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Luxembourg Holding Companies: Embracing and Unveiling the Multifaceted Intricacies of COMI, Central Administration and Real Centre of Management

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Luxembourg Holding Companies: Embracing and Unveiling the Multifaceted Intricacies of COMI, Central Administration and Real Centre of Management

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Acknowledgement

INSOL International is very pleased to present the 31st Technical Paper under its Technical Papers Series titled “Luxembourg Holding Companies: Embracing and Unveiling the Multifaceted Intricacies of COMI, Central Administration and Real Centre of Management” by Christel Dumont, Senior Counsel, Bonn Steichen & Partners, Luxembourg.

This paper examines the similarities and differences in the criteria for determining the Centre of Main Interest (COMI) or where the real central management is based, and these are examined in the context of restructuring and insolvency, corporate and tax perspectives. The paper also identifies the potential overlap between these criteria and highlights circumstances where COMI has been moved.

The concluding part the paper details the manner in which the COMI or registered seat transfer may be achieved, and provides some very useful examples of the potential consequences and practical issues that may arise from a COMI shift or where the company’s registered seat and central administration or real centre of management do not coincide.

INSOL International sincerely thanks Christel Dumont for this detailed analysis and for writing this excellent technical paper.

September 2015

Luxembourg Holding Companies: Embracing and Unveiling the Multifaceted Intricacies of COMI, Central Administration and Real Centre of Management

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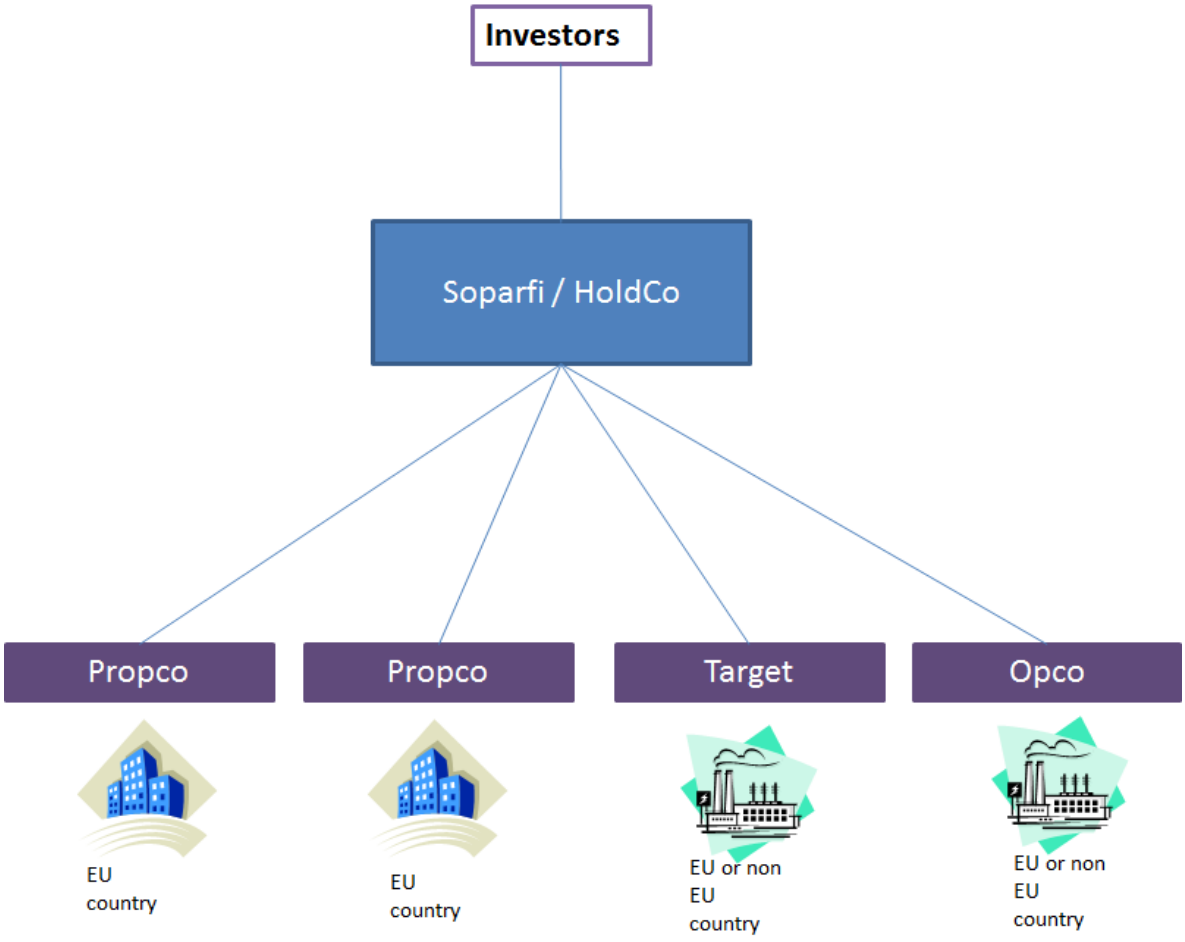
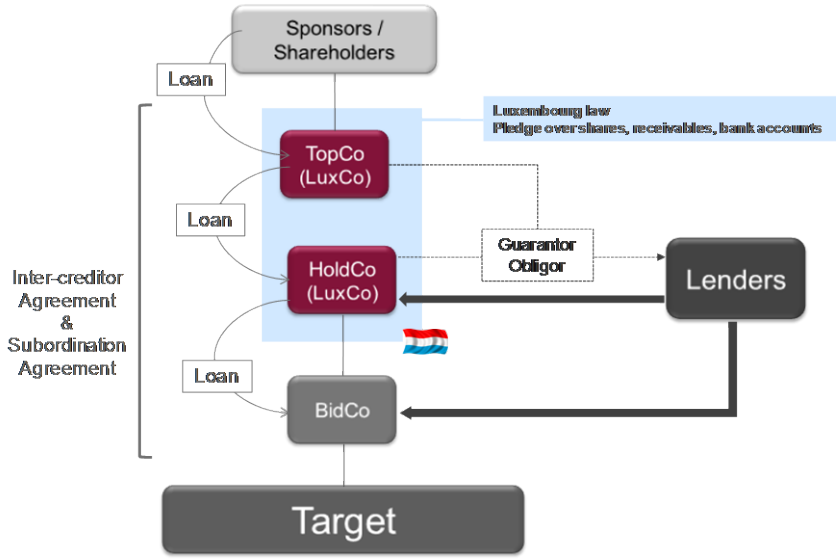
Over the past few decades, Luxembourg has become an increasingly attractive jurisdiction for structuring investments. Luxembourg has a strong reputation of stability and of pro-business legislation and administration, that has attracted numerous private equity houses and investment funds and has led to multinational groups adding one or several Luxembourg entities either as a parent holding company or as a subsidiary or subsidiaries in their Pan-European structures.

