INSOL INTERNATIONAL
FOUNDATION CERTIFICATE
IN INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) ASSESSMENT (RESIT SEPTEMBER 2022): MODULE 2B

THE EUROPEAN INSOLVENCY REGULATION

This is the **summative (formal) resit assessment** for **Module 2B** of this course. Please read the instructions on the next page very carefully.

The mark awarded for this assessment will determine your final mark for Module 2B. In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.

2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.

3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).

4. You must save this document using the following format: **[studentID.assessment2Bresit]**. An example would be something along the following lines: 202223-336.assessment2Bresit. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the word "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked**.

5. This assessment must be returned to David.Burdette@insol.org by e-mail no later than **23:00 (11 pm) BST (GMT +1) on Monday 26 September 2022**. When returning the assessment by e-mail, your e-mail must confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words**.

6. Prior to being populated with your answers, this assessment consists of **10 pages**.

ANSWER ALL THE QUESTIONS

Commented [DB1]: 39.5 out of 50 = 79%

QUESTION 1 (multiple-choice questions) [10 marks in total]

Commented [DB2]: 9 out of 10

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph **in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

The EIR 2000 was the first European initiative to ever attempt to harmonise the insolvency laws of EU Member States.

Select the correct answer from the options below:

(a) True, before the EIR 2000, the EU has not sought to harmonise the insolvency laws of EU Member States.

(b) False, there was another EU Regulation regulating insolvency law at EU level before the EIR 2000.

(c) False, an EU Directive regulating insolvency law at EU level existed before the EIR 2000.

(d) False, the EU sought to draft Conventions with a view to harmonising the insolvency laws of EU Member States as early as the 1960s, but these initiatives failed. Correct

Question 1.2

According to Article 1(1) of the EIR 2015, proceedings fall within the scope of the EIR if:

(a) they are based on laws relating to insolvency for the purpose of rescue, adjustment of debt, reorganisation, or liquidation; are public; are collective. Correct

(b) they are based on laws relating to insolvency for the purpose of liquidation; are public; are collective.

(c) they are based on laws relating to insolvency for the purpose of rescue, adjustment of debt, reorganisation, or liquidation; are public.

(d) they are based on laws relating to insolvency for the purpose of rescue, adjustment of debt, reorganisation, or liquidation; are collective.

Question 1.3

In 2017, the EIR Recast replaced the EIR 2000. Recasting the EIR 2000 was deemed necessary by various stakeholders. Why?

(a) Through its case law, the CJEU had altered the literal meaning of several provisions of the EIR 2000. Newly formulated rules, in line with the CJEU interpretation, were therefore needed.

(b) The EIR 2000 was generally regarded as a successful instrument in the area of European insolvency law by the EU institutions, practitioners and academics. However, a number of its shortcomings were identified by an evaluation study and a public consultation. Correct

(c) The fundamental choices and underlying policies of the EIR 2000 lacked support from the major stakeholders (businesses, public authorities, insolvency practitioners, etc.). A new Regulation was therefore needed to meet their expectations.

(d) The EIR 2000 proved to be inefficient and incapable of promoting co-ordination of cross-border insolvency proceedings in the EU.

Question 1.4

Why can it be said that the EIR Recast did not overhaul the *status quo*?

(a) The EIR Recast is a copy of the EIR 2000. Its structure and the wording of all articles are similar.

(b) Although the EIR Recast includes relevant and useful innovations, it has stuck with the framework of the EIR 2000 and mostly codified the jurisprudence of the CJEU. Correct

(c) The EIR Recast has not added any new concept to the text of the EIR 2000.

(d) It is incorrect to say that the EIR Recast has not overhauled the *status quo* at all. On the contrary, the EIR Recast has departed from the text of its predecessor and is a completely new instrument which has rejected all existing concepts and rules.

Question 1.5

The EIR Recast is an instrument of a predominantly procedural nature (including private international law issues). Nevertheless, it contains a number of substantive provisions. Which one of the following provisions constitutes a harmonised (stand-alone) rule of substantive law?

