

Italy: Making sense of the COMI definition



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The centre of main interests (“COMI”) mainly works under Regulation (EU) 2015/848 (“EIR”) both as a ground of jurisdiction (to open the main proceedings) and as a ground for the Regulation to be applied.

One novelty in the Italian Business Crisis and Insolvency Code (hereinafter, the “Code”) is the use of the COMI as a ground of jurisdiction (see Article 11), both in order to open Italian insolvency proceedings and to rule on the so-called “ancillary actions”. As a result of the COVID-19 emergency, the Government has postponed the Code’s entry into force, with some exceptions, from 15 August 2020 to 1 September 2021.

The novelty of jurisdiction in insolvency matters

As regards the novelties in insolvency matters, the Italian Government has followed the guidelines that the Italian Parliament set forth when delegating it to revise the Italian insolvency law “*taking into account the European Union Law and particularly Regulation (EU) 2015/848*” (see Article 1 (2), law 19 October 2017 no. 155).

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 (in or outside the EU). However, since the EIR applies where the COMI lies in a Member State, the Italian jurisdiction will be determined by the EIR, rather than by 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 another country.

In addition, Article 26 allows for the opening of insolvency



proceedings in Italy with respect to a debtor with a COMI abroad, but who also has an establishment in Italy. Unlike the former regime, it is no longer sufficient that the debtor has assets in Italy for the Italian proceedings to be opened.

The establishment works as a national ground of jurisdiction insofar as the COMI is located in another country. If the COMI were to lie in Italy, the establishment works as EIR grounds of jurisdiction.

Critical remarks

Having the inspiration of the EIR in mind, it is surprising that the Code provides no 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 of assessing whether an establishment lies in Italy.

Furthermore, Article 26(2) of the Code makes no sense when stating that “*the transfer of the COMI abroad does not bar the Italian jurisdiction if it occurred one year prior to the deposit of the request of opening the proceedings.*” Actually, this provision only applies to transfers to third States, as intra-EU transfers are governed by the EIR (see CJEU, Case C-1/04, *Susanne Staubitz-Schreiber* and Case C-

396/09, *Interedil*).

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. One may wonder, in fact, how the transfer of the COMI, which is in itself real, may, according to the law and as a consequence of the rule, have been presumptively fraudulent or abusive in the year before the request to open the proceedings, as this provision seems to imply.

Conclusion

In the light of the foregoing, Article 26 (2) conveys the inappropriate legislative choice not to insert in the Code the presumptions of coincidence between COMI and registered office or an individual’s place of business as habitual residence, upon which the EIR’s jurisdictional ground rests. Moreover, it could have proven fitting to provide for temporal clauses disconnecting the aforementioned presumptions as regards transfers of registered office or an individual’s place of business as habitual residence which would have occurred shortly before the request to open the proceedings.

As the Code is currently under a revision process, the Italian government should take the opportunity to amend the aforementioned provisions. ■



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