A typical Luxembourg investment structure comprises at least one company located in Luxembourg with direct or indirect subsidiaries also located in Luxembourg or in another EU or non-EU country. The types of assets held through such structure may vary. Real estate assets held through these structures are usually located within the EU (mainly in France, Germany or Spain but also in Eastern countries or in the US), operational assets could be located anywhere in the world.



Holding structures used for financing activities are slightly different as they may include two Luxembourg companies.

* The views expressed in this article are the views of the author and not of INSOL International, London.



The use of the double Luxembourg company structure has gained ground in financing activities since the French "*Coeur Défense*" case[1]. In this case, the structure was quite simple, a building located in the Paris business district of La Défense, was owned by a French company (*société par actions simplifiée*) which was held by a Luxembourg SOPARFI[2]. The only assets of the SOPARFI were the shares in the French company. The SOPARFI was guarantor under various loans to acquire and refinance the acquisition of the building. The French company and the SOPARFI, in anticipation of a default under the terms of the various loans, lodged a petition before the Paris commercial court to be placed under safeguard proceedings. The Paris commercial court, held on a number of grounds, that the centre of main interests (COMI) of the SOPARFI was not located in Luxembourg but in France.

Considering that the opening of the safeguard proceedings was detrimental to the lenders, legal practitioners have created structures that include two Luxembourg holding companies to lower the risks lenders could face under future similar circumstances. The determination of the location of COMI in the *Coeur Défense* case law proved to be crucial and it remains a key element in all restructuring and insolvency matters.

Under the European Regulation 1346/2000 on insolvency proceedings (EIR), the determination of COMI is paramount as it allows for the determination of jurisdiction and thus of the applicable law. Taking into consideration the definition of COMI provided for in EIR, the European Court of Justice (ECJ) and EU national courts have developed the applicable criteria to determine the COMI.

However, if COMI is the centerpiece in restructuring and insolvency matters, it seems that it is not an isolated concept, given that other relatively similar notions are used in tax and corporate matters.

From a tax perspective, the concept of central administration or the real centre of management is considered a key element in ascertaining whether a holding company has its tax residence in Luxembourg. It is highly important to determine if the central administration of a company is located in Luxembourg as it establishes where taxes are due in accordance with the national tax sovereignty principle.

From a corporate point of view, the registered seat of the company is considered to be located where the real centre of management is, i.e. where the important decisions are taken.

Although the above notions and the criteria used to determine them relate exclusively to their respective fields of application, this paper highlights that they can overlap and potentially interact.

For example, if a holding company considers undertaking a COMI shift to benefit from a more favourable insolvency regime, it may have to assess whether it could trigger unsuspected side effects from a tax or corporate perspective. Notwithstanding the fact that a company facing financial difficulties may not be primarily concerned by tax consequences, this issue should not be considered as purely theoretical.

[1] Paris commercial court, 3 November 2008 1st chamber and the subsequent appeal proceeding
[2] A SOPARFI is a non-regulated commercial company whose object is to hold participation in other entities.

The first part of this paper examines the similarities and differences in the criteria for determining COMI or real centre of management in each of the three areas and will highlight the importance of the date on which COMI or real centre of management is to be determined. The second part examines the potential overlap between the criteria. The third part briefly describes situations where COMI has been moved.

Finally, the last part of the paper provides some examples of the potential consequences related to the interaction of the three notions and analyses the practical issues that may arise from a COMI shift or from a transfer of real management seat.

1. Description of the Three Notions

1.1 Criteria Used to Ascertain Each Notion

1.1.1 Restructuring and insolvency

As mentioned, from a restructuring and insolvency perspective, COMI is a key element in determining the jurisdiction and applicable law in relation to restructuring and insolvency proceedings. It is particularly important to determine applicable law in restructuring proceedings as some EU countries have a less or more attractive legislation depending on whether the interested party is a creditor or a debtor. Within the EU, determining the criteria used to ascertain the COMI is quite simple as (i) the EIR defines what the COMI is (Recital 13) and where it shall presumably be (article 3.1), and (ii) the ECJ case law has clarified this concept and has explained that it has an autonomous meaning which must be interpreted in a uniform way independently of national legislation.