(a) Article 18 EIR Recast ("Effects of insolvency proceedings on pending lawsuits or arbitral proceedings").

(b) Article 40 EIR Recast ("Advance payment of costs and expenses").

(c) Article 7 EIR Recast ("Applicable law").

(d) Article 31 EIR Recast ("Honouring of an obligation to a debtor"). Correct

Question 1.6

The EIR 2015 does not provide a definition of "insolvency" or "likelihood of insolvency". What are the consequences of this?

(a) The ECJ has provided a definition of "insolvency" in recent case law.

(b) The European Commission has provided a definition of "insolvency" in its Recommendation on a "New Approach to Business Failure" published in 2014.

(c) Each Member State will define "insolvency" in national legislation. Correct

(d) Deciding whether a debtor is "insolvent" or not is a matter for the ECJ to determine.

Question 1.7

The EIR Recast introduced the concept of "synthetic proceedings". What are they?

(a) "Synthetic proceedings" means that when an insolvency practitioner in the main insolvency proceedings has given an undertaking in accordance with Article 36, the court asked to open secondary proceedings should not, at the request of the insolvency practitioner, open them if they are satisfied that the undertaking adequately protects the general interests of local creditors. Correct

(b) "Synthetic proceedings" means that for the case at hand, several main proceedings can be opened, in addition to several secondary proceedings.

(c) "Synthetic proceedings" means that when secondary proceedings are opened, these are automatically rescue proceedings, as opposed to liquidation proceedings.

(d) "Synthetic proceedings" means that insolvency practitioners in all secondary proceedings should treat the proceedings they are dealing with as main proceedings for the purpose of protecting the interests of local creditors.

Question 1.8

The EIR Recast kept the concept of the "centre of main interests" (COMI) of the debtor, which already existed in the EIR 2000. What were the amendments adopted in relation to this concept?

(a) The COMI of the debtor is not presumed to be "at the place of the registered office" anymore and the debtor will need to confirm where his COMI is before the beginning of each case.

(b) Although the COMI of a debtor is still presumed to be "at the place of the registered office", it is now possible to rebut this presumption, albeit only by the courts.

(c) The rule that a company's COMI conforms to its registered office is now an irrefutable presumption.

(d) Although the COMI of a debtor is still presumed to be "at the place of the registered office", it should now be possible to rebut this presumption based on Article 3 EIR Recast and Recital 31. Correct

Question 1.9

In which of the following scenarios may the recognition of a foreign insolvency proceeding be denied under the EIR Recast?

(a) Where the decision to open the insolvency proceedings was taken in flagrant breach of the right to be heard, which a person concerned by such proceedings enjoys. Correct

(b) The judgment, subject to recognition, was passed with incorrect application of the applicable substantive law.

(c) The court, which has opened insolvency proceedings (originating court), most certainly did not have international insolvency jurisdiction to do so under the EIR Recast.

(d) The rule applied by the court, which has opened insolvency proceedings (originating court), is unknown or does not have an equivalent in the law of the jurisdiction in which recognition is sought.

Question 1.10

In a cross-border dispute, the main proceedings before the German court concerns Schatz GmbH (registered in Germany) and Canetier SARL (registered in France). The case deals with an action to set aside four contested payments that amount to EUR 900,000. These payments were made pursuant to a sales agreement dated 29 December 2021, governed by Italian law. The contested payments have been made by Schatz GmbH to Canetier SARL before the former went insolvent. The insolvency practitioner of the company claims that the contested payments should be set aside because Canetier SARL must have been aware that Schatz GmbH was facing insolvency at the time the payments were made.

Considering the facts of the case and relevant provisions of the EIR Recast, which one of the following statements is the **most accurate**?

(a) The insolvency practitioner will always succeed in his claim if he can clearly prove that under the *lex concursus*, the contested payments can be avoided (Article 7(2)(m) EIR Recast).

