

The Transfer of the Registered Office and Forum-Shopping in International Insolvency Cases: an Important Decision from Italy*

– Case Note on the Decision “B & C” of the Italian Corte di Cassazione –

by

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The Italian Supreme Court (Corte di Cassazione) has issued an important decision on companies’ freedom of establishment in the European Union (EU) and on jurisdiction over insolvency proceedings. It was a typical forum-shopping case in insolvency situations, in which a company decides to shift its registered office abroad before a court from its original country declares the insolvency. The Cassazione did not apply EC-Regulation 1346/2000 on cross-border insolvency, but declared the company as liquidated because of the transfer of the registered office. This solution leaves many questions unclear, both under EC-freedom of establishment and under jurisdiction rules for cross-border insolvency.

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I. Introduction

The Italian Supreme Court (*Corte di Cassazione*)¹ has issued an important decision on international transfer of companies’ registered office and on jurisdiction in international insolvency. The latter is one of the most relevant issues in EC-law today and involves, as we will see later on, the application of the new regulation on cross-border insolvency.²

The company “B & C finanziaria”, formerly based in Italy, transferred its registered office to Luxembourg before creditors presented a petition for insolvency to an Italian court. This is a typical case of forum-shopping, *i. e.* the case when a company shifts its registered seat abroad before a court declares its default; in this way the company changes the law that should be applied, trusting that the new law could be more appropriate for its interests. In deciding the case, the Italian *Corte di Cassazione* applied neither the Italian rules on jurisdiction nor the European Insolvency Regulation, but based its arguments only on the conflicts rules of company law, arguing that the transfer of the registered office was a ground for winding up the company.

This decision is particularly interesting from a European perspective because it highlights two important issues for EC-law. The first issue concerns the

1 Corte di Cassazione Civile, Sezioni Unite, 23.1.2004, n. 1244, *Rivista italiana di diritto privato e processuale*, 2005, 1381.

2 Regulation of the Council n. 1346/2000, 29.5.2000 (in the following text also: “European Insolvency Regulation” or “the Regulation”), OJEC L160/2, 3 June 2000, entered into force on 31.5.2002 in all Member States of the EU, with the exception of Denmark, which did not participate in the adoption of the Regulation (according to the Protocol on the position of Denmark annexed to the Treaty of the EU). In 1995, an “EU Convention on insolvency proceeding” was signed by all Member States with the exception of the UK and hence did not enter into force (but its text was similar to the Regulation). See also the unofficial Explanatory Report by Prof. Virgos and Prof. Schmit (“Virgos-Schmit report”), which is considered as having an influence on the interpretation of the Regulation (the report is to be found in Moss/Fletcher/Isaac, *The EC Regulation on insolvency proceedings: a commentary and annotated guide* (2002)).

transfer of a registered office to another Member State, from the point of view of the country of departure. The second issue is the case of positive jurisdictional conflicts on cross-border insolvency, which has been recently submitted to the European Court of Justice by the Irish Supreme Court in the *Parmalat* case and by the German *Bundesgerichtshof*.³

II. Facts of the “B & C” case and the arguments used by the Court

The company “B & C finanziaria” srl (*società a responsabilità limitata*, private limited liability company; in the following text “B & C”) had its registered office in Rome; its sole shareholder was a Luxembourg company, “Santa Maura s.a.”. In 2001, B & C obtained from the company “Immobiltrading srl” (in the following text “Immobiltrading”) a loan, which was not refunded. Before Immobiltrading issued the loan, B & C transferred its registered office from Rome to Luxembourg.

In November 2001, Immobiltrading presented a petition to the *Tribunale* of Rome⁴ for declaration of insolvency of B & C. The company argued that under Italian law and the EC-Regulation, only Luxembourg’s judges have international jurisdiction over the case, as the registered office had been transferred to Luxembourg.

It is useful to illustrate briefly both the Italian and the EC rules on jurisdiction. According to Article 9 of Italian Insolvency Act of 1942,⁵ the *Tribunale* of the place where the firm has its “main seat” (*sede principale dell’impresa*) should declare the insolvency.⁶ Strictly speaking, this article concerns only “firms” (*imprese*), however, courts additionally apply it to companies and

3 Irish Supreme Court, 27 July 2004, *Eurofood/Parmalat*, 147/04 = <http://www.bailii.org/ie/cases/IESC/2004/45.html> (consulted on 30 May 2005); BGH, 27 November 2003, IX ZB 418/02, *EuZW* (2004) 158.

4 The *Tribunale* is the court which is generally competent for civil litigations in first instance, with the exception of the cases with small value, which are adjudicated to the *giudice di pace*. See Italian civil procedure code, King’s Decree, 28 Oct 1940, n. 1443, articles 7 and 9.

5 King’s Decree, 16.3.1942, n. 267.

6 According to Article 3 of the Italian Act on Conflicts of Laws (Legge 31 May 1995, n. 218), the competence rules should also be applied to determine the jurisdiction, in matters falling outside the Brussels convention on jurisdiction of 27 Sept 1968. Hence, Italian judges have jurisdiction for declaring the insolvency if the firm has its “main seat” in Italy. See Corte di Cassazione, 12 July 1999, n. 7331, *Il fallimento* (2000) 175 *et seq.*; Corte di Cassazione, 26 June 2001, n. 8745, *Rivista di diritto internazionale privato* (2002) 412 *et seq.*

other legal entities. Therefore, Italian judges have jurisdiction over the insolvency if, and only if, the company has its “main seat” in Italy, even if the registered office lies in another State. Many decisions presume that the main seat coincides with the registered office, but it is possible to prove that the former lies elsewhere.⁷ According to Article 3 of the EC-Regulation on insolvency procedures, the State where the debtor has the “centre of main interests” (in the following text also: COMI)⁸ has jurisdiction over its insolvency. For legal entities, the same Article presumes that the centre of main interests coincides with the country of the registered office, until otherwise proven.

B & C assumed that the above mentioned Articles contain identical rules,⁹ according to which the relevant place (*i.e.* the “main seat” and the “centre of main interests”) is presumed to be where the registered office lies, until shown proof to the contrary. B & C argued, therefore, that Italian judges do not have jurisdiction, because the company transferred its registered office to Luxembourg before Immobiltrading presented the insolvency’s petition to the *Tribunale* of Rome.

Immobiltrading countered that B & C should be considered as being wound-up under Italian law because it transferred the registered office to another country. Therefore, the case was not a matter of insolvency, but rather a case of winding-up, so that the jurisdiction of the Italian courts should be established at the moment of the decision transferring the registered office.