Recital 13 provides that "*the centre of main interest 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*". It clearly appears from this description that the European legislator prioritised the place where the interests of the debtor are administered and not the place where those interests are located. The ECJ confirmed the intention of the European legislator in the Interedil decision[3], when it stated that "*the presumption in the second sentence of Article 3(1) of the Regulation that the place of the company's registered office is the centre of its main interests and the reference in recital 13 in the preamble to the Regulation to the place where the debtor conducts the administration of his interests reflect the European Union legislature's intention to attach greater importance to the place in which the company has its central administration as the criterion for jurisdiction*". It is clear, therefore, that the location of the "head office" of a company is considered more important than where such company has its assets or interests.

The second important point arising from Recital 13 is that the location of the COMI shall be objective: it must be ascertainable by third parties and therefore, it shall not be solely determined by the debtor itself. The European legislator's main goal was to avoid forum shopping as far as possible, and although this goal has not been entirely met, the underlying idea is to allow creditors to measure the risk undertaken when they enter into an agreement with their counterpart. Indeed, when creditors sign an agreement, they will certainly be interested to ascertain which insolvency regime should apply to the agreement if their counterpart becomes insolvent. Recital 13, by providing that the COMI must be ascertainable by third parties, ensures that such third parties will benefit from some kind of certainty and foreseeability as their debtor will not normally be entitled to determine where its COMI is.

The ECJ has clarified the importance of the ascertainable character of the COMI in several important decisions[4]. In the *Eurofood* case, the ECJ mentioned that "*the centre of main interests must be identified by reference to criteria that are both objective and ascertainable by third parties. That objectivity and the possibility of ascertainment by third parties are necessary in order to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open main insolvency proceedings. That legal certainty and that foreseeability are all the more important in that, in accordance with Article 4(1) of the Regulation, determination of the court with jurisdiction entails determination of the law which is to apply*."

[3] ECJ, 20 October 2011, Case C-396/09, Interedil Srl c/ Fallimento Interedil Srl

[4] ECJ, 2 May 2006, Case C-341/04, Eurofood, ECJ, 17 January 2006, Case C-1/04, Staubitz-Schreiber, ECJ 15 December 2011, Case C-191/10 Rastelli c/ Hidoux, and Interedil case

The presumption that the COMI shall be located at the registered office of a company, set out in article 3(1) of the EIR, which aimed at simplifying the application of the rules of the EIR, was rapidly considered as rebuttable by the ECJ. In the *Eurofood* case, the ECJ stated that "*in determining the centre of 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*."

The Luxembourg courts have seldom been confronted with matters in which COMI has had to be ascertained, however, when such cases have arisen ECJ case law has mainly been followed. The main decisions in this area relate to the TAR Luxembourg case in which a creditor requested the Luxembourg courts to declare the debtor company bankrupt and the debtor company argued that its COMI was located in France and not in Luxembourg. The first instance court[5] applied a theory of *concordant indicia* and thus analysed all the facts and evidence submitted by the defendant, i.e. that its clients and activities were mainly based and exercised in France, and the management was conducted from the domicile of one of the directors in France, etc. However, the first instance court decided that these elements solely confirmed that the company held commercial activities in France and they did not ascertain that its COMI was in located there as well. The court considered that as the meetings of the board of directors were held at the registered office of the company in Luxembourg and that the supplier invoices were all sent to its registered office address, third parties had legitimately thought that the COMI was located at the company's registered office.

The court of appeal[6] was however of a different opinion. As a matter of fact, it confirmed that the company's COMI was located in France and not in Luxembourg as (i) the file contained two reports from the French and Luxembourg tax administrations which stated that the commercial activities of the company were held in France, (ii) the company managed its activities with its creditors from France and that all its material and intellectual infrastructure were located there as well, and (iii) the activities of the company in Luxembourg were those of a letter box company as opposed to its activities in France where it had usually managed its relations with its creditors and clients in a way easily ascertainable by them. The Luxembourg court of appeal followed the *Eurofood* decision[7], although it gave priority to the place where the company carried out its commercial activities and deemed less important the place where the board of directors of the company met.

1.1.2 Corporate

From a corporate perspective, article 2 of the law dated 10 August 1915 on commercial companies as amended (the Company Act) clearly provides that "*the domicile of a commercial company is located at the seat of its central administration. Until evidence to the contrary shall have been finally brought, the central administration of a company is deemed to coincide with the place where its registered office is located*". Although the initial wording of this article, amended in 2006[8], mentioned "principal place of business" instead of "central administration", legal authors have agreed that the two notions are quite similar[9]. It is, however, important to note that neither the Company Act, nor any other law defines the concept of "central administration".

In addition, article 159 of the Company Act provides that the central administration criterion determines the applicable law by stating: "*Any company whose central administration (head office) is in the Grand-Duchy shall be subject to Luxembourg law, even though the constitutive instrument may have been executed in a foreign jurisdiction*". This article further explains that: "*In case the domicile of a company is located in the Grand-Duchy of Luxembourg, it is of Luxembourg nationality and Luxembourg law is fully applicable to it. In case the domicile of a company is located abroad but such company has in the Grand-Duchy of Luxembourg one or more locations where it conducts operations, the place of its most important establishment in the Grand-Duchy of Luxembourg, which it shall indicate for that purpose in the documents whose*

[5] TAR Luxembourg, 9 February 2007, BIJ 2007, p. 81
[6] CA Luxembourg, 12 November 2008, Journal des Tribunaux Luxembourg, n° 1 – 01/2009, p. 32
[7] Le siège social au regard des procédures d'insolvabilité, Steve Jacoby, Journal des Tribunaux Luxembourgeois, n° 1 – 01/2009, p. 23
[8] Amended by the law dated 25 August 2006
[9] P-H Conac, le siège social en droit luxembourgeois des sociétés, Journal des Tribunaux Luxembourgeois, n° 1, 01/2009, p.2 ; Helene Massard. Le transfert international de siège des sociétés en droit luxembourgeois, Pasicrisie luxembourgeoise, 2012, p. 769

publication is required by law, shall constitute the secondary domicile of that company in the Grand-Duchy of Luxembourg".

