

LAWS AND REGULATIONS IN ROMANIA

REASSESSING COMI IN EU INSOLVENCY LAW: LEGAL CERTAINTY OR REGULATORY LOOPHOLE?

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Abstract: This paper provides a comprehensive analysis of the “centre of main interests” (COMI) within the framework of cross-border insolvency under European Union law. COMI serves as the central jurisdictional criterion for determining the competent court to open main insolvency proceedings and plays a pivotal role in ensuring legal certainty, creditor protection, and the effective coordination of transnational cases. The paper explores the origin and evolution of the concept, doctrinal interpretations, and relevant jurisprudence of the Court of Justice of the European Union (CJEU). Special emphasis is placed on the challenges arising from the artificial relocation of COMI by debtors seeking a more favourable legal environment—commonly referred to as forum shopping. The analysis highlights both the risks and legal constraints associated with such relocations and presents proposals for legislative reform aimed at enhancing transparency and consistency.

Keywords: COMI, cross-border insolvency, forum shopping, Regulation 2015/848, CJEU case law, insolvency proceedings.

1. Introduction

In the current economic context, marked by globalization, high capital mobility, and commercial interdependence among states, cross-border insolvency situations are increasingly frequent. In such cases, debtors have operations, assets, or creditors in multiple jurisdictions. These situations raise not only issues of court jurisdiction but also the balance between the commercial interests of debtors and the rights of creditors across various countries.

The need for a clear and effective legal framework for cross-border insolvency has arisen from globalization and the growing mobility of companies. Within the European Union, this area is governed by **Regulation (EU) 2015/848** on insolvency proceedings, which replaced **Regulation (EC) No 1346/2000**. Its main objective is to establish uniform rules on jurisdiction, recognition, and enforcement of judgments delivered in insolvency proceedings, as well as to prevent abusive forum shopping. This strategic behavior poses a threat to the uniform application of insolvency laws across the European Union and undermines the predictability of judicial outcomes in cross-border disputes.

A key concept in this context is the **centre of main interests** (COMI) of the debtor, the fundamental criterion for determining jurisdiction in the opening of main insolvency proceedings. Although theoretically straightforward, the practical application of COMI has generated numerous doctrinal controversies and interpretative challenges, particularly concerning fictitious seat transfers used to attract the jurisdiction of a specific Member State.

The importance of COMI goes beyond a mere procedural function – it is a legal instrument designed to prevent abusive forum shopping, i.e., the strategic choice of a jurisdiction perceived as more favorable by the debtor. In the absence of a clear, stable, and verifiable criterion, there is a risk that debtors may artificially relocate their registered office, to the detriment of creditors and the proper functioning of commercial justice.

Both legal doctrine and the case law of the **Court of Justice of the European Union (CJEU)** have sought to clarify the meaning, applicability, and limitations of COMI. The debates focus on:

- the legal nature of COMI – formal vs. functional;
- the possibility of a legitimate transfer of COMI;
- the minimum duration and evidentiary elements required to prove a genuine relocation of the centre of activity;
- specific scenarios involving corporate groups or natural persons.

In today's international environment, characterized by political uncertainty and economic instability, COMI is becoming an essential mechanism in the governance of international commercial insolvency proceedings. As the dynamics of international commerce evolve, the importance of a stable and enforceable framework for determining COMI becomes increasingly urgent.

2. The origin and legal nature of COMI

The concept of COMI (centre of main interests) was introduced into European legislation through Regulation (EC) No 1346/2000 and was maintained and strengthened in Regulation (EU) 2015/848 on insolvency proceedings. Its role is to determine the court having jurisdiction to open the main insolvency proceedings, with direct implications for the conduct and effects of the procedure across borders.

According to Article 3(1) of Regulation 2015/848, “the courts of the Member State within the territory of which the centre of the debtor's main interests is situated shall have jurisdiction to open the main insolvency proceedings.” For companies and legal persons, COMI is presumed to be located at the registered office, but this presumption may be rebutted if other elements prove that the actual centre of interests is situated in another Member State.

The regulation does not explicitly define the notion of COMI, leaving its interpretation to the courts and legal doctrine. In Case C-341/04 – Eurofood IFSC Ltd, the Court of Justice of the European Union (CJEU) stated that COMI must be determined based on “objective and ascertainable factors by third parties.” The emphasis on objectivity and third-party ascertainability reflects the Union's commitment to a transparent and creditor-friendly legal environment.

