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**Making Sense of the COMI Definition in Italy**

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*Introduction*

It is well-known that the center of main interests (“COMI”) is defined by Regulation (EU) 2015/848 (“EIR”) as “the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties” (Article 3 (1)). It mainly works both as a ground of jurisdiction (to open the main proceedings) and as a ground for the Regulation to be applied.

The Italian Business Crisis and Insolvency Code (hereinafter, “Code”), which was promulgated by legislative decree 12 January 2019 no. 14, revises the Italian insolvency law. One novelty is to have replaced the debtor’s “principal seat” with the COMI as a ground of jurisdiction (see Article 11), both to open Italian insolvency proceedings and to rule on the so-called “ancillary actions”. Besides, the Code embeds the same definition of the COMI as the EIR (see Article 2 (m)).

In this regard, the Italian Government has followed the guidelines that the Italian Parliament set forth when delegating powers to it to revise the Italian insolvency law “taking into account European Union Law and particularly Regulation (EU) 2015/848” (see Article 1 (2), Law 19 October 2017 no. 155). Although originally intended to apply, with some exceptions, as of 15 August 2020, the entry into force of the Code has now been postponed to 1 September 2021, due to the Covid-19 crisis. Nonetheless, the changes will constitute novelties regarding the jurisdiction of Italian courts in insolvency matters and some critical remarks are worth making.

*The Novelty of Jurisdiction in Insolvency Matters*

Generally speaking, one may agree with the choice to shape the ground of jurisdiction upon the model of the EIR’s COMI, so as to treat equally all debtors facing a crisis in Italy, irrespective of where their registered office or other formal seats are located (within or outside the EU). However, it is worth recollecting that the EIR applies where the COMI lies in a Member State, so that the Italian jurisdiction will rest on the EIR, rather than on the Code with respect to debtors having their COMI in Italy. This also happens when the debtor having the COMI in Italy has its registered office in a third country.

In addition, Articles 11 and 26 , taken as a whole, allow for jurisdiction and the opening of an insolvency proceeding in Italy with respect to a debtor with a COMI abroad that has an establishment in Italy, even if it has been submitted to insolvency proceedings abroad. Unlike the former regime, it is no longer sufficient that the debtor has assets in Italy for the Italian proceeding to be opened.

The criterion of the establishment works, as an Italian ground of jurisdiction, insofar as the COMI is located in a third country. If the COMI were to lie in EU Member State to which EIR applies, the criterion of the establishment would work under the EIR regime.

Taking account of the proclaimed inspiration of the EIR, what comes as a surprise is that the Code does not provide a definition of establishment upon the EIR’s model, as it does for the COMI. Admittedly, the explanatory report to the Code, *sub* Article 26, seems to implicitly match the notion of “establishment” to that encapsulated in the EIR. It is thus for the interpreter to draw equal conclusions at the moment to assess whether an establishment lies in Italy. If so, secondary proceedings may be opened in Italy even when the debtor has carried out therein in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets.

Turning attention to the COMI, Article 26(2) of the Code makes no sense when it states that “the transfer of the COMI abroad does not bar the Italian jurisdiction if it occurred in one year prior to the deposit of the request of opening the proceeding”. Actually, this provision only applies to transfers to third States, as intra-EU transfers are governed by the EIR (according to the CJEU’s case-law which has dealt with the topic under Regulation (EC) no. 1346/2000: see mainly Case C-1/04, *Susanne Staubitz-Schreiber* and Case C-396/09, *Interedil*).

What raises puzzlement is the fact that, if the provision aims at deterring fraudulent or abusive transfers (impairing the interests of creditors), then the reference to the COMI is useless and misleading. As a matter of principle, one may wonder how the transfer of the COMI, which is in itselfreal, may at lawand as a consequence of the rulebe presumptively fraudulent or abusive in the year before the request to open the proceedings as this provision seems to imply.

*Conclusion*

Logically, the provision is consistent with the appropriate legislative choice to make use of the COMI in lieu of the “seat” as a ground of jurisdiction. However, it also conveys the inappropriate choice not to insert in the Code the presumptions of coincidence between COMI and registered office/individual’s place of business/habitual residence upon which the EIR’s jurisdictional regime rests. Moreover, it could have proven fitting to address the fraudulent transfer as the EIR does, i.e. by providing for temporal clauses disconnecting the aforementioned presumptions as regards transfers of registered office/individual’s place of business/habitual residence occurred shortly before the request to open the proceedings.

As the Code is currently in suspension awaiting a future date for entry into force, the Italian government could take the opportunity to further amend the foregoing provisions in order to ensure conformity with the new insolvency rules in the EIR.