The *Corte di Cassazione*, which has competence in deciding conflicts of jurisdiction,¹⁰ decided in favour of the Italian judges, accepting the arguments of Immobiltrading. According to the Court, B & C moved the registered office to Luxembourg and also the administrative seat of the firm, reincorporating there as a *société à responsabilité limitée* under Luxembourg law.¹¹ We should

7 In recent times, see: Corte di Cassazione 28 Aug 2002, n. 12640, *Diritto e pratica societaria* (2003) n. 6, p. 89; Corte di Cassazione, 12 March 2002, n. 3655, *Diritto e pratica societaria* (2002) n. 13, 60; Corte di Cassazione, 21 March 2003, n. 4206, *Giust.civ.mass.* (2003) 573; Appello Brescia, 11 June 2003, *Il Fallimento* (2004) 705; Corte di Cassazione, 15 March 2005, n. 5570, *Giust.civ.mass.* (2003) n. 3.

8 Typically, this is hold as being equivalent to the “real seat”, cf. eg Schall, “The UK Limited Company Abroad – How Foreign Creditors Are Protected after Inspire Art”, *EBLR* (2005) to be published in December.

9 According to *B & C*, therefore, “main seat” and “centre of main interests” are synonyms.

10 Civil procedure code, King’s Decree 28 Oct 1940, n. 1443, Article 41 *et seq.*

11 In a following decision, the *Cassazione* denied the jurisdiction of Italian judges on the insolvency of the holding company Santa Maura, because its registered office was in Luxembourg, Corte di Cassazione, 28 Jan 2005, n. 1734, *Rivista italiana di diritto internazionale privato* (2005) 450.

remember that Article 25 of the Italian act on private international law follows the “incorporation theory”, under which the law of the State where companies have been formed should be applied. The same Article 25 provides that Italian law is to apply if the administrative seat or the main object of the company is located in Italy,¹² and allows companies to transfer the registered office in the event that the transfer is made according to the law of the country of arrival.

Applying this Article, the Italian Court stated that only where both States agree on the effects of the transfer and on the continuity of the legal entity, will the transfer not result in the winding-up of the company. In the view of the *Cassazione*, it is not the case if the country of arrival admits an identity preserving nationality change for arriving company, as is the case under Luxembourg law.

III. The ECJ decisions on freedom of establishment and their consequences for “departure” countries

First of all, we should bear in mind that the country of arrival was a Member State of the EU and therefore the solution of the Italian Court involves the question of the freedom of establishment in the EU. This issue has been strongly debated by legal scholars after the recent decisions of the ECJ, which has, as is well known, widened the possibility for EU companies to establish their administrative seat in a Member State different from the one of the incorporation.¹³

Article 48 of the EC-Treaty, on freedom of establishment of legal entities, is not very perspicuous:¹⁴ it simply extends freedom of establishment to companies incorporated according to the law of a Member State and having their registered office, central administration or principal place of business within

12 I should nevertheless point out that after the new ECJ decisions on freedom of establishment (see following n 13) no section of Italian company law can be applied to “pseudo-foreign corporations” grounded in a Member State. See Benedettelli, “‘Mercato’ comunitario delle regole e riforma del diritto societario”, *Rivista delle società* (2003) 700; Carbone, “La riforma societaria tra conflitti di leggi e principi di diritto comunitario”, *Rivista diritto commerciale internazionale* (2003) 94; Portale, “La riforma delle società di capitali tra diritto comunitario e diritto internazionale privato”, *Europa e diritto privato* (2005) 133.

13 ECJ, 9 March 1999, C-212/97, Rep. I. 1459 *Centros*; ECJ, 5 Nov 2002, C-208/00, Rep. I. 9919 *Überseering*; ECJ, 30 Sept 2003, C-167/01 *Inspire Art*, Rep. I. 1095. Cf. the case report by Klinke, “European Company Law and the ECJ: The Court’s Judgements in the Years 2001 to 2004” *ECFR* (2004) 270, 282 *et seq.*

14 Treaty of the European Community, Article 48 (1).

the Community. The ECJ, in the abovementioned decisions, resolves only some of the questions presented in this Article, but not all of them.

On the one hand, the ECJ decisions concerned only the transfer of the administrative seat: they affirmed that the country of incorporation does not need to coincide with the country in which the administrative seat is placed. The country of incorporation and the country of the administrative seat can diverge at the moment of the incorporation (cases *Centros* and *Inspire Art*¹⁵), or afterwards, if the company shifts the administrative seat in a different country (case *Überseering*¹⁶). The issue of the registered office's transfer has not yet been faced by the ECJ.

On the other hand, in the decisions *Centros*, *Überseering* and *Inspire Art* it was only considered whether restrictions to the transfer of an administrative seat put by the Member State of "arrival" were compatible with EC-law. However, in *B & C*, it was the case of an obstacle imposed by the domestic law of the country of "departure". The ECJ decided only once on the latter kind of restrictions: in the *Daily Mail* case it affirmed that obstacles imposed by British tax-law to the transfer abroad of the administrative seat were compatible with EC-law.¹⁷ In the *Überseering* decision, moreover, the ECJ distinguished the case submitted from the case of restrictions imposed by countries of departure, reaffirming implicitly that *Daily Mail* is still valid. Therefore, unless the ECJ will decide differently on this matter, as would appear possible following a recent decision on French tax law,¹⁸ Member States may still impose obstacles on the transfer of the registered office and/or the administrative seat of their companies or even dissolve them.¹⁹

15 ECJ, *Centros* (n 13); ECJ, *Inspire Art* (n 13).

16 ECJ, *Überseering* (n 13).

17 ECJ, 27 Sept 1988, C-81/87, *Daily Mail*, Rep. I. 5483.

18 ECJ, 11 March 2004, C-9/82, *Hughes de Lasteyrie du Saillant*, in 1 *ECFR* (2004) 379, with case note of Parleani, "Relocation and taxation: the European Court of Justice disallows the French rule on direct taxation of unrealised gains": ECJ declared as contrary to freedom of establishment a norm of French tax-law, according to which the transfer abroad of the tax domicile of a French citizen, who was partner of a French company, should lead to the taxation of future company earnings.

19 See Rehm, in Eidenmüller (ed.) *Ausländische Kapitalgesellschaften im deutschen Recht* (2004) 37; Forsthoff, "Mobilität von Gesellschaften im Binnenmarkt", in Hirte/Bücker (eds.) *Grenzüberschreitende Gesellschaften* (2005), 60; Portale (n 12) 131.

Therefore, Member States can still apply the "real seat doctrine" to their companies: see BayOblG, 11 Feb 2004, AG (2004) 266 (transfer of registered office together with administrative seat from Germany – following the "real seat doctrine" for own companies – to Portugal); see also Weller, "Zum identitätswahrenden Wegzug deutscher Gesellschaften", *DStR* (2004) 1218 *et seq.* and *Europäische Rechtsformwahlfreiheit und Gesellschafterhaftung* (2004) 75.