Romanian doctrine supports this interpretative approach. It was underlined that COMI “cannot be reduced to the formal registered office but must be determined according to the real centre of the debtor's economic activities.” (Turcu 2020:743). Similarly, it highlights that “interpreting COMI requires a contextual analysis that must reflect economic reality, not legal fiction.” (Dănișor 2022:55)

At the international level, COMI is inspired by similar concepts found in U.S. law, particularly Chapter 15 of the U.S. Bankruptcy Code, but has been adapted to fit the European legal context. Authors such as Gabriel Moss and Francisco Garcimartín observe that, although the regulation aims to provide predictability, uncertainties remain in practice concerning the timing and conditions under which the presumption of COMI may be rebutted. (Moss 2016:68, Garcimartin 2020:102)

The legal importance of COMI derives from the fact that it serves as the primary criterion for determining jurisdiction to open main insolvency proceedings. Correct identification of COMI has direct consequences for the application of national law, the recognition of foreign judgments, and the effective conduct of the procedure.

In French legal doctrine, COMI is assessed in relation to the place where the company's actual economic activity is carried out. Claude Witz emphasizes that the registered office has indicative but not decisive value, and that the true decision-making centre of the company must be taken into account. This functional and contextual view is also supported by other francophone authors. Similarly, German legal doctrine insists that COMI should be determined based on economic and practical criteria, rather than on formal registration. The place where contracts are signed, where board meetings take place, and where accounting is administered are considered essential factors in identifying COMI.

Different legal systems have adopted nuanced interpretations of COMI, each informed by their own legal traditions and economic priorities.

In Romanian law, the application of the European Regulation requires a harmonised interpretation aligned with CJEU case law. Romanian courts must analyse the full set of relevant circumstances, including the operational headquarters, commercial relationships, and how the debtor presents itself publicly. This approach is intended to avoid formalistic interpretations and to ensure proper identification

3. The transfer of COMI - reality or fiction?

One of the most controversial practices in cross-border insolvency proceedings is the **transfer of the debtor's COMI** shortly before filing for insolvency. The usual objective is to shift jurisdiction to a Member State perceived as "more favourable" to the debtor – a phenomenon commonly referred to as **forum shopping**.

To prevent abuse, **Regulation (EU) 2015/848**, in Article 3(1), provides that when a company has moved its registered office within the three months preceding the application to open insolvency proceedings, the courts must carefully examine whether the new COMI reflects a **genuine economic reality** or merely constitutes a **legal fiction**.

The first major decision was delivered in Case C-341/04 – *Eurofood IFSC Ltd*, where the Court reaffirmed that the registered office is presumed to be the COMI, unless objective elements demonstrate that the actual centre of business

activity is located in another Member State. The Court stressed that COMI must be “ascertainable by third parties” and cannot rely solely on a formal appearance

In Case C-396/09 – *Interedil*, the CJEU established a key principle: “COMI must be determined based on the place where the debtor regularly conducts the administration of its interests, in a way that is ascertainable by third parties.” It is therefore insufficient to simply move the registered office; the court must consider factors such as:

- the location of the company’s actual management,
- the place where commercial activities are conducted,
- banking relationships,
- contractual and business relations.

The Court’s insistence on genuine operational shifts reinforces a functional approach that prioritizes substance over form. These criteria, taken together, provide a factual matrix that courts can use to determine whether the COMI relocation was economically substantial or merely opportunistic.

Another important judgment is Case C-191/10 – *Rastelli Davide*, which addressed the issue of COMI in corporate groups. While each legal entity has its own COMI, in exceptional circumstances, a shared COMI may be recognised where a strong functional and managerial integration between group companies exists.

In Case C-649/13 – *Comité d’entreprise de Nortel Networks SA*, the CJEU reiterated that COMI must be determined rigorously, even in serial insolvency proceedings within corporate groups. The Court held that mere membership in a corporate group does not justify jurisdictional unification in the absence of a real and unique decision-making centre.

