

# CHINA BUSINESS 商 LAW JOURNAL 法

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## 知识产权警示

跨国公司担心成为反垄断执法目标



## IP red flags

Multinationals fear crackdown via antitrust law



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责任上限

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Liability caps

# 《欧盟破产条例》下的主要利益中心概念

## Getting to the core of EU Insolvency Regulation and centre of main interests



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《欧盟破产程序条例》(欧盟理事会第 1346/2000 号条例)旨在为欧盟建立统一的破产程序框架。《条例》使具有跨国元素的破产程序变得可操作。其目的在于防止面临债务困境的债务人挑选破产制度惩罚性较小、更利于自身具体情况的法域。《条例》对(丹麦以外的)欧盟所有成员国直接生效,适用于所有类型的破产程序,及大多数法人实体和自然人。

《条例》旨在解决的核心问题是如何精确定位可启动主破产程序的欧盟管辖权,以及相应的破产法的适用。对于这个棘手问题,债务人主要利益中心(COMI)是一个至关重要的基础概念。COMI 位于欧盟的债务人只要牵涉到适用的破产程序,即受《条例》的约束。

债务人转换 COMI 以及相应地选择司法管辖区进行破产清算,其理由多种多样。退出破产保护的期间在一个欧盟成员国可能大大地短于在另一个成员国,因而对个人债务人具有吸引力。

从债权人的角度看,确定一套适用于破产债务人的规则也很重要,因为只有主破产程序具有普遍的效力;而一国境内的从属破产程序只能覆盖位于启动该从属程序的欧盟成员国的资产。债权人可以清楚地看出自己受债务人的 COMI 所在成员国法律的约束。

“ [对于]《条例》旨在解决的核心问题……债务人主要利益中心(COMI)是一个至关重要的基础概念”

《条例》没有对 COMI 作出明确的定义,而是只提供概念的组件。如《条例》序言第 13 段条件性地指明:COMI 指债务人对自身的利益进行日常管理,并能够被第三方确定的地点。

定义的缺乏导致了欧盟法院和欧盟各成员国法院在确定 COMI 或将其转换至不同的法域问题上产生大量分歧。首要原则是实质性的:必须通过战略、运营和财务等管理事务在某地进行的合理持久程度来确定债务人的 COMI。

对于个人债务人,COMI 都会转向债务人从事职业和惯常居住的地方。对于法人实体,《条例》第 3 条规定,除非存在相反证据,否则注册办公地点应当被推定为 COMI。而相反证据需要对应于法人实体对自身利益进行日常管理并能够被债权人、雇员和客户等第三方确定的地点。

如果法人实体寻求推翻以注册办公地为司法管辖区的推定,就必须证明相关的可变因素是客观的并且是可确定的,足以支持实际存在的情形不同于注册办公地所反映的情形,从而满足可确定性和透明度要求。

至于哪些可变因素被认为能够转换 COMI,从欧盟法院的判例法揭示的情况来看,已经有所提示但并不详尽。这些可变因素与塞浦路斯税务当局在解释企业税务居民时采用的有效管理和控制标准有惊人的相似之处。尤其是,公司的 COMI 可以从其注册办公地转移至以下地方/位置:1) 公司业务的经营和管理所在地;2) 公司签订合同及合同的准据法所在地;3) 监管机构所在地;4) 董事会会议举行地;5) 公司账目的编制及审核地;6) 客户、供应商及贷款债权人所在地;7) 信息技术、

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支持、企业形象和品牌等部门的工作地;8) 公司首席执行官花费大多数时间的工作地;9) 大多数雇员及其雇佣合同的准据法所在地;10) 贸易业务的企业税缴纳地;11) 有效银行账户的持有及营运地;12) 公司总部及主要营业地址所在地。

债务人 COMI 的确定,以及特定欧盟成员国法院是否会接受对破产程序的管辖权,都在提起启动破产程序申请时决定,并取决于相关的欧盟成员国法院。

由于 COMI 转换可被视为欧盟自由决定权的一种体现,为了打击操纵 COMI 的企图,对债务人提起破产申请之前的经营历史可能会有一次回顾性审查。笔者认为,这种审查即使不是彻头彻尾的,也应当是详细的。

欧盟成员国的税务机构对企业的税务居民身份的承认不会自动确立 COMI 在该欧盟成员国的存续。由于《条例》没有对集团公司作出特别规定的情况下,COMI 的可变因素似应单独地、个别地适用于子公司,而不论该子公司的全面管理和运营表面上是否由 COMI 位于子公司以外地点的母公司主导。

由于尚未见到无论是债务人还是债权人在塞浦路斯法院基于《条例》发起诉讼,也就无从通过相关判例报告解读 COMI,所以还不能有任何把握地说,塞浦路斯法院会对《条例》进行广义的解释,并导致经营管理所在地并不位于/居住于塞浦路斯境内的企业的破产程序被(塞浦路斯)接受。

然而,可以预见的是,一些因素的重要性会得到相当多的考虑,比如债权人确定可以追索资产的地点,以及具有持久性的地点。■

The EU Insolvency Regulation EC1346/2000 purports to establish a uniform framework for insolvency proceedings in the EU. The regulation becomes operative in insolvency proceedings having a cross-border element. It is designed to prevent debtors experiencing financial distress from forum shopping, namely seeking recourse to jurisdictions that facilitate an insolvency regime that is less punitive and more favourable to their particular circumstances. It has direct effect in all EU member states (excluding Denmark), and applies to all types of insolvency proceedings and to most legal entities and natural persons.