In the B & C case it was considered whether a company transferring its registered office abroad can change nationality and the applicable company law, without having to be dissolved in the departure country and re-incorporated in the country of arrival. It is widely held that under EC-law, in order to introduce a right to such an “identity-preserving” nationality transfer, it should be necessary to approve the Directive proposals on transfer of registered office and on cross-border mergers.²⁰ The European Parliament has recently

Other legal scholars hold that countries of departure cannot impose obstacles on the transfer of the administrative seat: Kieninger, “Internationales Gesellschaftsrecht nach ‘Centros’, ‘Überseering’ und ‘Inspire Art’: Antworten, Zweifel und offene Fragen”, ZEuP (2004) 694 *et seq.* (who holds as unsound to apply the “real seat doctrine” to departure-cases); Eidenmüller/Rehm, “Niederlassungsfreiheit versus Schutz des inländischen Rechtsverkehrs: Konturen des Europäischen Internationalen Gesellschaftsrechts”, ZGR (2004) 177 (*Daily Mail* should still be held as “good law”, but this solution is at odds with a coherent development of the freedom of establishment); Eidenmüller, “Mobilität und Restrukturierung von Unternehmen im Binnenmarkt”, JZ (2004) 29 (obstacle imposed by departure Countries are limitations to freedom of establishment and need to be justified); Hirte, *Kapitalgesellschaftsrecht* (4th edition, 2004), 347, and “Die ‘Limited’ mit Sitz in Deutschland – Abkehr von der Sitztheorie nach Centros, Überseering und Inspire Art”, in *Grenzüberschreitende Gesellschaften* (n 19) 10; Klinke (n 13) 296.

- ²⁰ New draft of 18 Nov 2003 for the 10th directive on cross-border mergers COM (2003) 703 final; a proposal for a 14th directive on seat transfer has been made by the Commission on 22 April 1997, but has been never been officially presented: <http://www.uv.es/cde/TEXTOS/14thCLDd.pdf> (consulted on 7 June 2005). See Schön, “Die Niederlassungsfreiheit im System der Grundfreiheiten”, in *Festschrift Lutter* (2000) 685 *et seq.*; Kieninger (n 19) 704; Leible, “Niederlassungsfreiheit und Sitzverlegungsrichtlinie”, ZGR (2004) 535 *et seq.*

We cannot forget that other scholars hold a different point of view, arguing that it is possible to deduce from the EC freedom of establishment a right to transfer the registered office and to change company law, preserving the legal identity: Roth, “Die Freiheit des EG-Vertrages und das nationale Privatrecht” ZEuP (1994) 19 *et seq.*; “Internationales Gesellschaftsrecht nach Überseering”, IPRax (2003) 121 and “Die Wegzugsfreiheit für Gesellschaften”, in Lutter (ed.) *Europäische Auslandsgesellschaften in Deutschland* (2005) 389; Klinke (n 13) 296. See also Behrens, “Das Internationale Gesellschaftsrecht nach dem Überseering-Urteil des EuGH und den Schlussanträgen zu Inspire Art”, IPRax (2003) 205, who argues that the *Daily Mail* decision only says that if a company wants to preserve the legal personality should either leave the administrative seat in the original country, or transfer it together with the registered office; hence, companies do not have a right toward their countries to transfer their administrative seats maintaining at the same time the old nationality, but *Daily Mail* has left open the question, whether a company, transferring the registered office, can change the applicable company law.

approved this proposal,²¹ with some amendments to the original version inserted by the Commission, so that if the Council approves the amended version of the Directive, it will soon come into operation. If it transpires as such, EC-law will be provided with an instrument that does not allow companies to transfer the registered office and change company law and nationality, but permits them to avoid the biggest obstacle imposed by the incorporation country to the transfer abroad, allowing companies to create a new company in a foreign country and then to merge with it, as is the case under US law.

IV. The transfer of the registered office under Italian law

1. The framework of Italian conflict rules

Member States can, nevertheless, allow companies to transfer their registered office abroad and even to change the applicable law. We should point out that the *effects* of a registered office's transfer do not depend on conflict law, but on substantive law, as the former determines only which substantive law is applicable to a specific case, but does not provide for the solution to the case.

As we have already seen, according to Italian conflict law, companies and other legal entities are regulated by the law of the country under which they were formed ("incorporation doctrine").²² Therefore, the registered office's transfer should be irrelevant in determining which substantive law should be applied, because this transfer does not change the original country of incorporation.²³ Following this "philosophy", Article 25 of the Italian private international law act provides for a special rule for the transfer of registered office, according to which companies can transfer the latter only if the transfer is allowed and executed following both the law of the departure country and the law of the arrival country.

21 DOC A6-0089/2005, 8 April 2005.

22 Article 25 of the Act on Conflicts of Law n. 218/1995.

23 Among legal scholars see Lombardo, "Libertà di stabilimento delle società dopo il 'caso Überseering': tra armonizzazione e concorrenza tra ordinamenti", *Banca borsa titoli di credito* (2003) 459.

A different solution is followed by English both substantive and conflict rules; on the one hand, company law does not permit to transfer the registered office abroad: see Davies, *Gowers and Davies' Principles of Modern Company Law* (7th edn 2003) 117; on the other hand, English conflict law, which follows the incorporation doctrine, does not accept the transfer of the "domicile" and the reincorporation abroad: see Dicey/Morris, *On the Conflict of Laws* (13th edn 2000) 1102.

2. Previous decisions of Italian courts on transfers of the registered office

It is interesting to show how Italian courts have decided on the transfer of registered office in the past, although only a few decisions have been published, and most of them have been issued before the reform of 1995.

Only an old decision of the Turin's Court of Appeal declared the winding-up of a company, which decided to transfer its registered office abroad.²⁴ All following decisions stated, to the contrary, that the transfer is not a ground for a winding-up under Italian law. The only moot point is whether Italian companies, transferring the registered office, change the law applicable to them.

Some Courts decided that after the transfer of registered office, the company preserves its legal identity, but does not lose the Italian "nationality" and Italian company law continues to be applied²⁵. Other courts declared as void a decision of the general meeting transferring the registered office from Italy to Switzerland, changing nationality and company law.²⁶ In these latter decisions, the judges leave unclear whether a company can transfer its registered office without changing nationality and the applicable company law.