Legal international doctrine is similarly critical of such manoeuvres. An author argues that “the relocation of COMI must correspond to a genuine economic decision, not to a formal arrangement designed to escape a national legal regime.” (Garcimartin 2020:109). Another author likewise warns that fictitious COMI transfers may undermine creditor confidence and distort the uniform application of European insolvency law. (Bork 2018:145)

In some jurisdictions, such as the Netherlands and the United Kingdom, courts have developed additional standards to verify the authenticity of COMI transfers. In the British case *Re Stanford International Bank Ltd*, the court held that the relocation was purely formal and not accompanied by actual economic activity. As a result, the newly declared COMI was not recognised.

German doctrine proposes the introduction of a “**real intention**” test and an **extended look-back period** (6 to 12 months) for assessing the COMI transfer. Such mechanisms would allow a more thorough evaluation of the debtor’s conduct and would prevent strategic relocations motivated solely by the pursuit of more favourable legal treatment.

Thus, while the Regulation aims to balance **freedom of establishment** with **creditor protection**, in practice **forum shopping remains a persistent phenomenon**, requiring rigorous and contextual interpretation by the courts.

Beyond corporate debtors, questions also arise regarding **natural persons**, for whom COMI is generally associated with **habitual residence**. In practice, individuals may claim residence in another Member State solely to benefit from a more permissive insolvency regime – a practice deemed problematic especially in jurisdictions with short debt discharge periods.

All these examples and analyses converge towards the conclusion that **COMI transfer is a matter of fact, not of form**. It must be proven before the court by concrete evidence, not merely by formal declarations.

In the absence of a clear and exhaustive legal definition of COMI, the Court of Justice of the European Union (CJEU) has played a crucial role in shaping interpretative criteria. Through a series of key rulings, the Court has established objective standards designed to prevent abusive forum shopping and to ensure legal certainty in cross-border insolvency cases.

At the national level, Romanian jurisprudence has begun to adopt these principles. For instance, in Case no. 3445/99/2019, the Iași Tribunal analysed an application for the opening of main insolvency proceedings submitted by a company that had moved its registered office to Italy only 45 days earlier. The court found that the relocation was not accompanied by an actual transfer of activity or management and therefore dismissed the application as inadmissible. Another relevant example is Decision No. 897/A/2022 of the Bucharest Court of Appeal, which confirmed that the mere existence of a registered office in another Member State is not sufficient if the real economic activity and relevant business relations are still conducted in Romania. The court emphasised the importance of the COMI being “ascertainable by third parties”, in line with CJEU jurisprudence.

In Romanian court practice, tribunals have become increasingly vigilant. For instance, in Case no. 4306/63/2016, the Bucharest Tribunal examined in detail the relocation of a Romanian company’s registered office to another Member State just two months prior to the filing. The court rejected the foreign jurisdiction, finding that the relocation did not reflect a real COMI.

These cases demonstrate that Romanian courts are increasingly applying CJEU standards rigorously, avoiding formalistic interpretations and protecting creditor interests against strategic relocations by debtors.

Courts in Romania are now frequently applying a mixed test to determine COMI:

- objective factors: contracts, operational headquarters, bank accounts, actual management;
- public elements: trade register records, corporate publicity;
- procedural conduct: consistency between commercial activity and the declared location.

This alignment with European standards lays the groundwork for a more predictable and uniform national practice, contributing to the consolidation of Romania’s cross-border insolvency framework. This composite test aligns Romanian practice with evolving European standards and reflects an increasing awareness of the economic underpinnings of insolvency law.

4. Reform proposals

The application of the COMI concept has revealed significant tensions between the principles of economic freedom and the need to protect creditors. Although Regulation 2015/848 provides an apparently clear legal framework, in practice multiple interpretative difficulties and strategic jurisdictional manipulations arise.

One of the main criticisms targets the presumption of the registered office as COMI, which is regarded in the doctrine as excessively formalistic. This may result in the neglect of actual economic reality, particularly in cases where companies relocate their seat “on paper” without transferring their operations, personnel, or executive management. Laura Dănișor observes that “the pressure of legal formalism risks concealing the commercial reality and undermining creditor confidence.”