It is important to point out that the ECJ[10] had the opportunity to clarify the notion of "place of business" as being the "*place where the essential decisions concerning the general management of that company are adopted and where the functions of its central administration are carried out*" thus emphasising the importance of the notion of central administration. The ECJ further stated that: "*the determination of a company's place of business requires a series of factors to be taken into consideration, foremost amongst which are its registered office, the place of its central administration, the place where its directors meet and the place, usually identical, where the general policy of that company is determined*". The ECJ clearly excludes that a "letter box" company could be considered as a place of business. Once again, the criterion as to where the "head office of a company is located, seems to be given priority.

The Luxembourg courts have adopted the same position. In a decision dated 18 April 2008[11], the first instance court explained that the definition of the ECJ in the above mentioned case is the same as the one contained in the parliamentary works regarding the law dated 29 December 1971, which states that "*the term "centre of real management" is a synonym of the term "central administration" mentioned in article 159 of the Company Act. This is the place where intellectual managerial activities are carried out, the place where the general meetings of shareholders are held, and where the board of directors are held*,..". The first instance court further explained that this is the place where the main important decisions concerning the corporate lifecycle of a company are taken. The court of appeal, in the same case, further explained that it was necessary to distinguish the notion of a company's operational centre, i.e. the place where the company operated and the place of central administration, i.e. the place where the main decisions regarding the operations of a company were taken[12].

Throughout various jurisdictions the applicable law is usually determined according to two main criteria, either the place of its real seat (as is the case in Luxembourg) or the place of its incorporation, where it first acquired its legal personality. We will see in part 2 of this article that the mere fact that the same criterion is not used in all jurisdictions may give rise to potential issues.

1.1.3 Tax

From a tax perspective, as from a corporate perspective, the notion of "central administration" is crucial as it determines the tax residence of a company, which consequently determines where it shall be subject to (*inter alia*) income tax.

From a Luxembourg tax law point of view, according to article 159 of the Luxembourg Income Tax Law dated 4 December 1967, as amended, two main criteria are taken into account by the tax administration, i.e. the registered office (*siège statutaire*) and the place of central administration ("*administration centrale*") to determine whether a company is considered a tax resident in Luxembourg. These criteria are not cumulative and if a company has at least its registered office or its central administration in Luxembourg, such company will be considered as a Luxembourg tax resident[13] from a domestic tax standpoint.

The criterion of central administration replaced the criterion of principal place of business ("*principal établissement*") in Luxembourg income tax law in 2007 to bring the tax concept in line with the Company Act (please refer to section B above). The Luxembourg legislator has however explicitly specified in the official commentaries to the law introducing the concept of central administration that this change should not have any practical consequences[14]. Therefore, the Luxembourg doctrine generally considers that the concept of central administration is equivalent to the concept of principal place of business.

[10] ECJ, 28 June 2007, Case C-73/06, Planzer Luxembourg Sàrl c/ Bundeszentralamt für Steuern
[11] TAR Luxembourg, 3ème chambre, 18 April 2008, n° 107744 judgment n° 70/2008
[12] CA Luxembourg, 21 October 2009, n° 33908, citing Prof. P-H Conac
[13] A. Steichen, « Le siège social au regard du droit fiscal », *Journal des Tribunaux Luxembourgeois*, n° 1, 01/2009, p. 6
[14] Article 159 of Luxembourg income tax law, note 2

Legal authors generally argue that the tax notion of principal place of business (mainly) corresponds to the (same) concept of principal place of business in corporate law and in the Company Act[15].

Therefore, the assessment of the principal place of business from a tax perspective will generally depend on the same factual analysis as from a corporate law point of view, i.e. the principal place of business is the place where the effective management of the company is located, that is to say where the board of directors and where the general meetings of shareholders are held. It is generally considered that the place where the business is operated is not relevant.

As some other countries do not use the criteria mentioned above, tax treaties are entered into to avoid double taxation. The OECD model tax convention, which is usually used by Luxembourg in its tax treaties, provides that the criterion to be used is the place of effective management, i.e. the place where the company's key management and commercial decisions are taken.

1.2 Date on which COMI or Central Administration is to be Determined

Once the criteria used to determine COMI or central administration has been determined, the other main issue in assessing such notions is the timing of ascertainment.

Regarding the timing of ascertainment of COMI, ECJ case law is quite clear on when COMI has to be determined, such issue being particularly important, especially if a COMI shift has been operated.

The ECJ clarified in 2006[16] 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 main 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*."

The ascertainment is therefore clearly done (ex-post) at the time of the request to open main insolvency proceedings.

In the *Interedil* case, despite the fact that the national court did not raise the question of the COMI's timing of ascertainment, the ECJ explained that it was necessary to identify its relevant date in order to determine its location and thus provide a full answer to the referring court. *Interedil* was an Italian company that transferred its registered office to London (United Kingdom) on 18 July 2001. On the same date, it was removed from the Italian register of companies. It appeared that it was removed from the United Kingdom register of companies on 22 July 2002 and that one of its creditors, Intesa, filed for the opening of bankruptcy proceeding before an Italian court on 28 October 2003. *Interedil* claimed that the Italian court was not competent as it did not have its COMI in Italy. The ECJ stated that the EIR does not contain any express provisions concerning the specific case involving the transfer of a debtor's COMI and that in the light of the general terms in which Article 3(1) of the EIR is worded, the last place where a company's COMI was located must be regarded as the relevant place for the purpose of determining the court's jurisdiction to open main insolvency proceedings.