A decision of the *Tribunale* of Monza in a jurisdiction case is worth mentioning. The court stated that the transfer of a registered office from Italy to Nigeria results in Italian judges no longer having jurisdiction in company law matters pertaining to the company.²⁷ This case reveals the risks associated with the transfer of a registered office. If we assume that an Italian company transferring its registered office cannot lose its Italian nationality, the transfer would become an obstacle to the enforcement of Italian law,²⁸ as the com-

24 Appello Torino, 17 June 1958, *Rivista diritto industriale* (1958) II, 607 *et seq.*, which follows the old theory of Anzilotti, "Il mutamento di nazionalità delle società commerciali", *Rivista diritto internazionale* (1912) 109 *et seq.* The case debated by the Turin Court of Appeal concerned a partnership without legal personality.

25 Appello Milano, 7 May 1974, *Giurisprudenza commerciale* (1975) II, 832 *et seq.* and Tribunale Verona 5 Dec 1996, *Società* (1997) 574 *et seq.*

26 Tribunale Alessandria 19 Aug 1995 and Appello Torino, 1 Dec 1995, *Nuove Leggi Civili Commentate*, (1996) 855 *et seq.*

27 Tribunale Monza, 5 April 2002, *Giurisprudenza commerciale* (2003) II, 558 *et seq.* (with a case note of Dal Soglio).

28 For this argument see recently BayObLG, 11 Feb 2004 (n 21) and Roth "Die Wegzugsfreiheit" (n 21) 395.

petence and jurisdiction of national authorities and courts is predominantly determined by the place of the registered office.²⁹

The *Cassazione* in the B & C case had not considered this latter remark, as it declared B & C as wound-up *specifically* because it lost the Italian nationality through the re-incorporation in Luxemburg. We can argue, therefore, that B & C would not have been declared as wound-up if it had not lost the Italian nationality, but in this case it would be extremely difficult to enforce Italian company law.

3. *The application of Italian conflict rules on the transfer of the registered office*

In order to verify whether the arguments used by the *Cassazione* are correct, we should follow the path traced by Article 25 of the private international law act, according to which the transfer of registered office is admitted if it is made according to both the law of the departure country and the law of the arrival country.

Therefore, we should apply both Italian substantive and conflict law as the law of the country of departure, asking whether it allows Italian companies to transfer the registered office abroad. Under Italian company law, the answer is easy because the *codice civile*³⁰ expressly permits companies to transfer their registered office to another State, allowing dissenting shareholders to withdraw from the company.³¹ Hence, the transfer of the registered office *as*

29 For instance: for joint-stock companies, the competent register is the one of the place where the company has its registered office (Article 2330 *codice civile*); the competence and the jurisdiction on company law matters is established either in the place of the “seat” of the company, *i.e.* the registered office, or in the place where the company has an establishment or a representative (Article 19, *codice di procedura civile*); competence and jurisdiction for proceedings in chambers are determined in the place of the registered office (Law-Decree 17 Jan 2003, n. 5, Reform of civil procedure in company law cases, Article 25).

30 Civil code, King’s Decree 16 March 1942, n. 262.

31 Article 2437 *codice civile*. The same solution was to apply also before 1995, when Italy followed the “real seat doctrine”. This makes clear that the solution does not depend on conflict of law, but on substantive company law. According to the real seat doctrine, if the company transfers only the registered office, leaving the administrative seat in the country of departure, it should be still applied the law of the latter country, under which the company has been struck off from the Registrar office and hence should be considered as wound-up; if the company transfers both the registered office and the administrative seat, the real seat doctrine *theoretically* should not put any obstacle for

such cannot be considered as a ground for winding-up under Italian substantive law.³² The same solution should be followed under Italian conflict rules, as the “incorporation theory” as such, notwithstanding some legal scholars’ arguments,³³ does not impede the transfer abroad of the registered office. The applicable law is, indeed, that of the relevant country of incorporation, which does not change with the transfer of the registered office.³⁴

The following step is to apply both conflict law and company law of the country of arrival. For both the “real seat doctrine”, as is the case under Luxembourg law, and the “incorporation doctrine” the transfer of the registered office might not be significant: conflict rules determine only which substantive law should be applied, but not whether the law of the arrival country should consider the company transferring the registered office as wound-up.³⁵ If the arrival country does not admit an identity preserving nationality and company law change, all assets should be transferred to the

the transfer, but in practice this is not the case. See. Ballarino, “La società per azioni nella disciplina internazionalprivatistica”, in Colombo/Portale (eds.) *Trattato delle società per azioni*, vol. 9/1 (1994) 103 *et seq.* and Behrens, “Identitätswahrende Sitzverlegung einer Kapitalgesellschaft von Luxemburg in die Bundesrepublik Deutschland”, *RIW* (1986) 591 (who debated a case of transfer of registered office from Luxemburg to Germany).

- 32 Santa Maria, “Società (diritto internazionale privato)”, *Enciclopedia del diritto*, vol. 42 (1990) 898; Ballarino (n 31) 105; Santus, “In tema di trasferimento della sede all’estero ed omologazione parziale”, *Nuova giurisprudenza civile commentata* (1996) 857; Luzzato – Azzolini, “Società (nazionalità e legge regolatrice)”, *Digesto disc. priv. sez. commerciale*, vol. 14 (1997) 153.
- 33 See, for instance, Sandrock, “Was ist erreicht? Was bleibt zu tun?”, in Sandrock/Wetzler (eds.) *Deutsches Gesellschaftsrecht im Wettbewerb der Rechtsordnungen* (2004) 86.
- 34 Ballarino, *Dritto internazionale privato e processuale* (1999) 357 *et seq.* Under English conflict law, following the incorporation doctrine, see Smart, “Corporate domicile and multiple incorporation in English private international law”, *Journal of business law* (1990) 126 *et seq.* For a more general overview of the different sorts of incorporation theories existing, see: Hoffmann, “Das Anknüpfungsmoment der Gründungstheorie”, *ZVglRWiss* 101 (2002) 293; Zimmer, “Ein internationales Gesellschaftsrecht für Europa”, 67 *RabelsZ* (2003) 299 (both distinguish three sort of Incorporation doctrine: the law under which shareholders have organized the company, the place of incorporation, the place of the registered office. The latter coincides usually with the place of incorporation, because no legal system permits to ground a company on his territory if the registered office lies abroad.)
- 35 See Behrens (n 31) 590; Knobbe-Keuk, “Umzug von Gesellschaften in Europa”, 154 *ZHR* (1990) 335; Engert, in *Ausländische Kapitalgesellschaften im deutschen Recht* (n 19) 125.

shareholders and the company is to be taxed as though it were liquidated.³⁶ According to Luxembourg law, companies incorporated abroad can transfer their registered office to Luxembourg without having to be dissolved and reincorporated, but they have to change nationality and to adapt their charters to Luxembourg's company law.³⁷ In the B & C case, therefore, the country of arrival admits an identity-preserving nationality and company law change.