Another contentious point is the lack of a uniform definition of COMI for natural persons, where courts rely on habitual residence. While theoretically useful, this criterion is difficult to prove in practice and is easily subject to manipulation. In cross-border consumer insolvency, numerous cases of forum shopping have been reported, involving declarations of residence in Member States with more lenient discharge laws. (Piperea 2019:278)

Both doctrinal and institutional stakeholders have made several reform proposals, of which the most relevant include:

- extending the look-back period for reviewing COMI transfers (from 3 to 6 or even 12 months) to discourage strategic relocations;
- establishing a European insolvency register, where COMI would be declared and monitored transparently;
- clarifying the COMI criteria for natural persons by adopting a cumulative checklist (place of work, effective residence, family links, etc.);
- harmonising the treatment of COMI in corporate groups, to reduce the risk of artificial separation between entities.

International legal doctrine advocates for strengthening a jurisdictional control system based on objective verifiability and cross-border judicial cooperation. Moreover, a proposal has been made for adopting European guidelines on COMI interpretation to support courts and reduce divergent national approaches. (Garcimartín 2020:133 and Moss 2022:118)

Equally important is enhancing the role of insolvency practitioners, who can provide courts with detailed and professional assessments of the debtor’s actual economic activity. They can serve as a key filter in preventing abusive forum shopping and deceptive COMI manipulations.

5. Conclusion

The analysis conducted throughout this study illustrates both the potential and the fragility of COMI as a jurisdictional tool in the European legal order. The concept of COMI represents one of the fundamental pillars of European cross-

border insolvency law, with a direct impact on the determination of the competent court, the recognition of judgments, and the application of national legislation in cases with international elements. Although initially conceived as a tool for legal certainty and procedural coherence, in practice, it has often proven vulnerable to abusive interpretations and forum shopping.

CJEU case law has played a significant role in developing an objective and verifiable approach, but the complexity of individual cases and the diversity of economic situations continue to place pressure on both courts and practitioners. The artificial relocation of COMI in order to attract a more favourable jurisdiction remains a major challenge, directly affecting the balance of proceedings and the rights of creditors.

A key conclusion is that legal formalism must not prevail over economic reality. Any interpretation of COMI must begin with a concrete, contextual analysis, in which factual elements (such as actual activity, managerial decisions, commercial relations, and the location of accounting) should take precedence over purely formal criteria.

At the same time, legislative reform is required to clarify the COMI regime, particularly with regard to natural persons and corporate groups. The introduction of European guidelines, the extension of the look-back period for COMI transfers, and the creation of a European insolvency register are necessary steps toward greater transparency and trust in cross-border judicial cooperation.

Finally, the role of insolvency practitioners must be further reinforced, as they are often the first to detect irregularities in the debtor's operational structure and can provide courts with the necessary tools for a correct determination of COMI.

Therefore, COMI is not merely a jurisdictional criterion. It reflects a fragile but essential balance between economic reality and legal formality, a balance that must be preserved through clear legal instruments, rigorous interpretation, and effective transnational cooperation. As insolvency increasingly transcends borders, the continued refinement and enforcement of COMI standards will be critical to maintaining fairness, efficiency, and legal integrity within the EU.

References

- Bork, Robert, *The Abuse of COMI Transfers in European Insolvency Law*, in *European Company and Financial Law Review*, no. 2/2018, pp. 139–162.
- Dănișor, Laura, *Aspecte controversate privind COMI în insolvența transfrontalier*, in *Revista Română de Drept al Afacerilor*, no. 4/2022, pp. 51–60.
- Garcimartín, Francisco, *International Insolvency Law*, Kluwer Law International, Haga, 2020.
- Moss, G., Fletcher, I.F., Isaacs, S., *The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide*, Oxford University Press, Oxford, 2016.
- Moss, Gabriel, *Cross-Border Insolvency Law*, 5th ed., Oxford University Press, Oxford, 2022.
- Piperea, Gheorghe, *Dreptul insolvenței*, Ed. Rosetti, București, 2019.
- Turcu, Ion, *Tratat de insolvență*, Ed. C.H. Beck, București, 2020.
- Jurisprudence
- CJEU, Case C-341/04 – *Eurofood IFSC Ltd*, ECLI:EU:C:2006:281.
- CJEU, Case C-396/09 – *Interdil Srl*, ECLI:EU:C:2011:671.

CJEU, Case C-191/10 – *Rastelli Davide*, ECLI:EU:C:2011:838.

Re *Stanford International Bank Ltd* [2010] EWCA Civ 137 (Court of Appeal, England and Wales).

Iași Court, File no. 3445/99/2019.

București Court, File no.4306/63/2016.

Court of Appeal București, Decision no. 897/A/2022.

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