid only under the assumption that in the EU the main goal of insolvency is to protect creditors whose interests are at risk as a result of the insolvency proceeding. Indeed, the Recast of the Insolvency Regulations fails to consider the difference between a company in a bankrupt state and one simply in financial distress. In fact, it is possible to imagine an alternative approach that would focus on quick insolvency or an effective prompt restructuring that would put a company in financial distress on the right track again. Still, it is a troublesome question: how to prove that a particular action or transaction done in one country triggers the avoidance laws of another? A "one-size-fits-all" solution is doomed to failure: different legal traditions, jurisdictions and economies on different levels clearly have different priorities, as well as a different understanding of the goals of insolvency proceedings.[34]

As far as international company law is concerned, parties to a contract enjoy great autonomy to decide whether a particular transaction is worthy of being carried out, and if so, on what conditions. A business has numerous reasons to consider the aims of a cross-border company's reincorporation. Hence a company transferring its seat may seek a more flexible market or more convenient company law regulations, but also be seeking to circumvent company creditors demanding compensation. It should not come as a surprise that the latter involves not only cross-border company law, but also insolvency proceedings at the same time. Therefore, the applicable law may not be entirely neutral and, depending on the preferred policy, a proper balance needs to be struck between the involved interests.[35]

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[33] "Convergence of insolvency frameworks within the European Union – the way forward?", Brussels Conference held on 12 July 2016, available at: https://europa.eu/newsroom/events/convergence-insolvency-frameworks-within-european-union-way-forward_en (accessed 30 June 2018).

[34] Ch.G. Paulus, *Global Insolvency Law and the Role of Multinational Institutions*, 32 Brooklyn Journal of International Law 755 (2007), p. 765.

[35] Ch.G. Paulus, *A Statutory Proceeding for Restructuring Debts of Sovereign States*, 49 Recht der internationalen Wirtschaft 401 (2003).

The issue of forum shopping has also been widely discussed in the US literature.[36] This is due to the fact that the US Bankruptcy Code allows the proceedings to be initiated in the place of debtor's incorporation, or where its principal place of business is located, or where its affiliate has already filed for bankruptcy.[37] The relevant provisions on dissolution and liquidation are in Chapter 7 of the US Bankruptcy Code, however, most important provisions for foreign companies are in Chapter 11, the goal of which is prepare and confirm a reorganization plan. However, insofar as the jurisdictional threshold is concerned, there is no distinction between the liquidation proceedings in Chapter 7 and reorganization proceedings in Chapter 11. Namely, section 109(a) of the Bankruptcy Code provides for a wide-ranging jurisdictional basis, according to which "any person who resides or has a domicile, a place of business or property in the United States may be a debtor under the Code." This has been further expanded by the acceptance of US bankruptcy jurisdiction on the sole basis that the debtor had a place of business in a hotel room, or possessed a bank account in the US.[38] Even a shareholding in a US-incorporated subsidiary or retainer paid in advance of the bankruptcy filing to a US counsel constituted property in the US sufficient to file for bankruptcy under the US Bankruptcy Code.[39]

Chapter 11 is based on the idea that a failing business can be reorganized into a successful operation.[40] As the US Supreme Court noted:

> [i]n proceedings under the reorganization provisions of the Bankruptcy Code, a troubled enterprise may be restructured to enable it to operate successfully in the future…By attempting reorganization, Congress anticipated that the business would continue to provide jobs, to satisfy creditors' claims, and to produce a return for its owners… Congress presumed that the assets of the debtor would be more valuable if used in a rehabilitated business than if sold for scrap.[41]

[36] J.A.E. Pottow, *The Myth (and Realities) of Forum Shopping in Transnational Insolvency*, 32 Brooklyn Journal of International Law 785 (2007); R.K. Rasmussen, *Where Are All the Transnational Bankruptcies? The Puzzling Case for Universalism*, 32 Brooklyn Journal of International Law 983 (2007); M.B. Jakoby, *Fast, Cheap and Creditor-Controlled: Is Corporate Reorganization Failing?*, 54 Buffalo Law Review 401 (2006); K. Ayotte, D. Skeel, *An Efficiency-Based Explanation for Current Corporate Reorganization Practice*, 73 University of Chicago Law Review 425 (2006); S. Parikh, *Modern Forum Shopping in Bankruptcy*, 46 Connecticut Law Review 28 (2003).