Hence, the law of both the countries of departure and of arrival do not consider a transfer of registered office as a ground for winding-up the company and preserving its legal personality. Conflict rules of these countries differ only on the question of the nationality change: whereas according to Italian conflict law, the original company law should be applied after the transfer, Luxembourg's law imposes a change of nationality to companies coming into its territory. Italian courts, therefore, applying the principle of Article 25 of private international law act on transfer of registered office, should preserve the continuity of the legal identity of a company transferring its registered office to Luxembourg, because neither the law of the country of departure, nor the law of the country of arrival consider the company as dissolved.

4. *Conclusions: the mistaken decision of the Court*

Therefore, we can conclude by stating that the B & C decision cannot be reconciled with Italian company law, for which the transfer of the registered office is not a ground for winding-up the company. The B & C decision is also unsound under Italian conflict law, according to which, Italian law should accept the transfer of the registered office if it is made according to both the company and conflict law of the departure and the arrival country. Therefore, companies could be declared as wound-up under Italian law only if the country of arrival does not recognise the legal personality of the arriving company, but it is not the case under Luxembourg law.

The Court's decision should be criticized also from a different point of view, as it argues that Italian judges have jurisdiction because B & C has been

36 See Sørensen/Neville, "Corporate migration in the European Union: an analysis of the proposed 14th EC Company law Directive on the transfer of the registered office of a company from one Member State to another with a change of applicable law", 6 Colum. J. Eur. L. (2000) 191 and Hoffmann, "Neue Möglichkeiten zur identitätswahrenden Sitzverlegung in Europa?", 164 ZHR (2000) 45.

37 See *Loi* 10 Aug 1915 on the "societes commerciales", Article 159 (modified by the *Loi* 31 May 1999). See also Sørensen – Neville (n 36) for other examples of European conflict rules admitting the transfer of the registered office.

wound-up. The Court misunderstands that the point discussed was one of jurisdiction and not of company law, and that the conflict rules of the former are different from the ones of the latter. Hence, even if we accept that B & C was to be declared as wound-up, we could not argue that Italian judges have jurisdiction to hear the case. The plaintiff presented a petition for insolvency of the company, not for declaring it as wound-up. Therefore, the “right” legal question concerns jurisdictional rules in insolvency cases, not the conflict rules of company law.³⁸

*V. The real question behind the arguments of the Cassazione:
the risk of forum-shopping in insolvency cases*

1. The “centre of main interests” (COMI) of the insolvent company

The reason for such a tortuous solution followed by the *Cassazione* decision can be understood by explaining the jurisdiction norms of the EC-Regulation and the most debated relating questions. According to Article 3 of the Regulation, the centre of main interests of legal entities lies in the place of the registered office, in the absence of proof to the contrary. Therefore, the answer to the jurisdiction issue depends on the definition of “centre of main interests”, or COMI, which should be proven differently from the registered office, in order to overcome the presumption of Article 3 of the Regulation.

The uncertainty about the meaning of the “centre of main interests” has raised many conflicts of jurisdiction, among which the most important are related to the insolvency of companies belonging to multi-national groups. It is necessary, therefore, to establish what the COMI is, but the Regulation does not define this concept precisely.

The sole criteria suggested by the Regulation for overcoming the presumption of Article 3 can be found in Recital n. 13, according to which the COMI “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”. Two criteria, therefore, seem to be relevant for overcoming the presumption of Article 3: 1) the place where the debtor administers its firm; and 2) the fact that third parties can ascertain where the place of the administration lies. Despite the Recital, among legal scholars and courts there is no agreement on the definition of the COMI.

³⁸ We should point out that according to Article 5 of the Italian civil procedure code the jurisdiction should be established regarding the factual situation when the petition has been presented, and at this moment B & C had already transferred its registered office to Luxembourg.

Most decisions assume that the COMI corresponds to the place of the central administration of the company, that is where the head office functions are carried out on a regular basis. This criterion usually adjudicates the insolvency of affiliated companies to the judge which is competent for the holding company. The main problem is, of course, which evidence can overcome the presumption of Article 3 Regulation. It is possible to summarise the arguments used by the most important decisions issued by European courts.

Courts have considered as COMI of a company:³⁹ a) the place where the debtor financing was organised;⁴⁰ b) the country of the holding company, when the subsidiaries need the approval of the former for the most contracts;⁴¹ c) the place where the meeting with the principal creditors are held;⁴² d) the country of the holding company, when the most contracts of the insolvent subsidiaries are dealt by or in accordance with the former, or when the contract are guaranteed by the holding company;⁴³ e) the country of the holding company, when “all corporate identity and branding” of the insolvent subsidiaries are run by the former.⁴⁴ A different criterion seems to be applied recently by a German court⁴⁵ and by the Irish Supreme Court,⁴⁶ according to which the COMI lies where the commercial activities of the firm on a day-to-day basis are mainly run.

39 For a description see also Benedettelli, “‘Centro degli interessi principali’ del debitore e forum shopping nella disciplina comunitaria delle procedure di insolvenza transfrontaliera”, *Rivista di diritto internazionale privato e processuale* (2004) 499 *et seq.* and Kübler, “Der Mittelpunkt der hauptsächlichen Interessen nach Art. 3 Abs. 1 EuInsVO”, in *Festschrift Gerhardt* (2004) 558 *et seq.*

40 High Court Chancery Division, 7 Feb 2003, *BRAC*, [2003] EWHC (Ch) 128 = [2003] 2 All ER 201 = [2003] BPIR 531; High Court Chancery Division Leeds 16 May 2003 *Daisytek-ISA*, [2004] BPIR 30; Tribunale Roma, 26 Nov 2003, *Cirio Holding Luxembourg*, *Rivista di diritto internazionale privato e processuale* (2004) 691 *et seq.*; Tribunale Parma, 4 Feb 2004, *Parmalat Netherland BV*, *Rivista di diritto internazionale privato e processuale* (2004) 693 *et seq.*; High Court Chancery Division Birmingham, 18 April 2005 *MG Rover*, [2005] BWHC 874 (Ch) = <http://www.rws-verlag.de/volltext-2005/rover1.pdf> (consulted on 11.9.2005) = EWIR 2005, 637 (noted Manowski).

41 High Court Chancery Division Leeds, *Daisytek-ISA* (n 40).

42 High Court Chancery Division Leeds, 20 May 2004, *Ci4net.com/DBP*, unreported.

43 High Court Chancery Division Leeds, *Daisytek-ISA* (n 40); High Court Chancery Division Birmingham (n 40).

44 High Court Chancery Division Leeds, *Daisytek-ISA* (n 40).

45 AG Mönchengladbach 27 April 2004 *EMBIC I*, ZIP (2004) 1064. The argument used by this court relies only on whether third parties could ascertain the COMI and not on the evidence that the administration lies in a different place than the registered office.