(b) The contested transactions cannot be avoided if Canetier SARL can prove that the *lex causae* (including its general provisions and insolvency rules) does not allow any means of challenging the contested transactions, and provided that the parties did not choose that law for abusive or fraudulent ends.

(c) The contested payments will not be avoided if Canetier SARL proves that such transactions cannot be challenged on the basis of the insolvency provisions of Italian law (Article 16 EIR Recast).

(d) To defend the contested payments Canetier SARL can rely solely, in a purely abstract manner, on the unchallengeable character of the payments at issue on the basis of a provision of the *lex causae*.

QUESTION 2 (direct questions) [10 marks]

Commented [DB3]: 8.5 out of 10

Question 2.1 [maximum 2 marks] 1.5 marks

The following **two (2) statements** relate to particular provisions / concepts to be found in the EIR Recast. Indicate the name of the provision / concept (as well as the relevant EIR Recast article), addressed in each statement.

Statement 1. The presumptions that the registered office, the principal place of business and the habitual residence are the centre of main interests need to be rebuttable.

Statement 2. Proceedings covered by the scope of the EIR 2015 should include proceedings promoting the rescue of economically viable debtors, especially at a stage where there is a mere likelihood of insolvency.

Statement 1 is found in Article 3(1) of the EIR Recast entitled International Jurisdiction 0.5 mark

Statement 2 is found in Article 1 of the EIR Recast entitled Scope with guidance provided by Recital 10 1 mark

Question 2.2 [maximum 3 marks] 3 marks

The EIR Recast is built upon the concept of modified universalism, as pure universalism has been deemed idealistic and impractical for the time being. Provide **three (3) examples** of provisions from the EIR Recast which highlight this modified universalism approach.

Three examples from the EIR Recast which highlight modified universalism are:

Article 3(1) of the EIR Recast centre of main interest is the place where the debtor conducts the administration of its business on a daily basis and which is ascertainable to third parties.

Article 19(2) of the EIR Recast adds that the recognition of main proceedings does not preclude the opening of secondary proceedings by a court in another member state – this pursuant to Article 3(2)

Article 38 of the EIR Recast allows for the opening of synthetic secondary proceedings. Synthetic secondary proceedings are aimed at modifying the universalist implications of having one set of main proceedings.

Your answer does not reference the correct recitals, but because you have identified the correct issues, I have awarded full marks.

Question 2.3 [maximum 3 marks] **3 marks**

Because pure universalism has not been adopted under the EIR 2015, main and secondary insolvency proceedings can be opened at the same time against the same debtor. In light of this, it is seminal that proper co-operation between the actors involved in concurrent proceedings takes place. It is therefore not surprising that co-operation has been introduced as an obligation on several actors in the EIR 2015. List **three (3) provisions** (recitals and / or articles) of the EIR Recast that deal with the obligation to co-operate.

Three provisions which deal with the new obligation under the EIR Recast for cross-boarder co-operation and communication between courts are:

(1) Article 42(1) of the EIR Recast which codifies best practices in co-operating and communicating between courts and mandates that courts faced with the issue of pending insolvency proceedings or opening insolvency proceedings in the same matter, should co-operate and communicate with each other

(2) Article 42(3) of the EIR Recast which empowers the court to co-ordinate the administration and supervision of the debtor's assets and affairs and synchronise the conduct of hearings and the approval of protocols, where necessary

(3) Recital 50 of the EIR Recast which enables a court to appoint a single insolvency practitioner over several insolvency proceedings which involve the same debtor.

Question 2.4 [maximum 2 marks] **1 mark**

It is widely accepted that the opening of secondary proceedings can hamper the efficient administration of the debtor's estate. For this reason, the EIR Recast has introduced a

number of legal instruments to avoid or otherwise control the opening, conduct and closure of secondary proceedings. Provide **two (2) examples** of such instruments and briefly (in one to three sentences) explain how they operate.