[37] L.M. LoPucki, *Courting Failure: How Competition for Big Cases is Corrupting the Bankruptcy Courts*, University of Michigan Press, Ann Arbor: 2005.

[38] *In Re Primo Camera* (1933) 6 F Supp. 267, *In Re McTaque* (1996) 198 BR 428, *In Re Globo Communicacoes E Participacoes SA* (2004) 317 BR 235 at 249.

[39] *In Re Marco Polo Seatrade BV*, No. 11-13634; *see also* J. Canfield, *How Low Can You Go? Minimum Jurisdictional Threshold for US Bankruptcy Courts in Cross-Border Insolvency Cases*, ABI Committee News, March 2012.

[40] I. Darke, *Use of US Chapter 11 Filings by Non-US Corporations; Realistic Option of Non-Starter*, International Corporate Rescue 206(2011); E. Warren, J.L. Westbrook, *The Success of Chapter 11: A Challenge to the Critics*, 107 Michigan Law Review 603 (2009).

[41] *US v. Whiting Pools Inc.* (1983) 462 US 198 at 203. HR Rep. No 595, 95th Congress, 1st Sess 220 (1977).

The main attractiveness of Chapter 11 for foreign companies, including companies that engage in forum shopping, lies mainly in the worldwide stay – brought about automatically by a bankruptcy filing – of any and all enforcement proceedings against the debtor or its property.[42]

Section 541 of the Bankruptcy Code provides that the property of the debtor that comprises the bankruptcy estate includes property "wherever located and by whomever held."[43] Therefore, the bankruptcy estate consists of debtors' property located wherever in the world. Apart from that, it is also helpful for a foreign company not to be under an obligation to automatically replace the company management with an outside administrator or trustee. Chapter 11 proceedings are initiated by a debtor's voluntary petition and the existing corporate management structure remains untouched. Therefore, even if the reorganization process has formally been commenced, the companies corporate governance does not change, unless – which happens exceptionally rarely – under strong creditors' pressure. This is also related to the consolidation of insolvency proceedings, which co-ordinates group rescue reorganization for multinational companies active across a number of jurisdictions.

Chapter 15 of the Bankruptcy Code has implemented the UNICTRAL Model Law on Cross-Border insolvency.[44] The Model Law does not directly allocate jurisdiction to open insolvency proceedings, because it does not define mandatory uniform conflict of law rules. It rather provides for recognition – albeit not automatic – of insolvency proceedings, depending on the application to the court and in part on the law of the recognizing state. Namely, foreign main insolvency proceedings will be recognized if they were opened in the jurisdiction where the debtor has its centre of main interest. However, under section 1528 of the US Bankruptcy Code, a case may be commenced based on Chapters 7 and 11 only in the event that the debtor has assets in the US, since the effects of such a case will normally be restricted to assets that the foreign debtor has in the US. In contrast, in the EU the recognition of the proceedings is automatic and has the same effect throughout all the Member States.

The criticism of the application of Chapter 15 together with Chapters 7 and 11 lies in the asymmetry in the threshold concerning the opening of the bankruptcy proceedings. On one hand, US courts will recognize foreign main insolvency proceedings only provided that they were initiated in a jurisdiction where the debtor has its centre of main interest, whereas on the other hand the threshold for opening main insolvency proceedings in the US for a foreign debtor is much lower and is satisfied with minimal assets in the US.

Forum shopping appears as an immanent component of EU insolvency law. Due to the significant differences between the Member States with respect to the priorities granted to creditors, e.g. whether to continue existing contracts or avoid

[42] *Re Nortel Networks Inc.* (2011) 669 F 3d 128.

[43] *Hong Kong and Shanghai Banking Corp v. Simon* (1998) 153 F 3d 991 at 996.

[44] The UNCITRAL Model Law on Cross-Border Insolvency (1997) with Guide to Enactment and Interpretation (2013).

them, debtors may endeavour to change the applicable insolvency law.[45] Obviously, a decision to change the applicable law may have interests in common with business decisions on the transfer of a company's seat, or may have a completely dissimilar logic. Despite the actual justification, forum shopping results in different pay outs to creditors.