46 Irish Supreme Court, 27 July 2004, *Eurofood/Parmalat* (n 3), which has submitted to ECJ a preliminary question also on this issue.

The application of apparently identical criteria can, nevertheless, lead to different solutions, according to the relevance attributed to the fact that the real administrative seat was ascertainable by third parties. Some decisions, for instance, in order to establish that the COMI of an affiliated company lies in the place of the registered office of the holding company, attribute relevance to internal devices of the group, which are not easily ascertainable by third parties.⁴⁷

In order to answer the question, we should remind ourselves that the “main proceeding”, according to the Regulation, is universal, *i.e.* it involves the whole debtor’s estate, in whatever country it lies, except the assets lying in countries where a secondary proceeding is open.⁴⁸ Therefore, the Regulation should admit opening not more than one universal proceeding on the assets of a debtor and the latter, hence, could have only one COMI.⁴⁹ The presumption that the COMI lies in the country of the registered office is a legal mechanism, which should avoid any uncertainty on jurisdiction; therefore it should be overcome only if the evidence is as certain as the presumption itself.

The reason for this mechanism is easy to understand. All insolvency proceedings have in common that the debtor is in a financial and liquidity crisis, which, without an “extraordinary” intervention of the law, would jeopardise creditors and produce inequalities among them. Third parties, who deal with a firm, should be able to calculate in advance the risk of their investment, also relating to the applicable insolvency law.⁵⁰ According to Article 4 of the Re-

47 See: AG München, 4 May 2004, *Hettlage*, ZIP (2004) 962, (jurisdiction in Germany, country of the Holding-company, over the insolvency of an Austrian subsidiary, since most organisational parts were in Germany, without further evidence that this was ascertainable by third parties); Irish High Court 23 March 2004, *Eurofood*, 2004 No 33 COS = Rivista di diritto internazionale privato e processuale (2004) 1120 *et seq.* (which affirmed the competence of Irish court – despite a previous decision to open a proceeding by the competent Italian authorities – stating that the proceeding in front of the Italian court did not respect the right of parties to a fair proceeding, but avoided the crucial question of the COMI); High Court Chancery Division Birmingham (n 40) (the board of all subsidiaries always included British members and was appointed by the holding company, based in UK; the subsidiaries did not have autonomous and independent sales activity). For a broader comment, see Kübler (n 39) 542.

48 See Article 17 Regulation.

49 Dicey/Morris (n 23) 277. A different opinion is held by Benedettelli (n 39) 520, who argues that every national law should establish which interests are relevant, according to the policy goals of the own proceedings.

50 Eidenmüller, “Der Markt für internationale Konzerninsolvenzen: Zuständigkeitskonflikte unter der EuInsVO”, NJW (2004) 3456. See *Virgos-Schmit Report* (n 2) para. 75: “Insolvency is a foreseeable risk. It is therefore important that international jurisdiction [...] be based on a place known by the debtor’s potential creditors”.

gulation, the insolvency law of the Member State which has jurisdiction should be applied and therefore jurisdictional rules should be sure to make predictable which insolvency law will be applied.

For overcoming the presumption, therefore, it is not sufficient to furnish proof that the insolvent company was managed from a different country. It should rather be shown that third parties could ascertain where the administrative seat actually was. It may be the case, for instance, if the insolvent company is a subsidiary, which presents itself to third parties as a mere “division” of a whole firm managed by the holding company, giving evidence, for instance, that both use the same or a similar name or brand;⁵¹ the presumption can be rebutted, moreover, if the insolvent company is a mere pseudo-foreign corporation, which operates in a country different than the one of the registered office⁵². In most other cases, the presumption should not be considered as rebutted, so that only the court of the registered office is competent to open the insolvency proceeding.⁵³

2. *Avoiding positive conflicts of jurisdiction under the European Insolvency Regulation: the debate over the “priority rule”*

Under the European Insolvency Regulation, there is a debate on how to avoid positive conflicts of jurisdiction, *i. e.* the cases when two or more courts

See also High Court Chancery Division 15 July 2002, *Geveran* [2003] BPIR 73: “It is the need for third parties to ascertain the centre of a debtor’s main interests that is paramount, because, if there are to be insolvency proceedings, the creditors need to know where to go to contact the debtor”.

Therefore the “third” parties, who should be able to ascertain where the “true” COMI is, are all possible persons who handle with the company itself, which are not only financier and suppliers, as it has been decided in *Daisytek* (n 40), but also purchaser or workers, because national insolvency laws can influence also their interests.

51 See High Court Chancery Division Leeds, *Daisytek-ISA* (n 40).

52 AG Hamburg, 14 May 2003, NJW (2003) 2835 *et seq.* On the law applicable to pseudo-foreign companies after *Inspire Art* see e.g. Hirte/Bücker (n 19); Eidenmüller (n 19); Lutter (n 20); Ulmer, “Gläubigerschutz bei Scheinauslandsgesellschaften”, NJW (2004) 1201 *et seq.*; Weller, “Scheinauslandsgesellschaften nach Centros, Überseering und Inspire Art: Ein neues Anwendungsfeld für die Existenzvernichtungshaftung”, IPRax (2003) 207 *et seq.*; Fischer, “Die Verlagerung des Gläubigerschutzes vom Gesellschafts- in das Insolvenzrecht nach ‘Inspire Art’”, ZIP (2004) 1477 *et seq.*; Schall, “Englischer Gläubigerschutz bei der Limited in Deutschland”, ZIP (2005) 965 *et seq.*

53 As was the case in AG Mönchengladbach (n 45). See Weller, “Forum shopping im internationalen Insolvenzrecht?”, IPRax (2004) 415; Haubold, in Gebauer/Wiedmann (eds.) *Zivilrecht unter europäischem Einfluss* (2005) note 49.

of different countries claim to be competent over the insolvency of the same company.⁵⁴ These conflicts, according to most legal scholars,⁵⁵ should be decided following a “priority rule”, so that each Member State should automatically recognise every decision on the commencement of an insolvency procedure issued by the court of another Member State, unless the recognition itself is “manifestly contrary to [the] State’s public policy”.⁵⁶

This rule should be derived from Recital 22 and Article 16 of the Regulation. The former states that under the Regulation, there should be immediate recognition concerning the opening of a procedure⁵⁷ on the basis of mutual trust,⁵⁸ so that “the decision of the first court to open proceedings should be recognised in the other Member States without those Member States having the power to scrutinise the court’s decision”.⁵⁹ Article 16 of the Regulation

54 The Regulation does not resolve neither the negative conflicts of jurisdiction, *i.e.* when the judges of two Member States both declared themselves not being competent to open a main proceeding. In this case both judges will open a territorial proceeding, so that there will be no main proceeding at all in the EU: see eg Di Amato, “Le procedure di insolvenza nell’Unione Europea: competenza, legge applicabile ed efficacia transfrontaliera”, *Il fallimento* (2002) 698; De Cesari, “Giurisdizione, riconoscimento ed esecuzione delle decisioni nel regolamento comunitario relativo alle procedure di insolvenza”, *Rivista di diritto internazionale privato e processuale* (2003) 65. See also Duursma-Kepplinger, in Duursma-Kepplinger/Duursma/Chalupsky (eds.) *Europäische Insolvenzordnung. Kommentar* (2002) Art 3 note 36, who holds that according to the principle of mutual trust the second judge could not refuse opening a main proceeding stating that the first judge was competent, but only if he recognise a third Member State as competent.