The cornerstone concept of the centre of main interests (COMI) of the debtor lies in the core of the regulation, the vexed determination of which is crucial in pinpointing to the EU jurisdiction where the main insolvency proceedings may be opened, and accordingly the insolvency law that will be applied. A debtor whose COMI is in the EU will be subject to the regulation in so far as the applicable insolvency procedures are concerned.

The reasons for shifting COMI, and accordingly for a debtor choosing the jurisdiction in which to become insolvent, vary. The period of exiting bankruptcy in one EU member state may be considerably shorter when compared to another and accordingly attractive to an individual debtor.

Identifying the set of rules that will apply to an insolvent debtor is also important from a creditor's perspective, as only main insolvency proceedings have universal effect; territorial and secondary proceedings cover only assets situated in the EU member state in which the secondary proceedings are opened. Creditors may well find themselves bound by the laws of the debtor's COMI.

The regulation does not feature an express definition of COMI, but rather opts to provide the components making up the concept. Paragraph 13 of the preamble of the regulation suggests conditionally that COMI should correspond to the place where the debtor conducts the administration of its interests on a regular basis and is ascertainable by third parties.

The paucity of the definition has led the European Court of Justice (ECJ) and EU national courts to the generation of a multitude of variables in establishing or shifting COMI towards different jurisdictions. The overarching principle

is substance: a debtor's COMI must be distinguished by a reasonable degree of permanence to where the strategic, operational and financial management take place.

For individual debtors, COMI will invariably turn to the place of the debtor's professional and habitual residence. In the case of legal entities, article 3 of the regulation creates a strong presumption that the place of registered office shall be presumed to be the COMI, in the absence of proof to the contrary. Such proof would need to correspond to the place where the legal entity conducts the administration of its interests on a regular basis, and be ascertainable by third parties that would include creditors, employees and customers.

Should a legal entity seek to rebut the presumption that jurisdiction follows the registered office, it must demonstrate that the components of ascertainability and transparency are satisfied by variables that are objective and ascertainable to support that an actual situation exists that is different from what the location of the registered office reflects.

The suggestive, yet not exhaustive, variables revealed by ECJ case law that have been considered as capable of shifting COMI bear striking similarities to the criteria of effective management and control used by the Cyprus tax authorities in deciphering an undertaking's tax residence.

In particular, a company's COMI may shift from its registered office to the place/location where: i) the company's business is managed and operated; ii) its contracts are concluded, as well as the governing law of such contracts; iii) its regulatory authorities exist; iv) the board meetings are held; v) the accounts are prepared and audited; vi) the customers, suppliers and loan creditors are; vii) information technology, support, corporate identity and branding are run from; viii) the CEO spends most of his or her time running the business; ix) the majority of the employees exist and the governing law of their contracts is located; x) corporation tax is paid for its trading operations; xi) an active bank account is held and operated, and xii) the company's head office and principal operating address is located.

The determination of a debtor's COMI, as well as whether a court in a particular EU member state will accept

“ *The cornerstone concept of [COMI] of the debtor lies in the core of the regulation* ”

jurisdiction over insolvency proceedings, are both decided at the point when the petition to commence insolvency proceedings is lodged, and rest with the particular EU member state court concerned.

As COMI shifting may be seen as a manifestation of the EU right of freedom of establishment, a possible look-back period to the debtor's operational history prior to the petition in order to combat attempts to manipulate COMI should, in the view of the author, be circumstantial if not disregarded in its entirety.

An admission by a tax authority in an EU member state as to the tax residency of an undertaking does not automatically establish that the COMI subsists in that EU member state.

In the absence of particular provisions in the regulation dealing with group of companies, it is considered that the variables pointing to COMI would be separately and individually applicable in the context of a subsidiary company, irrespective of whether the complete management and operations of such subsidiary company are ostensibly conducted by a parent company whose COMI is situated in a place other than that of the subsidiary.

No reported case has yet been brought under the regulation before the Cyprus courts, by either a debtor or creditor, to interpret COMI, so it cannot be said with any certainty that the regulation would be interpreted broadly by the Cyprus courts and result in insolvency proceedings being accepted for the administration of an undertaking that is not seated/domiciled in the Republic of Cyprus.

It is expected, however, that considerable weight would be given to the importance of creditors being certain about where they can pursue assets, and of that place having an element of permanence. ■

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