U.S. corporate law, in principle, does not provide creditors with protection from redistributive cross-border reincorporations.[46] Such transactions normally aim at increasing the shareholders' value, therefore remain irrelevant and neutral for the creditors. Here, the mechanism for creditors' protection is shifted from company law to insolvency law or tort law. In the EU, in contrast, there are still doubts about the feasibility of transferring the registered office abroad, due to the necessity to protect creditors from opportunistic cross-border reincorporations that may increase the shareholders' value but be detrimental to creditors. This is so because, indeed, creditors that have once relied upon particular company law may be damaged by the reincorporation and the accompanying change of applicable law. In the current state of the law, the most workable method is a merger or acquisition, wherein creditors are entitled to oppose the merger in order to receive an advance payment or security.[47] In this respect, the Member States are free to shape more or less stringent mechanisms offering different levels or protection to creditors, depending on each national policy. Otherwise, if national company law does not provide for a protective mechanism, the creditors' protection may be at the disposal of the board and shareholders who decide upon and pursue the cross-border reincorporation, who clearly may have different interests in mind.[48] Insolvency law at the national level may not offer sufficient shielding from such operations. Whenever the creditors' protection relies on company law rules rather than on insolvency law, such mechanisms usually prevent a significant number of cross-border reincorporations, in part by increasing their costs and time.

The ECJ has already banned unreasonable burdens to inbound transfers of a company's seat. The issue of system shopping and international company law lies at the heart of the *Centros* judgment, where the ECJ stated that as long as there remain differences in the choice of law rules, there exists a motive for seeking out and for utilizing the "most favorable climate."[49] In the EU there is an emerging market of rules in which States compete with each other in offering to entrepreneurs different models of both company law as well as insolvency law. This raises the question to what extent

[45] E. Warren, *Bankruptcy Policy*, 54 University of Chicago Law Review 775 (1987); R. Goode, *Principles of Corporate Insolvency Law*, Sweet & Maxwell, London: 2011, pp. 72-79.

[46] RMBCA, para. 13.02(b)(1).

[47] Cross-border merger Directive, Article 4. S. Lombardo, *Regulatory Competition in Company Law in the European Union after Cartesio*, 10 European Business Organization Law Review 627 (2009), p. 647.

[48] M.-P. Weller, *The German Autonomous International Company Law*, 2 IPRax 167 (2017).

[49] J. Carruthers, C Villiers, *Company Law in Europe – Condoning the Continental Drift*?, 11 European Business Law Review 91 (2000), p. 95.

Member States' interests might be associated with free movement within the internal market.[50]

In general, the ECJ seems to show considerable tolerance toward companies seeking out the most favourable company law. In this vein, the Member States' margin for action is rather limited. They are not allowed to adopt measures which create obstacles to fundamental freedoms nor undermine the full effect and uniform application of EU law. Nevertheless, there are cases in which the subjective motives to rely on EU law are deliberately aimed at achieving an advantage from evading Member States' laws.[51] The subjective element is decisive in particular in those cases which are on the borderline between the use and abuse of EU law.[52] The ECJ has made it clear that the intention to search for the most suitable rules governing the formation of a company cannot be abusive and should be viewed as a legitimate manifestation of the right of establishment. According to the Court, the aim to form a company in accordance with the least restrictive legal system entails the avoidance of more stringent national provisions. However, even 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 abusive or fraudulent conduct which would entitle the latter Member State to deny the company the benefit arising from the right of establishment.[53] The possibility of forum shopping is a logical consequence of the rights guaranteed under the Treaty, and is also consistent with the objective to achieve the internal market.[54]

On the other hand, a Member State may have a legitimate interest in preventing its nationals from attempting to evade the application of its national legislation. Attempts to circumvent the national set of rules can be remedied within the confines of the four-factor test.[55] Therefore, according to case law of the Court, a Member State is entitled to take restrictive measures designed to prevent its nationals from attempting, under cover of the rights created by the Treaty, to circumvent national legislation or to prevent individuals from improperly or fraudulently taking advantage of the provisions of EU law.[56]

[50] J. Meeusen, *System Shopping in European Private International Law in Family Matters*, in: J. Meeusen, M. Pertegás, G. Straetmans & F. Swennen (eds.), *International Family Law for the European Union*, Intersentia, Antwerp: 2007, pp. 239-278.

[51] P. Cabral, P. Cunha, '*Presumed Innocent': Companies and the Exercise of the Right of Establishment under Community Law*, 25 European Law Review 157 (2000), p. 161.

[52] Meeusen, *supra* note 50, p. 258.

[53] ECJ, C-212/97 *Centros*, paras. 26-29.