The ECJ, according to the findings of the *Staubitz Schreiber* case, explained that: "*it is the location of the debtor's main centre of interests at the date on which the request to open insolvency proceedings was lodged that is relevant for the purpose of determining the court having jurisdiction*". Therefore, if the debtor's transfer of registered office takes place prior to the request to open insolvency proceedings, the debtor's COMI is presumed to be located at its new registered office in accordance with the presumption set out in article 3(1) of the EIR, unless such presumption is rebutted by evidence that the COMI has not followed the change of registered office.

In the case of *Interedil*, it appeared that on the date when the request to open insolvency proceedings was lodged, *Interedil* had already been removed from the register of companies in

[15] G. Heintz, « L'impôt sur le revenu des collectivités », *Etudes Fiscales n° 113/114/115*, Luxembourg, Ed. St Paul, 1999, p. 51
J. Shaffner, *Droit fiscal international*, n°54 p92

[16] ECJ, 17 January 2006, C-1/04 Staubitzs-Schreiber

the UK and it had ceased all activity. The ECJ considered that: "*a debtor company's main centre of interests must be determined by attaching greater importance to the place of the company's central administration, as may be established by objective factors which are ascertainable by third parties. 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 that provision cannot be rebutted. Where a company's central administration is not in the same place as its registered office, the presence of company assets and the existence of contracts for the financial exploitation of those assets in a Member State other than that in which the registered office is situated 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 Member State".*

The ECJ then explained that if *"a debtor company's registered office is transferred before a request to open insolvency proceedings is lodged, the company's centre of main activities is presumed to be the place of its new registered office".* By bearing in mind that the COMI shall be ascertained on the date when the request to open main insolvency proceedings is lodged, both the *Interdil* case and the *Staubitz-Schreiber* case (although slightly different in context) have confirmed that the relevant time to ascertain the presumed COMI's is the same, i.e. on the date when the request to open main insolvency proceedings is lodged whether the COMI is located at the registered office or at another place ascertainable by third parties. In any case, these examples clearly illustrate that many practical situations are difficult and that the timing of a COMI's ascertainment is as crucial as its ascertainment.

From a tax perspective, in the absence of a registered office in Luxembourg, the determination of the residence of a company is necessarily done ex-post as the second criterion applicable to determine whether a company is a tax resident in Luxembourg, namely the place of central administration or principal place of business, is a matter of fact and may by way of consequence change over time. The principal place of business or central administration is determined on the basis of *concordant indicia,* such as the place where the general meetings of shareholders or the meetings of the board of directors are held, the place where the main accounts are held and where the main decisions are taken[17]. The determination is in practice done by the tax administration when it is confronted with a situation where the company takes the position that it has (or does not have) its central administration in the country. It is also important to note that the determination must be done on a long-term basis to limit the risks of abusive situations. For example, a company knowing that it may benefit from a more favorable tax regime on a specific operation, might be tempted to transfer its central administration from / to Luxembourg for the period of the relevant operation and then retransfer it once it has ended. If the determination were not on a long-term basis, it would increase the possibilities of abuse.

1.3 Consequences

If from a European perspective the issue of timing seems rather clear, it can be much more complicated in a wider international context. It is important to point out here and to recall that the determination of COMI in an insolvency context determines the jurisdiction and consequently the applicable law. A European creditor who must deal with the insolvency proceedings of its debtor that has assets in an offshore jurisdiction or in any another non EU country that has not implemented the UNCITRAL Model Law, will certainly have problems with foreign legal intricacies and will most likely consider the EU as a legal haven despite the fact that EIR could certainly benefit from some improvements.

Creditors having experienced a similar situation must have noticed that most of the Caribbean offshores jurisdictions will consider the country of incorporation as being the country where main insolvency proceedings will be opened. On the other hand, most onshore jurisdictions are more likely to prefer to open main insolvency proceeding in their own jurisdiction if it appears that this is where the assets are located. Undoubtedly, the non-alignment of the countries of incorporation, assets and management could trigger extensive problems in case of opening of insolvency or bankruptcy proceedings, especially as the control of assets is usually the Holy Grail that everyone involved in the proceedings is seeking.

[17] Patrick Mischo et Marie Junius, « Résidence fiscale et substance », IFA

In addition, practitioners might also have to face the issue of companies seeking recognition in the US under Chapter 15 if any assets are located there. According to Chapter 15 (i) a "foreign main proceeding" is a foreign proceeding pending in the country where the debtor has its COMI and (ii) a "foreign non main proceeding" is a foreign proceeding other than a main proceeding, pending in a country where the debtor has an establishment. Contrary to "establishment"[18], which is defined in Chapter 15, COMI has not been defined and the absence of a definition has led to numerous court decisions. This is indeed a main issue as the recognition of a foreign proceeding as main or non-main proceeding is considered fundamental to determine what types of relief a foreign entity may obtain in the US. While the foreign main representative can obtain an automatic stay of all of the debtor's properties in the US and the ability to voluntarily file for a Chapter 11 case, the foreign non-main representative can only file for an involuntary Chapter 11 case. A non main proceeding recognition gives more power to creditors due to the fact that non voluntary Chapter 11 cases can be started by the representative[19].