Two instruments which have been introduced to avoid or otherwise control the opening, conduct and closure of secondary proceedings are:

(1) the right to give an undertaking ("synthetic" secondary proceedings). This right is provided for under Article 38(2) of the EIR Recast. The undertaking must be given in accordance with Article 36 of the EIR Recast and it requires the court asked to open secondary proceedings by the insolvency practitioner, not to do so, if it (the court) is satisfied that the undertaking adequately protects the general interests of local creditors; and yes

(2) the stay of opening secondary proceedings. This stay is provided for under Article 38(3) of the EIR Recast. In addition to preserving the integrity of the insolvency estate, it also provides some breathing room to enable negotiations between the debtor and its creditors. Without the stay, the effectiveness of negotiations could be undermined. Under Article 38(3), the stay must be requested and it may not be imposed for a period exceeding 3 months and suitable conditions must be attached to the stay to protect the interests of local creditors.

QUESTION 3 (essay-type questions) [15 marks in total]

Commented [DB4]: 11 out of 15

In addition to the correctness, completeness (including references to case law, if applicable) and originality of your answers to the questions below, marks may be awarded or deducted on the basis of your presentation, expression and writing skills.

Question 3.1 [maximum 5 marks] 4 marks

During the reform process of the EIR 2000, what main elements were identified by the European Commission as needing revision within the framework of the Regulation (whether adopted or not)?

The main elements identified by the European Commission as needing revision within the framework of the Regulation were:

(1) the scope of the EIR 2000 where the focus was on liquidation;
(2) the necessity for stronger rules on cooperation between courts and insolvency practitioners;
(3) the necessity for rules relating to group companies;
(4) the need to streamline the initiation of concurrent main and secondary proceedings;
(5) the scope of secondary proceedings;
(6) the need for certain presumptions in relation to a company's COMI; and

(7) addressing forum shopping concerns.

By the time the EIR 2015 was brought into force, the scope of its application increased from mainly liquidation to encompass pre-insolvency rescue proceedings and restructuring. These broader rescue proceedings may now be engaged where there is a chance to rehabilitate a debtor whose situation only presents a likelihood of insolvency. As regards cooperation between insolvency practitioners and courts, prior to the EIR 2015, there was only one provision which mandated that insolvency practitioners in main and secondary proceedings should communicate with each other (Article 31 EIR 2000). Now that EIR 2015 has been brought into force, there is a comprehensive framework for cooperation and communication between (i) insolvency practitioners (Article 41 EIR 2015); (ii) the courts (Article 42 EIR 2015); and between insolvency practitioners and the courts (Article 43 EIR 2015).

Similarly, Articles 56-59 EIR 2015 now provide the framework for coordination and communication in insolvency proceedings between two or more members of a group of companies.

On a company's COMI, the main presumption is a registered office presumption (Article 3(1) EIR 2015) which, in relation to a company or legal person, is presumed to be that company or legal person's COMI.

Question 3.2 [maximum 5 marks] 3 marks

While the EIR Recast was welcomed by most stakeholders, it was also criticised by some as a "missed opportunity" and "modest". List **two (2) flaws** or shortcomings of the EIR Recast and explain how you consider they could be corrected.

Two flaws or shortcomings of the EIR Recast are:

(1) the prejudice which creditors endure in dealings with groups of companies; and
(2) providing for harmonisation of substantive insolvency laws across member states.

As to the prejudice which creditors suffer in their dealings with groups of companies, while the EIR Recast now contains provisions which deal with groups of companies (there were no such provisions in the EIR 2000), the reform does not go far enough. The reform is based on the principle in *Eurofood IFSC*, which respects the separate legal personality of individual companies within a group. Based on this principle, businesses are able to create corporate structures which support 'entity shielding'.

Theses provisions could be improved by:

(i) removing the right of veto granted to insolvency practitioners;
(ii) requiring a majority of the insolvency practitioners appointed in respect of group companies to vote in favour of a group co-ordination regime;

(iii) requiring cooperation agreements to be put in place for each group insolvency and providing default rules that apply. Certain carve-outs could be built into this such as giving preference to the insolvency practitioner and the courts in the Member State in which the largest group company is located; and

(iv) ensuring that where default rules are created, there are carve-outs for circumstances in which the default rules can be adjusted – i.e. where the court considers that a departure from the rules would be just and equitable.