[54] ECJ, C-79/85 *Segers v. Bedrijfsvereniging voor Bank- en Verzekeringswezen. Groothandel en Vrije Beroepen* [1986], ECR 2375, para. 16.

[55] National measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfill four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.

[56] M. Evers, A de Graaf, *Limiting Benefit Shopping: Use and Abuse of EC Law*, 6 EC Tax Review 279 (2009), p. 285.

An example of such a restrictive measure can be found in the *National Grid Indus* judgment, where the ECJ declared that the transfer of the place of effective management cannot mean that the Member State of origin has to abandon its right to tax a capital gain which arose within the ambit of its powers of taxation before the transfer.[57] From the ECJ's point of view, such a measure was intended to prevent situations capable of jeopardising the right of the home Member State to exercise its powers of taxation in relation to activities carried on in its territory, and may therefore be justified on grounds connected with the preservation of the allocation of powers of taxation between the Member States.[58]

In contrast, one of the goals of the Recast of the Insolvency Regulation is to limit forum shopping.[59] Recital 29 expresses this very clearly: "This Regulation should contain a number of safeguards aimed at preventing fraudulent or abusive forum shopping." However, the practice of active companies looks quite different, as forum shopping is becoming more and more common in the EU. The reason for this can paradoxically be found in the mechanisms of the Insolvency Regulation itself. Namely, the main insolvency proceeding with universal effect (i.e. on all debtors' assets regardless of their location) is governed by the law of State where a debtor's centre of main interests is located.[60]And the companies' COMI is presumed to coincide with their registered office, unless the contrary is proven.

This can clearly encourage insolvency forum shopping.[61] A debtor might seek to change its COMI because a transaction that might come under the scrutiny of a liquidator benefits a person connected with the debtor, such as the relative of a director of a corporate debtor. But also directors of the company involved in the insolvency proceedings may find it beneficial to change in advance the company's COMI in order to benefit from more lenient insolvency rules.

Without doubt, the wording of the Recast Insolvency Regulation intends to comply with the ECJ case law concerning COMI, such as the *Interedil*, *Eurofood*, *Bank Handlowy* or *Mediasucre* judgments. The problem, however, arises if we take into account that

[57] ECJ, C-371/10 *National Grid Indus BV v. Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam* [2011] ECR I-12273 para. 46. The Court held that, in accordance with the principle of fiscal territoriality linked to a temporal component, namely the taxpayer's residence for tax purposes within national territory during the period in which the capital gains arise, a Member State is entitled to charge tax on those gains at the time when the taxpayer leaves the country. *See also* to that effect ECJ, C-374/04 *Test Claimants in Class IV of the ACT Group Litigation v. Commissioners of Inland Revenue* [2006], ECR I-11673, para. 59.

[58] ECJ, C-371/10 *National Grid Indus*, para. 46; Case C-311/08 *Société de Gestion Industrielle (SGI) v. Belgian State* [2010], ECR I-487, para. 60.

[59] F.M. Mucciarelli, *The unavoidable persistence of forum shopping in European insolvency law* (November 2013), available at: https://ssrn.com/abstract=2375654 (accessed 30 June 2018).

[60] Article 3(1) of the Insolvency Regulation. Nevertheless, based on Article 3(2) of the Insolvency Regulation, courts of states where a debtor has an "establishment" can open ancillary proceedings with mere territorial effects and aimed at liquidation.

[61] G. Moss, *Group Insolvency – Choice of Forum and Law: The European Experience Under the Influence of English Pragmatism*, 32 Brooklyn Journal of International Law 1005 (2007), J. L. Westbrook, *Locating the Eye of the Financial Storm*, 32 Brooklyn Journal of International Law 1019 (2007).

thanks to the ECJ case law, as well as relevant EU legislation, companies can transfer not only their COMI but also their registered office abroad. Since the reference date to assess the insolvency competence is a three-month period, if a company relocates its registered office abroad before that period, the creditors will have to prove that the COMI is still in the former Member State and that the new jurisdiction should not take the competence to govern the insolvency from the original State.[62]

Additionally, creditors' protection against abusive insolvency forum shopping depends on the "ascertainability" criterion, which means that the presumption that the COMI coincides with the registered office cannot be rebutted if a company relocates its COMI alongside with its registered office in a way that is "ascertainable" by third parties.