In this context, the analysis of COMI which is done by US courts may be slightly different from the analysis done by a foreign court having appointed a foreign representative. It seems that US courts consider that if foreign proceedings took place in the country of the debtor's registered office, this country is presumed as the proxy for COMI, unless evidence is provided to demonstrate the contrary. On the contrary, if foreign proceedings took place in a country other than the one of the debtor's registered office, the foreign representative has the burden of proof on COMI. This could clearly lead to divergent interpretations. In the case *In re Tri Continental Exchange Ltd.*[20] the debtors were insurance companies operating under the laws of St Vincent and the Grenadines ("SVG"). A SVG court appointed liquidators but a creditor argued that the liquidators should not be allowed to obtain recognition as foreign main proceedings since the debtors conducted fraudulent activities in the US and that most of the alleged defrauded creditors were located in the US. The US court however considered that the debtors conducted "regular business operations at their registered offices" in SVG and that the COMI was located at such registered offices. The Southern District of New York court decided in the case *In re SPhinX*[21]*.* A debtor, incorporated and registered in the Cayman Islands kept some records there and received some mails but was not authorised to conduct business in the Cayman Islands and had no employees or assets there. The US court considered in light of these facts and of the facts that the debtor had USD 500 million in assets in the US and business operations there, that these facts were sufficient to rebut the presumption that the COMI was located at the registered office in the Caymans and recognised the proceeding as a foreign non main proceeding thus allowing creditors to seek insolvency remedies in the US.

When considering the COMI, it is understood that US courts consider the following criteria:

- Location of the debtor's headquarters,
- Location of those legal persons who actually manage the debtor,
- Location of assets,
- Location of the majority of the debtor's creditors or of the majority of the creditors who would be affected by the case,
- The jurisdiction whose law would apply in most disputes, and
- The jurisdiction in which the debtor is organised and/or registered, and the type of business entity[22].

The fact that such criteria may not coincide with the criteria used by the foreign courts, whether onshore or offshore, clearly leads to major difficulties for the representative or creditors.

[18] "any place of operations where the debtor carries out a non transitory economic activity
[19] Megan R. O'Flynn, The Scorecard so far: Emerging issues in Cross-Border Insolvencies under Chapter 15 of the US Bankruptcy Code, Northwestern Journal of International Law & Business, Volume 32, Issue 2
[20] 349 B.R. 627, 634 (Bankr. E.D. Cal. 2006)
[21] 351 B.R. 103, 117 (Bankr. SDNY 2006)
[22] Douglas E. Deutsch and Francisco Vasquez, The Chapter 15 petition, American Bankruptcy institute Journal, Vol. XXIX n°4, May 2010

2. Potential Overlaps Between Criteria

As described in the first part of this paper, difficult situations may arise due to the fact that (i) the criteria used to ascertain the insolvency, tax and corporate notions of COMI or central administration may differ, (ii) the registered office of a company may not coincide with its central administration and the criteria used to determine it differs as well. However, the criteria and notions may be reconciled although they are not entirely similar.

From a corporate law perspective, the Luxembourg legislator and legal authors have always favoured the principle of real seat rather than the theory of incorporation. The real seat theory favours the criteria of central administration or principal place of business and is used in Luxembourg but also in France, Belgium and Germany. This theory presents the advantage of a political will to privilege a coincidence of the registered office and of the central administration to avoid the risk of abuse of "letterbox" companies. The theory of incorporation favours the place where the company has been incorporated and is mainly used in the UK, the US (especially in the Delaware State), the Netherlands, Italy, and Switzerland. Within the EU, the use of the two theories can create conflicts, especially in case of transfer of registered seat. The EU's founding treaty ("TFEU") promotes the freedom of establishment and thus the right for a company to transfer its registered office to another member state.

The ECJ has been frequently confronted with cases in which it had to decide on the freedom of establishment in case of conflict on the occasion of a transfer of registered seat. What derives from the ECJ case law can be summarized as follows:

- The member state of origin, in case of transfer of a company seat, is free to apply the real seat theory and therefore to impose on a company incorporated on its territory to also have its real seat (i.e. its central administration) on such territory. On this basis, the member state of origin may require the dissolution of the company if it transfers only its real seat / central administration without transferring its registered office. However, if the company transfers both real seat and registered office, the member state of origin cannot oppose such transfer.

- The host member state cannot refuse to register a branch of a company incorporated in accordance with the legal provisions in its member state of origin where it has its registered office, without having any commercial activities in such member state of origin. This implies that the host member state cannot forbid a company incorporated in another member state having transferred its real seat / central administration on its territory to exercise its commercial activities and rights there.

From an insolvency perspective, where the TFEU does not favour the theory of incorporation or the theory of real seat and where difficulties may arise, the EIR gives priority to the real seat theory. This sounds quite logical if we consider that the aim of the EIR is to help protect the rights of creditors as the criteria used need to be "objective and ascertainable by third parties".