As to the harmonisation of substantive insolvency laws across member states, the current focus of the EIR Recast is procedural harmonisation. The nature of cross-border enterprise is such that it requires that parties understand what triggers insolvency proceedings and how those proceedings will be handled in the event of financial distress.

A good example on how the lack of harmonisation of substantive insolvency laws across member states can cause issues is seen in Article 7 of the EIR Recast. The phrase "the law applicable to insolvency proceedings and their effects" is found in that article but there is no guidance on how the phrase is to be interpreted nor is there any guidance on what the term "effects" entails.

The issue which this has caused is borne out in the *Simona Kornhaas v Thomas Dithmar* (C-594/14, ECLI: EU:C:2015:806 (December 10, 2015)) case where the CJEU had to decide whether liability for failure to initiate insolvency proceedings within a specific time, which was integrated in German company law, nevertheless fell within the applicable law provision of Article 4 EIR 2000 (the predecessor to Article 7 EIR Recast). In this case, the debtor company was registered in the UK but was placed into insolvency in Germany, which was determined as its COMI. The director of the company having been alleged to have made unauthorised payments during the company's insolvent period, could not escape personal liability after failing to apply for the company to be placed into insolvent liquidation within the period specified by German law. Although the company was a UK registered company, the court found that the company law of the place of incorporation did not apply, but rather that the insolvency law of Germany did. The EIR Recast could have, in view of the uncertainties surrounding this Article 7, have clarified the position.

Good attempt – I have copied the model answer below.

- Groups of companies. It can be argued that the newly introduced provisions on group insolvencies are too weak (or toothless). The EIR Recast does not advocate for either procedural (no group/enterprise COMI) or substantive consolidation (see Article 72(3) EIR Recast). The voluntary nature of group coordination proceedings (see Article 65 EIR Recast re opt-out), supplemented by non-binding actions (recommendations) of a group coordinator, cannot guarantee efficiency, as group members may freely decide to take a hold out (non-cooperative) position. Potential improvements can provide for the adoption of a group restructuring or insolvency plan that is binding for all participating members (with or without cross-jurisdictional (cross-entity) cram-down) and the option for substantive consolidation of the estates of jointly administered members of the group in certain narrowly defined circumstances. See also

Recommendations 9.01-9.12 in Bob Wessels and Stephan Madaus, *Instrument of the European Law Institute - Rescue of Business in Insolvency Law*, 2017.

- 'Synthetic' secondary proceedings. Article 36 EIR Recast ('Right to give an undertaking in order to avoid secondary insolvency proceedings') contains 11 paragraphs and evidences a long struggle between representatives of the Member States. It is one of the most complicated provisions of the EIR Recast, touching upon such elements as the language, form of an undertaking, its approval, execution, challenge, etc. This level of detail is meant to guarantee legal certainty and ensure its harmonised application across the Member States. However, the novelty of the concept of 'synthetic' proceedings and the number of provisions used in the EIR Recast inevitably give rise to myriad of questions. For example, under paragraph 1 of Article 36, an undertaking shall specify the "factual assumptions on which it is based, in particular in respect of the value of the assets located in the Member State concerned and the options available to realise such assets." The question arises, how such assets can (and should) be identified and how their value is to be determined. Another problem relates to the establishment of the 'known' foreign creditors. In the absence of the opened secondary proceedings, it is not always possible (without incurring disproportionate costs) to determine such creditors. Ironically, the desired predictability and harmonisation in approaches and rules related to 'synthetic' proceedings has not been fully achieved in practice. A recent report by the Conference on European Restructuring and Insolvency Law (CERIL), CERIL Report 2018-1 of 4 June 2018, has revealed substantial divergence in the way different Member State legislate on 'synthetic' proceedings. While some of them (e.g. Finland, the Netherlands) decided not to introduce specific legislation on how to proceed with them, others (e.g. France, Germany) specified the process of accepting an undertaking under national law. The fact that the procedure established in Article 36 EIR Recast has not gained ground since its introduction in summer 2017 may indicate that its improvement or simplification may be necessary. The value of the undertaking is in its flexibility, but overregulation may stifle such flexibility. Giving more freedom to the parties involved and to the Member States in devising the most appropriate solutions on a case-by-case basis can prove to be more desirable and functional.