According to Recital 28:

> 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 transfer of centre of main interests, informing creditors of the new location from which the debtor is carrying out its activities, for example by drawing attention to the change of address in commercial correspondence, or by making the new location public through other appropriate means.

These criteria of ascertainability are designed to guarantee creditors that a company will not move its COMI or registered office in order to search for a more convenient insolvency law.[63]

Can we accept that within the European internal market creditors might be faced with the risk of a fluctuating value of their investment? Can we presume that they should be aware enough to protect themselves *ex ante*, for instance, by way of contractual obligations and conditions or in the price of credit?[64] While creditor risk is an obvious component of insolvency law, one may ask whether the very possibility of forum shopping indeed prevents potential creditors from calculating their risks?[65]

In my opinion, the rebuttable presumption of the COMI in fact decreases the legal predictability. Although, one of the goals of the Insolvency Regulation is "to avoid

[62] Recital 31 of the Insolvency Regulation: "With the same objective of preventing fraudulent or abusive forum shopping, the presumption that the centre of main interests is at the place of the registered office, at the individual's principal place of business or at the individual's habitual residence should not apply where, respectively, in the case of a company, legal person or individual exercising an independent business or professional activity, the debtor has relocated its registered office or principal place of business to another Member State within the 3-month period prior to the request for opening insolvency proceedings."

[63] G. McCormack, *Jurisdictional Competition and Forum Shopping in Insolvency Proceedings*, 68(1) Cambridge Law Journal 169 (2009), p. 191; M. Szydło, *Prevention of Forum Shopping in European Insolvency Law*, 11 European Business Organization Law Review 253 (2010), pp. 258-259.

[64] B. Adler, *A theory of corporate insolvency*, 72 New York University Law Review 342 (1997); S.A. Davidenko, J. R. Franks, *Do bankruptcy codes matter? A study of defaults in France, Germany and the U.K.*, 63 Journal of Finance 565 (2008).

[65] M.-P. Weller, *Forum shopping im internationalen Insolvenzrecht?*, IPRax 412 (2004).

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),"[66] creditors could be better protected *ex ante* rather than having to risk their investments being put at risk by changing insolvency rules and proceedings in the event of a debtor's default.

3. TRANSFER OF REGISTERED OFFICE

Globalization, as well as the growing integration of the markets, leads companies to increasingly do business across national borders, both within the Union and beyond.[67] Their mobility may take various forms, such as mergers or acquisitions and transfer of seats, including the transfer of registered office. One of the options provided for the European Company (SE) is that a company is granted the right to transfer its registered office from one Member State to another with the attendant change of the applicable law.[68] Additionally, a directive on cross-border merger grants EU companies the right to merge across-borders, i.e. to relocate their registered office.[69]

Based on the ECJ case-law concerning international company law, such as, e.g., *National Grid Indus*, cross-border transfer of the registered office falls within the scope of the freedom of establishment. Nevertheless, the home State is still free to decide whether to permit the company to retain its status as a company incorporated under national law. Therefore, according to the Court, the transfer of seat is covered by the freedom of establishment at least when the company retains its legal personality based on the law of the country from which it migrated.[70]

The extent of regulatory power of Member States has been further clarified in the most recent case – *Polbud* – where the ECJ noted that the regulatory power ends when a company converts itself into a company governed by the law of another Member State.[71] Accordingly, it is for the latter State to determine the legal and economic conditions that have to be satisfied in order to bring the conversion into effect.[72]As a rule, based

[66] Rt. 13 of the Insolvency Regulation.

[67] C. Pamboukis, *La renaissance-métamorphose de la méthode de reconnaissance*, 97 Revue Critique de Droit International Privé 513 (2008), p. 519; K. J. Hopt, *Droit compare des société: Quelques réflexions sur l'actualité et les evolutions comparés du droit allemand et du droit français des sociétés*, Revue des sociétés 309 (2009); P. Jund, *Vers une convergence des droits allemand et français des societiés?*, 4 Revue internationale de droit comparé 861 (2008).

[68] Regulation of the Council 2157/2001/CE, 8 October 2001 on the statute of the European Company (the SE Regulation), OJ L 294, pp. 1-21.

[69] 21 Directive 2005/56/CE of the Parliament and the Council of26 October 2005, on cross-border mergers of limited liability companies, OJ L 294, 10.11.2001, pp. 22–32.