Finally, in terms of overlapping between criteria, the ECJ in a recent decision[23] stated what should be considered as an establishment and that the fact that a company has its registered office in a member state does not exclude that it may also have an establishment in such member state and its COMI in another state, where main insolvency proceedings have already been opened. In the case at hand, Illochroma SA had its registered office in Belgium where it had a building, employees and where it conducted commercial activities. It appeared however that Illochroma had its COMI in France and that main insolvency proceedings where opened in France on 21 April 2008. On 4 November 2008, Burgo Group SpA, presented the liquidator a statement of liability. At a later date, the liquidator later informed Burgo Group SpA that the statement of liability was not taken into account because it was outdated. Burgo Group SpA then applied to the Belgian court in order to open secondary proceedings in Belgium, hoping to see its claim admitted in the secondary proceedings. The Belgian court referred to the ECJ and asked whether Article 3(2) of EIR must be interpreted to the effect that, where winding-up proceedings are opened in respect of a company in a Member State other than that in which it has its registered office, secondary proceedings may also be opened in respect of that company in the Member State in which its registered office is situated and in which it possesses legal personality. The ECJ explained that the EIR *"does not preclude a request to open insolvency*

[23] ECJ, 4 September 2014, C-327/13, Burgo Group SpA c/ Illochroma SA in liquidation

proceedings in a Member State where the debtor has an establishment. Article 3(2) of that regulation thus provides that, in such a case, the courts of another Member State are to have jurisdiction to open secondary proceedings against a debtor only if he possesses an establishment within the territory of that other Member State". The ECJ further explained that the definition of establishment supposes the pursuit of an economic activity which implies the presence of human resources and the requirement of a minimum level of organization and a degree of stability but does not rule out for the purpose of this provision that "*an establishment may possess legal personality and be situated in the Member State where that company has its registered office, provided that it meets the criteria set out in that provision*."

In light of this analysis, it seems that the *concordant indicia* that are taken into account to ascertain COMI or central administration seem to be much closer than expected. IAs a matter of fact, the criteria and notions seem to highlight that the main important fact is where the head of the company is located, i.e. where the decisions of the board of directors are taken and where the general meetings of shareholders are held. However, it is certainly important to consider under which circumstances the COMI or central administration has to be determined. The analysis is always a factual one and depending on whether the COMI or the central administration has to be determined, i.e. what type of interests are to be protected[24], its result may vary as the interests at stake are not the same. For example, in insolvency matters, the interests that shall be protected are those of creditors as it appears that the COMI shall be determined on elements that are objective and ascertainable by third parties. At the same time, the ECJ case law states which valid elements should be considered to determine where the COMI is located. These elements do not fundamentally differ from criteria used from a corporate or tax perspective. Consequently, the determination may lead *in fine* to the same result and should be pondered more seriously in case of transfer of central administration or registered seat and COMI shifts.

3. COMI or Registered Seat Transfer

According to the freedom of establishment deriving from article 49 and 54 of the TFEU, a company having its registered office or central administration in a member state shall benefit from the freedom to transfer its COMI or registered seat within the EU and no member state may impose restrictions on the exercise of such freedom.

From a practical point of view, a cross-border transfer may be achieved by the transfer of the registered office, the transfer of central administration without the transfer of registered office, or the transfer of both registered office and central administration. On the corporate side, in countries favouring the theory of incorporation, the registration in a trade register is usually considered as the main element to determine the nationality of a company, whereas in countries favouring the real seat theory, a public notarial deed in the country of origin and one in the host country are required. In any case, the process seems quite straight forward and simple. From a tax perspective, as the criteria used are similar to the corporate ones, in Luxembourg, the transfer of the tax residency of a company will also be achieved by public notarial deeds in the country of origin and in Luxembourg and further factual elements will be required.

From an insolvency law perspective, examples of COMI shifts are numerous and consist of factual elements. In Luxembourg, one of the most famous examples of COMI shift is the PIN Group case[25]. PIN Group AG SA was a Luxembourg company which was the holding company of Germany's second largest mail service provider. It was incorporated in Luxembourg and had its registered office there. The company moved its COMI to Germany and filed a petition for insolvency there in January 2008. Indeed, from mid-December 2007, the company had moved part of its assets and activities to Cologne in a manner ascertainable by third parties. Offices were rented in Germany and the board members were replaced by German board members. The books and records were transferred from Luxembourg to Germany. Despite the fact that the timing of this COMI shift was rather tight and the company still had employees and offices in Luxembourg, the German court considered that the COMI was in Germany and opened main insolvency proceedings there. The Luxembourg court required by a Luxembourg creditor had no other choice but to recognise the existence of the main insolvency proceedings opened by the German court and to open secondary insolvency proceedings in Luxembourg.

[24] A. Prüm, observations de synthèse, Journal des Tribunaux Luxembourgeois, n° 1, 01/2009, p. 29
[25] Amstgericht Köln, 19 February 2008, 73 IE 1/08 and TAR Luxembourg, 21 March 2008, n°447/08

From a practical point of view, as the determination of COMI is mainly based on a factual analysis, a COMI shift should entail several steps that may demonstrate that the COMI has been moved. This shall of course comprise the relocation of central administration, which may include the replacement of directors by new directors located in the country where the COMI has been shifted. The creditors and counterparts must also be informed by appropriate communications and, as the case may be, activities and / or assets shall also be transferred.

However, all consequences and issues should be considered before any transfer of registered seat and / or central administration or before any COMI shift in order to avoid any backfire consequences that are not exceptions in practice.

4. Potential Issues and Practical Consequences

It is deemed important to take into account all circumstances to avoid any unexpected consequences. A few practical examples will be analysed.

A company that had its registered office in Luxembourg decided for tax reasons to move its central administration, without moving its registered office, to the UK where it had some real property. A liquidation risk in Luxembourg cannot be excluded for this type of company. Indeed, Article 159 of the Company Act states that any company that has established its central administration in Luxembourg, is subject to Luxembourg law, regardless of the place where its constitutional act has been signed. This article further provides that "*in case the domicile of a company is located in the Grand-Duchy of Luxembourg, it is of Luxembourg nationality and Luxembourg law is fully applicable to it*". In the envisaged case, the nationality of the company can however be disputed. Article 2 of the Company Act provides that "*the domicile of a commercial company is located at the seat of its central administration (head office). Until evidence to the contrary shall have been finally brought, the central administration of a company is deemed to coincide with the place where its registered office is located*".