Question 3.3 [maximum 5 marks] 4 marks

The European Insolvency Regulation is a choice-of-forum instrument, which although aiming at procedural harmonisation, did not harmonise the substantive insolvency laws of the Member States. Because of lingering disparities among the national insolvency regimes across the EU, the European institutions introduced the Directive on Preventive Restructuring Frameworks in 2019, which is meant to dovetail the European Insolvency Regulation. List **two (2)** ways in which the Regulation and the Directive differ.

The Regulation and the Directive differ in these two respects:

(1) The Regulation does not have minimum standards for preventive restructuring procedures across Member states, whereas the Directive establishes a set of minimum standards for this purpose. The purpose behind this is to enable debtors in financial difficulty to restructure at an early state to avoid insolvency. The Directive's further aims include (i) enhancing the efficiency of early restructuring; (ii) improving the negotiation process; and (iii) facilitating the continuation of the debtor's business while restructuring is taking place.

(2) The Regulation only applies to proceedings adopted by Member States and included in Annex A. The Directive on the other hand can be implemented by means of procedures which do not satisfy "all conditions for notification" under Annex A, and this implementation will therefore fall outside the scope of the Regulation.

QUESTION 4 (fact-based application-type question) [15 marks in total]

Commented [DB5]: 11 out of 15

Scenario

Bella SARL is a French-registered company selling cosmetic products. The company had opened its first store in Strasbourg, France in 2010 and has warehouses across Europe, including in Germany, Ireland, Italy, Spain and Portugal. Its main warehouse is located in Cork, Ireland. All of its employees are located in these countries and most of its customers are also located in these countries, yet some online purchases are coming mainly from the Netherlands and Poland.

In 2011, Bella SARL entered into a loan agreement with a Spanish bank because it was hoping to expand its reach onto the Spanish luxury cosmetic market. It opened a bank account with the bank while also negotiating prices with local suppliers. It signed some (non-binding) memoranda of understanding with three Madrid-based suppliers.

Unfortunately for Bella SARL, the timing of this initiative coincided with the Great Economic and Financial crisis which hit Europe in the late 2000s. By 2014 the company was in financial difficulty, yet managed to keep afloat for another few years. On 20 June 2017, it filed a petition to open safeguard proceedings in the Strasbourg High Court in France.

Question 4.1 [maximum 5 marks] 4 marks

Assume that the timeline is slightly different and, therefore, assume that it is not the EIR 2015 that applies but the EIR 2000.

Does the Strasbourg High Court have jurisdiction to open the requested safeguard proceedings under the EIR 2000?

You must justify your answer when explaining why it does or does not have jurisdiction. Your answer should contain references to the applicable law and the relevant CJEU jurisprudence.

The safeguard proceedings contemplated here would be main insolvency proceedings. Under the EIR 2000, main insolvency proceedings are connected to the debtor's COMI. The guidance provided in Recital 13 states that "the "centre of main interests" 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."