[70] M. Benabdallah, R. de Wit, H. Reinoud, *ECJ Disallows Immediate Collection of Tax Upon Migration*, Baker & McKenzie –Nederlands, Client/Legal Alert, 5 December 2011.

[71] ECJ C-106/16 *Polbud — Wykonawstwo sp. z o.o., in liquidation* [2017], ECLI:EU:C:2017:804.

[72] *Ibidem*, para. 33.

on Articles 49 and 54 TFEU, the home Member State is entitled to provide legislation for the protection of public interests but cannot impose mandatory liquidation. In *Polbud*, the ECJ extended the scope of application of the principle of equivalence to the Member State of origin.[73]

Therefore, inasmuch as this kind of reincorporation is accessible to companies, they obviously make use of it. Consequently, companies take advantage of the presumption that their COMI coincides with their registered office, unless creditors are able to rebut the presumption by proving that it is still in the State of origin.

Without any doubt, a decision to transfer the COMI when insolvency proceedings are on the horizon significantly impacts creditors' risks.[74] The three-month reference date/freezing period might be seen as a simple solution to forum shopping at the creditor's expense. As a consequence, the applicable law will be that of the jurisdiction of the Member State in which the principal place of business or the registered office was located within the three-month period prior to the request for opening insolvency proceedings.

The considerations with respect to this freezing period were further analysed by the ECJ in the *Staubitz-Schreiber* case, in which a German sole trader resident in Germany pursued business activities until 2001, when she filed for the opening of insolvency proceedings. In 2002, she moved to Spain in order to live and work there, i.e. she moved her residence from Germany to Spain after filing for insolvency with a German court.[75] The ECJ maintained that a transfer of jurisdiction from the court originally seized to a court of another Member State would be contrary to the objectives pursued by the Regulation, which intends to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another in order to obtain a more favourable legal position.

> That objective would not be achieved if the debtor could move the centre of his main interests to another Member State between the time when the request to open insolvency proceedings was lodged and the time when the judgment opening the proceedings was delivered and thus determine the court having jurisdiction and the applicable law.[76]

Furthermore, it would be contrary to efficient and effective cross-border proceedings, as it would oblige creditors to be in continual pursuit of the debtor wherever it chose to establish itself more or less permanently, and would often mean in practice that the proceedings would be prolonged, whereas "retaining the jurisdiction of the first court ensures greater judicial certainty for creditors who have assessed the risks to be assumed

[73] *Ibidem*, para. 43. Please note that the principle of equivalence requires the same remedies and procedural rules to be available to claims based on European Union law as are extended to analogous claims of a purely domestic nature.

[74] P.L. Davies, S. Worthington, *Gower and Davies' Principles of Modern company Law*, Sweet & Maxwell, London: 2012, pp. 235-237.

[75] ECJ C-1/04 *Susanne Staubitz-Schreiber* [2006], ECR-I 00701, para. 15.

[76] *Ibidem*, paras. 24-25.

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."[77] Indeed, if the transfer of a company's centre of main interest after the filing resulted in a change of the international competence, the debtor would have the unrestricted power to select the preferred location and the applicable law.[78]

We may then conclude that the *Staubitz-Schreiber* case was underpinned by the need to avoid forum shopping. It seems, however, that one of the next ECJ cases, i.e. *Interedil,* actually paves the way for that practice.

The problematic issue in *Interedil* related to the question whether the reasoning from *Staubitz-Schreiber* could be applied when a COMI was transferred before the filing for insolvency. Interedil was established under Italian law and had its registered office in Italy. In 2001, its registered office was transferred to the United Kingdom as a result of acquisition proceedings and removed from the Italian register of companies. However, it still held some assets and a bank account in Italy. In 2003 an Italian creditor filed a petition with the Italian court for the opening of bankruptcy proceedings against Interedil. Interedil challenged the jurisdiction of that court on the grounds that, as a result of the transfer of its registered office to the United Kingdom, only the courts of that Member State had jurisdiction to open insolvency proceedings.[79]

The ECJ stated that when the registered office is transferred before a request to open insolvency proceedings is lodged, the centre of the debtor's main interests is therefore presumed, in accordance with the second sentence of Article 3(1) of the Regulation, to be located at the place of the new registered office and, accordingly, the courts of the Member State within the territory in which the new registered office is located have jurisdiction. The same rules must apply where, at the date on which the request to open insolvency proceedings is lodged, the debtor company has been removed from the register of companies, and where it has ceased all activity.[80] As a consequence, cross-border reorganizations before the filing would also shift the applicable law and jurisdiction for insolvency proceedings.