According to the combination of article 2 and article 159 of the Company Act, a company shall transfer at the same time both its registered office and its central administration to avoid any risk of liquidation. Indeed, a company that solely transfers its central administration to a foreign country without transferring its registered office may be considered as contravening the provisions of the Company Act and may be declared in judicial liquidation according to article 203 of the Company Act "*the Tribunal d'Arrondissement dealing with commercial matters, may, at the application of the Procureur d'Etat (Public Prosecutor), order the dissolution and the liquidation of any company governed by Luxembourg law which pursues activities contrary to criminal law or which seriously contravenes the provisions of the commercial code or the laws governing commercial companies…*". If the Public Prosecutor can provide evidence that proves that the place of central administration and the place registered office do not coincide, the company shall be considered has not having its domicile in Luxembourg and shall be thus deemed in violation of the Company Act. Under such potential circumstances, a court decision ordering the dissolution of the company could be deemed a rather radical considering that the risks seem more theoretical than real and that the breach does not seem to be a serious one. However, in practice, they cannot be excluded.

COMI shifts are also rarely considered from a tax perspective despite the fact they may entail tax consequences. As explained, the notion of central administration used for tax purposes is quite close to the notion of COMI. Therefore, a COMI shift will usually comprise a transfer of the central administration but if the registered office is maintained in the country of origin, the company may become a dual-tax resident. This shall be the case of a Luxembourg company that transfers either its registered office or its central administration as the criteria used for tax purposes are alternative.

Further complex situations may arise. For instance, the case of a company located in a country applying the real seat theory that transfers its central administration to a country applying the incorporation theory. In such a case, in the country of origin, the company would be considered as having left the country but as the host country does not recognise the real seat theory, it would not consider the existence of the company on its territory as it has not been incorporated there. The company will then be in a sort of no-man's land.

Obviously, in the case of a COMI shift, once insolvency proceedings are opened, problems of recognition may also arise and even more difficult situations can occur where parallel main

proceedings are opened simultaneously in both offshore and onshore jurisdictions. Within the EU, recognition should not be an issue as EIR specifically provides rules of recognition. In practice, in situations where the COMI has been shifted recently, such as the PIN Group case, recognition may be more problematic. Some of the issues that may occur in offshore jurisdictions, seeking Chapter 15 recognition in the US such as timing of the tests for management control, location of assets, parallel US proceedings, illustrate the tensions that arise, as explained in point 0 and are much more problematic. Recognition could also be refused the other way round. The application of Mr. Picard, the US court appointed SIPA trustee in the Madoff case, for recognition in the BVI was refused[26]. Such refusal is not an isolated case. Trustees of the estate of a judgment debtor appointed in Hong Kong bankruptcy proceedings also sought recognition before the BVI court and assistance under part XIX of the Insolvency Act 2003 as amended[27]. The aim for the trustees was to obtain the same powers that they would have had, if they had been appointed by a BVI court. The application was rejected. The BVI court considered that it did not have jurisdiction to grant powers to a foreign trustee, which are only granted to a local appointed trustee by way of a local appointment.

5. Conclusion

The notions of COMI and central administration are deemed crucial in their respective fields of use. Analysis illustrates, however, that the criteria used to ascertain each of these notions are similar and that, to avoid unexpected consequences, particular attention should be paid when considering a COMI shift or a transfer of central administration. In practice, it is not unusual to add, especially in financing agreements, a clause under which the debtor undertakes not to move its COMI or not to transfer its central administration. This type of clause may give some comfort to financing institutions and may clearly avoid some of the difficult situations a creditor may encounter in practice.

The expected reform of the EIR, formalized in the proposal for a regulation of the European Parliament and the Council amending the EIR[28], will clarify the notion of COMI by reflecting the conclusions of the ECJ case law, and particularly the conclusions of the Interedil case[29] treated above. For various reasons and despite its good intentions, this reform will not be able to solve all the problems related to the determination of COMI. A significant step forward could be brought about by a wider adoption of the UNCITRAL Model Law, especially to solve some of the issues related to the recognition and ascertainment of COMI. The main aim of the UNCITRAL Model Law is to promote co-operation between states for a fair and efficient administration of cross-border insolvencies and to protect and maximise the value of the debtor's assets. If a debtor has assets in more than one country, the UNCITRAL Model Law is certainly a useful tool. A broader implementation of the UNCITRAL Model Law along with the use of the EIR, especially in the EU, would be likely welcomed by some practitioners involved in complex international cases as some sort of relief, even though it will not be enough to solve all their complex issues.

[26] BVIHCV 2010/00140

[27] Source : South Square digest November 2014, Focus on BVI, Philipp Kite and Vicky Lord

[28] European Commission, « Proposal for a regulation of the European Parliament and of the Council amending the Council Regulation (EC) No. 1346/2000 on insolvency proceedings", COM (2012) 744 final, 2012/0360 (COD).

[29] Cintia Martins Costa, Dirk Richter, Martine Gerber-Lemaire, Aurore Marchand, Regulation No. 1346/2000 on insolvency proceedings : the difficult COMI determination, the treatment of groups of companies and forum shopping in light of the CJEU's and domestic case law, and the modernization of the Regulation, ALJB 2014, Anthemis-Larcier, p. 3281

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