55 See Moss/Fletcher/Isaac (n 2) 41; Dicey/Morris (n 23), third supplement 2003, 277; Huber, “Der deutsch-englische Justizkonflikt – Kompetenzkonflikte im Internationalen Insolvenzrecht” in Lorenz/Trunk/Eidenmüller/Wendehorst/Adolff (eds.), in *Festschrift Heldrich* (2005) 679 *et seq.*; Herchen, “International-insolvenzrechtliche Kompetenzkonflikte in der Europäischen Gemeinschaft”, *ZinsO* (2004) 63; Kübler (n 39) 558 *et seq.*; De Cesari, “Disposizioni generali”, in *Le procedure di insolvenza nella nuova disciplina comunitaria* (2004) 110.

56 Article 26 European Insolvency Regulation.

The “priority rule” was the legal basis for the decision issued by the Irish High Court in the *Eurofood/Parmalat* case, which established the jurisdiction in favour of Irish courts: see Irish High Court 23 March 2004, TAR Lazio, 12 July 2004 and 16 July 2004, Foro It. (2004), I, 615 *et seq.*; Tribunale Parma, 20 Feb 2004, Foro it. (2004), I, 1567 *et seq.* (according to the Act of 8 Feb 2004 on the administrative proceeding for crisis of “big” companies, the Industry Minister is competent to open the proceeding and to appoint the liquidator, and the Tribunal is competent to declare the insolvency).

57 Recital 22, first sentence.

58 Recital 22, third sentence.

59 Recital 22, fifth sentence.

states that “any judgment opening insolvency procedure handed down by a court of Member States” should be recognised by other Member States. According to this “priority rule,” therefore, any decision opening a proceeding, issued after the court of another Member State has opened a “main proceeding” concerning the same debtor, will be limited to a “territorial proceeding” without universal character.

The “priority rule” has been analysed in the *Daisytek* case,⁶⁰ involving English, German and French courts, which is paradigmatic of the uncertainty in the enforcement of the Insolvency Regulation. The English High Court opened an administration procedure on the English company Daisytek-ISA Ltd and, at the same time, also on three German companies and one French affiliated company, affirming that the COMI of the latter was situated in England. The Tribunals of Düsseldorf and Pontoise claimed to have competence, although the English court had already issued a decision opening the main insolvency proceeding.⁶¹ On appeal against these decisions, the Amtsgericht of Düsseldorf and the Court d’Appel of Versailles rebutted the first decisions and denied the jurisdiction to domestic courts, relying on the “priority rule” stated in Article 16 of the Regulation.⁶²

The application of the “priority rule” raises the question, recently submitted by the Irish High Court to ECJ for a preliminary ruling,⁶³ of the relevant

60 High Court Chancery Division Leeds (n 40).

61 AG Düsseldorf 6 June 2003, ZIP (2003) 1363; Tribunal de Commerce de Pontoise, 26 May 2003, *Rivista di diritto internazionale privato* (2003) 780 *et seq.*

62 AG Düsseldorf 12 March 2004 *ISA-Daistek*, ZIP (2004) 623; Court d’Appel Versailles, 4 Sept 2003, *Recueil Dalloz* (2003) 2352.

See also LG Innsbruck, 11.5.2004 ZIP (2004) 1721 = EWiR 2004, 1085 (which denied the competence of Austrian courts, admitting that the COMI of an Austrian company was in Germany, where was the registered office of the Holding) and High Court Chancery Division, *Ultra Motorholmes*, 25 May 2005 [2005] EWHC 872 (Ch) (*obiter dictum*).

63 See Supreme Court, 27.7.2004, *Eurofood/Parmalat* (n 3). In this case, an Irish court appointed a provisional liquidator at 27.1.2004, i.e. on the same day the biggest creditor of Eurofood presented a petition seeking the winding-up by the Court (which is a proceeding regulated sec. §§ 206 (a), 213 (e) and 214 of Irish companies act.). At 23.3.2004 – that is after the Italian Industry Minister has opened the administrative proceeding for the crisis of the whole group Parmalat and *Tribunale* of Parma has declared the insolvency of Eurofood – the Irish High Court issued the decision opening the proceeding, which, according to the Irish company law (sec. 220 (2) Companies act 1963), should confer, in a retroactive manner, validity to the appointment of the provisional liquidator. The High Court of Dublin submitted to ECJ a preliminary question, asking what is the relevant moment for the priority rule, i.e. whether it is the petition, the order to appoint the provisional liquidator or the successive decision opening officially a proceeding.

moment for determining jurisdiction. It is indeed necessary to establish in which cases a decision opening a proceeding has been handed down, precluding other courts to open another main proceeding. Article 2(f) and 16(1) of the Regulation affirm that the “time of the opening” is when a decision “becomes effective” and, therefore, it should be considered as relevant only the time of the decision itself, not the time when the petition has been presented.⁶⁴ Hence, whichever Court opens the proceeding “faster” will prevail.⁶⁵

The “priority rule”, nevertheless, is not accepted unanimously. According to a prominent legal scholar,⁶⁶ the Regulation does not really contain a strict “priority rule”. Therefore, every court can open a main procedure even if a court of another Member State has already opened a proceeding first. This interpretation relies upon two arguments. The first is that the Regulation had to provide explicitly for a “priority rule”, as is the case in Article 35 of the Regulation on jurisdiction in civil and commercial matters⁶⁷ or in Article 19 of the Regulation on jurisdiction for family cases.⁶⁸ The second argument is that Article 16 of the Regulation does not confirm that courts should recognise *every* decision opening a proceeding handed down by a court of a different Member States, but only that courts should recognise decisions “handed down by a court of a Member State *which has jurisdiction pursuant to Article 3*”.⁶⁹ Hence, if the latter court does not have jurisdiction because it incorrectly established the COMI, other courts could claim to be competent under Article 3 of the Regulation.