In the CJEU's decision in *Eurofood IFSC Ltd* (Case C-341/04, ECLI:EU:C:2006:281 (May 2, 2006), it was held that "*[w]here a debtor is a subsidiary company whose registered office and that of its parent company are situated in two different Member States, the presumption laid down in the second sentence of Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, whereby the centre of main interests of that subsidiary is situated in the Member State where its registered office is situated, can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which location at that registered office is deemed to reflect. That could be so in particular in the case of a company not carrying out any business in the territory of the Member State in which its registered office is situated. By contrast, where a company carries on its business in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by that Regulation.*"

On the basis of the above, the Strasbourg High Court in France will not have jurisdiction to open the requested safeguard proceedings under the EIR 2000 since it is clear that Bella SARL's only connection to France is its registration. There is otherwise no business conducted by Bella SARL in France, nor would it be reasonable to expect that third parties would consider France its COMI, in circumstances where its main warehouse is in Ireland and where it has no warehouse or physical operating presence in France. Good answer

Question 4.2 [maximum 5 marks] **5 marks**

Assume that the timeline is as explained in the original scenario above and that the French High Court opens safeguard proceedings on 30 June 2017.

Will the EIR Recast be applicable to the proceedings?
Your answer should address the EIR Recast's scope and contain **all** steps taken to answer the question.

In order to answer this question, the following questions must first be addressed:

1. when does it apply in time (temporal scope);
2. to whom does it apply (personal scope);
3. which proceedings are covered by it (material scope); and
4. what are its geographical limitations (geographical scope)

In addressing each of the questions above, one must first answer the question whether the debtor has its COMI in a Member State of the EU, with the exception of Denmark. In this

case, the company has its main warehouse in Ireland, which is likely to be its COMI. The answer to that question is therefore YES. yes

Next, it has to be determined whether the company is an "excluded" undertaking. In this case, Bella SARL's business is not an excluded undertaking under Article 1(2) of the EIR Recast. yes

Whether the proceeding opened against the debtor is listed in Annex A to the EIR Recast. Here, the proceedings contemplated will fall into one of the categories listed in Annex A in relation to Ireland and the proceedings have been opened after 26 June 2017. Yes

As such, the EIR Recast will apply to the proceedings. yes

Good answer

Question 4.3 [maximum 5 marks] **2 marks**

An Italian bank files a petition to open secondary insolvency proceedings in Italy with the purpose of securing an Italian insolvency distribution ranking.

Given the facts of the case, can such proceedings be opened in Italy under the EIR Recast?

Your answer should contain references to the applicable law and the relevant CJEU jurisprudence.

The secondary proceedings opened by the bank in Italy cannot be opened under the EIR Recast since proceedings were initiated on 20 June 2017, prior to the effective date of application of the EIR Recast that date being 26 June 2017. "Establishment"?

Any secondary proceedings opened by the bank in Italy will therefore have to be opened under the EIR 2000. Here, these proceedings would only cover assets falling under the limited geographical scope of the place where the secondary proceedings are opened. Furthermore, the secondary proceedings can only be opened in Italy if Bella SARL has an establishment there. For the purposes of the EIR 2000, an establishment is any place of operation where a debtor carries out or has carried out a non-transitory economic activity with human means and goods (Article 2(h) EIR 2000). yes

No discussion of case law. Model answer provides the following:

- According to Article 3(2) EIR Recast, where the debtor's COMI is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if it possesses an establishment within the territory of that other Member State.

- Under Article 2(10) EIR Recast, 'establishment' means any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open

main insolvency proceedings a non-transitory economic activity with human means and assets.

- Relevant case law: *Interedil Srl, in liquidation v Fallimento Interedil Srl*, Case C-396/09, ECLI:EU:C:2011:671 (Oct. 20, 2011), *Burgo Group SpA v Illochroma SA*, Case C-327/13, ECLI:EU:C:2014:2158 (Sep. 4, 2014).

- The facts of the case do not support the finding of an establishment of Bella SARL in Italy. The presence alone of assets (leased-out warehouse) in isolation, contractual relations with a local bank (including maintenance of a bank account) and occasional negotiations (whether individual or collective) with local distributors do not qualify as 'non-transitory economic activity with human means and assets'. The requisite minimum level of organisation and a degree of stability (see para. 64 in *Interedil*) is evidently missing.

]Therefore, under the EIR Recast, secondary insolvency proceedings cannot be opened in Italy, nor Spain.

***** END OF ASSESSMENT *****