Therefore, we may conclude that a company's COMI is to be determined having regard exclusively to factual elements existing within the three-month period prior to the request for opening insolvency proceedings, irrespective of the previous location of a company's registered office and real seat. If a company transfers its registered office to another Member State three months before filing for insolvency, the presumption is that the COMI is also transferred to the Member State of the new registered office, unless proven to be the contrary. Obviously, the burden of proof of that is shifted to the objecting creditors. Proving such an assertion is not an easy task, since they have to

[77] *Ibidem*, paras. 26-27.

[78] M.-P. Weller, *Die Verlegung des Centre of Main Interest von Deutschland nach England*, 37(6) Zeitschrift für das gesamte Handels- und Gesellschaftsrecht 835 (2008), p. 850; H. Eidenmüller, *Abuse of Law in European Insolvency Law*, 1 European Company Financial Law Review 1 (2009), p. 13.

[79] ECJ, C-396/09 *Interedil*, paras. 10-13.

[80] *Ibidem*, paras. 56-57.

prove that the last location of the company's headquarters is still the only one that third parties can "ascertain" as the company's centre of administration.[81]

This reasoning, however, remains in line with the ECJ case-law in international company law granting companies the right to free movement within the European Union. The home State's priority position is maintained, though combined with a reference to the host State's law in so far as the latter accepts the new *lex societatis* of the company.[82]

As a consequence, we may conclude that corporate mobility has significantly impacted EU insolvency law by enabling forum shopping through the transfer of registered offices, despite the fact that the Insolvency Regulation itself intends to limit forum shopping. Companies can manage to change the applicable law for their insolvency by transferring their registered offices and – after three months – filing for insolvency in that Member State.

If the insolvent company transfers its headquarters together with its registered office and third parties can clearly ascertain that the company is managed from the new Member State, no evidence can be given to overcome the presumption that a company's COMI coincides with its registered office. The *Interedil* decision applied the principles of *Eurofood* by specifying what proof is required to rebut the presumption of concurrence between the COMI and the registered office.[83] The ECJ held that "where a company carries on its business in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by the Regulation."[84] Additionally, it was stated that if a company's headquarters coincides with its registered office in a way ascertainable by third parties, the presumption cannot be rebutted.[85] Therefore, the ascertainability mechanism is able to prevent forum shopping, but in fact at the creditors' expense.[86]

It would be possible to reduce uncertainty by replacing the COMI test for main insolvency proceedings within the EU with an incorporation or registration seat test, or by allowing the presumption that COMI equals the place of registered rebuttable

[81] The ascertainability requirement was initially mentioned by the ECJ in its *Eurofood* case, where it stated, *inter alia*, that "in determining the centre of the main interests of a debtor company, the simple presumption laid down by the Community legislature in favour of the registered office of that company can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect" (ECJ, C-341/04, *Eurofood IFSC Ltd.* [2006], ECR I-1078).

[82] D. Daniel, *Outbound Establishment Revisited in Cartesio*, 6 EC Tax Review 250 (2008), p. 251; M.-P. Weller, *Die Rechtsquellen des Gesellschaftskollisionsrechts*, 3 IPRax 202 (2009).

[83] ECJ, *Interedil*, para. 53.

[84] ECJ, *Eurofood*, sentence pt. 1.

[85] ECJ, *Interedil*, para. 59.

[86] Whereas there are better instruments that the ascertainbility criterion: for instance, the cross-border merger directive requires Member States to protect creditors of the merging companies which have to provide a security or to pay in advance credits that have not yet fallen due; creditors are often required to file a petition or to oppose judicially against the merger.

only in wholly exceptional circumstances. While companies are free to choose their business location within the EU, Member States are still entitled to implement various procedures and laws that would combat fraud and wholly artificial arrangements. Such an approach would be advisable as far as the EU and all its safeguards and mutual recognition principle are concerned. In contrast, the current shape of the conflict of laws rules in insolvency law, i.e. the COMI principle with the rebuttable presumption with respect to the registered office, might be maintained as far as companies originating from third countries beyond the European Union would be concerned.