This opinion aims to create a control mechanism over the jurisdiction decisions of European courts and, to that end, should be praised. Unfortunately,

64 Dicey/Morris (n 23) 274; Weller (n 53) 417; De Cesari, (n 54) 65. Among European courts, see AG Mönchengladbach (n 45).

65 Benedettelli (n 39) 526.

66 See Mankowski, case note to AG Düsseldorf (n 61), EWIR (2003) 768; see also Kübler (n 39) 559, according to which Article 16 and Recital 22 should preclude other courts from verifying the validity of the first decision, unless the latter is not declared as void by a court of the same Member State.

67 Council Regulation 44/2001, 22. 12. 2001, OJEC L 12/1, 16. 1. 2001, “Council Regulation on jurisdiction and the recognition and enforcement of judgement in civil and commercial matters”.

68 Council Regulation 2201/2003, 27. 11. 2003, EJEU L238/1, 23. 12. 2003 “Council Regulation concerning jurisdiction and the recognition and enforcement of judgement in matrimonial matters and the matter of parental responsibility”, repealing Regulation 1347/2000. On both Regulations see Lupoi, *Conflitti transnazionali di giurisdizioni* (2002) 427 *et seq.*

69 Article 16 (1) Regulation.

the Regulation does not provide for a centralised competence for the ECJ to decide on the merit of any positive or negative conflict of jurisdiction. Therefore, only a “priority rule” seems to be able to resolve the conflict of jurisdiction issue, so that it is only possible to appeal against the initial decision opening a proceeding.⁷⁰

3. *The relevant moment to determine the jurisdiction under the European Insolvency Regulation*

Another issue essential for the avoidance of forum-shopping concerns the relevant moment to assess the jurisdiction, i.e. the moment when the facts alleged for establishing the jurisdiction should exist. The German BGH has recently submitted this issue to the ECJ for a preliminary ruling.⁷¹ In this case, an individual entrepreneur shifted his residence and, therefore, his COMI from Germany to Spain, after a petition for his insolvency was presented, but before any decision opening the proceeding. BGH asked the ECJ whether a court keeps its competence if the insolvent firm transfers the COMI abroad between the petition and the decision opening the proceeding. If it was the case, it was of course easy to “forum-shop” after the petition, shifting the COMI to a more favourable country.

Article 5 of the Italian civil procedure act states that the jurisdiction should be established according to the law and the facts existing when the petition was presented (so called *perpetuatio iurisdictionis*). The jurisdiction, therefore, should not change if the insolvent firm shifts its COMI between the petition and the decision opening the proceeding.⁷² This rule avoids most cases of forum-shopping, it nevertheless permits transferring the registered office after the default, but before the petition is presented. For these cases, Italian courts can accept the proof that the transfer of the registered office did not coincide with a change of the real seat of the firm and therefore, is made “fraudulently” and contrary to the competence norms.⁷³

The solution of Italian civil procedure law is also supported by the Regulation. Indeed, we cannot forget that the Regulation only *presumes* that the COMI coincides with the registered office, allowing proof that the former lies somewhere else. In case of transference of the registered office, therefore,

70 Kübler (n 39) 559; De Cesari (n 55) 112. See also *Virgos-Schmit Report* (n 2) Para. 79.

71 BGH 27. 11. 2003, ZinsO (2004) 34 = IPRaX (2004) 429.

72 See Guglielmucci, *Lezioni di diritto fallimentare* (2004), 42. Under the Insolvency Regulation, the same solution is followed by Haubold (n 53) note 52.

73 See Corte di Cassazione, 16. 3. 2005, Diritto e giustizia (2005) n. 18, 35.

it should be possible to prove that this transfer was only a “formal” transfer, so that the COMI is still in its original place. In this way we reach a degree of legal certainty in jurisdictional issues and can avoid the forum-shopping based on the transfer of the registered office before the petition.⁷⁴ This solution could, nevertheless, lead to positive conflicts of jurisdiction if the court of the departure country accepts the proof that the COMI has not been transferred together with the registered office, but the court of the arrival country is not satisfied with this evidence and considers the presumption of Article 3 Regulation as not rebutted.⁷⁵

These problems are less significant than they first appear. We cannot forget that the relevant criterion to rebut the presumption of Article 3 Regulation is to prove where the administrative seat was ascertainable by third parties. Therefore, the firm that shifts abroad the registered office or the domicile does not automatically transfer the COMI. The firm should rather transfer the real administrative head office in a way perceivable to third parties and customers and, in most cases, also transfer the activities abroad changing customers and suppliers, which is a costly decision.⁷⁶ Therefore, in most cases it should be easy to prove that the COMI has not been transferred together with the registered office.

VI. Conclusions

The *Corte di Cassazione*, as has been shown, turns a blind eye to the questions related to jurisdiction in insolvency cases. One can imagine that the Court, aware of the problems raised by the European Insolvency Regulation, deliberately tried to attribute the jurisdiction to Italian judges following a different line of argument. The aim of the Court should be praised, as it avoids the risk of forum-shopping among insolvency laws and legal systems, but one cannot praise the method by which it was reached.

When a firm chooses a different country shortly before its default, the seat has probably been transferred for the purposes of avoiding domestic law and fraudulently at the expense of creditors and third parties, which have dealt

74 This is the question raised by Weller (n 53) 416, who follows a different solution, affirming that the jurisdiction should belong to the court where the COMI was at the moment when the insolvency was economically unavoidable or already “mature” (“*wo sich der Interessenmittelpunkt des Schuldners zur Zeit der ‘Insolvenzreife’ befindet*”).

75 See Duursma-Kepplinger (n 54) 130, Rz. 17.

76 See Smid, *Deutsches und Europäisches Internationales Insolvenzrecht. Kommentar* (2004) 41; Kübler (n 39) 554.

with the firm on the presumption that a different insolvency law would be applied in case of default. This kind of opportunistic forum-shopping could lead to insecurity among potential creditors, who can discount the risk through higher interest rates, creating an inefficient allocation of resources.⁷⁷

The *Cassazione* applies conflict rules of company law, declaring B & C as wound-up, although it was in fact a case of jurisdiction and not of company law. Forum-shopping could have been avoided simply by applying the European Insolvency Regulation, but in order to follow this path, correct though it was, the *Cassazione* would have had to answer the questions outlined in this article, which remain open in the enforcement of the Regulation. Unfortunately, the *Cassazione* has missed a valuable opportunity to express its opinion on some very important issues for the future of insolvency law in the European Union.

77 Eidenmüller (n 50) 3456.