The US already applies, with respect to its recognition of main insolvency proceedings, an asymmetric logic between a national and a foreign company. As explained, the criterion of centre of main interest will be of primary importance if the main insolvency proceedings are commenced by a national company in a foreign jurisdiction, whereas more trust is granted and a lower threshold required for opening main insolvency proceedings in the US for a foreign debtor.

There is no similar policy within the EU, but it seems to suit perfectly the above postulated approach, according to which the centre of main interest could apply only to the recognition of the foreign main insolvency proceedings, whereas more trust would be provided for similar proceedings originating within the EU.

CONCLUSIONS

The European Commission has identified insolvency and restructuring proceedings for debtor companies as an important factor and one of its top priorities for creating a strong capital market. As the Brussels conference on convergence of insolvency frameworks within the European Union proved, there is a room for an increasing harmonization of insolvency law.

The Recast Regulation implements a theory of universalism within the EU and automatically recognizes main insolvency proceedings opened in any Member State where the debtor has its COMI, with such proceedings encompassing all the debtor's assets situated anywhere in the EU. It is, however, legitimately being questioned whether this actually strengthens, or rather weakens, the COMI/registered office rebuttable presumption and in fact encourages insolvency forum shopping. A debtor might seek to change its COMI because a transaction that might come under the scrutiny of a liquidator benefits a person connected with the debtor, such as the relative of a director of a corporate debtor. But directors of a debtor company may also find it beneficial to change in advance the company's COMI in order to benefit from more lenient insolvency rules.

The issue of transfer of the company seat, as well as forum shopping, has been widely discussed by the ECJ in its case-law on international company law. Due to the lack of a uniform European choice-of-law rule for companies, this case-law sheds light on the impact of the EU law on the right of establishment on the cross-border activities of companies in the internal market. In the same vein, the US Supreme Court has issued several significant decisions based on which the limits of acceptable forum shopping are at least a little bit more clearly marked.

Based on the aforementioned, European harmonization measures facilitating cross-border mobility should necessarily offer predictability and efficiency, but as well as the security of such operations. It is essential that the parties should be able to calculate the risk of an investment, including the foreseeability of the applicable law that will handle any future disputes.[87] "A free demand for corporate law requires freedom of incorporation as well as freedom of reincorporation,"[88] but it should be balanced with fundamental insolvency law policies.

Recital 22 of the preamble to the Recast Regulation acknowledges that "as a result of widely differing substantive laws it was not practical to introduce insolvency proceedings with universal scope throughout the entire EU. The application without exception of the law of the State of the opening of proceedings would (…) frequently lead to difficulties. This applies, for example, to the widely differing national laws on security interests to be found in the Member States. Furthermore, the preferential rights enjoyed by some creditors in insolvency proceedings are, in some cases, completely different."

There are different opinions as to the extent to which a company during the insolvency process should be entitled to abrogate existing contractual commitments. Furthermore, there is no agreement as to the priority afforded secured credit, or whether secured creditors are subject to a restructuring or bankruptcy moratorium, or if they can be forced to agree on a restructuring plan against their will. In the same vein, some countries place a strong emphasis on liquidation, whereas others emphasise company restructuring.

Taking into account the flexible insolvency market in the US, as well as high business mobility within the US, the European Commission noted in its Communication on a new European approach to business failure and insolvency that: "As Europe is facing a severe economic and social crisis, the European Union is taking action to promote economic recovery, boost investment and safeguard employment. It is a high political priority to take measures to create sustainable growth and prosperity." The Commission highlights the importance of insolvency rules in supporting economic activity.

However, since the solution applied by the Recast Regulation to determine a court's international competence and the applicable law remains open to challenge, it reduces legal certainty and encourages an increase in litigation with respect to proper jurisdiction. Both national courts as well as businesses would appreciate more precise guidance to determine the applicable law for insolvency. Therefore, the traditional national approach underlying the current system of insolvency law might possibly make room for a unilateral approach which would grant a central place to intra-Union mobility and recognition of rights granted by other Member States, whereas COMI would still remain the applicable threshold for companies originating from third States.

[87] H. Eidenmüller, *Der Markt für internationale Konzerninsolvenzen: Zuständigkeitskonflikte unter der EuInsVO*, 57 Neue juristische Wochenschrift 3456 (2004).

[88] F.M. Mucciarelli, *Freedom of Reincorporation and the Scope of Corporate Law in the US and the EU*, New York University Law and Economics Working Papers 2011, p. 4.