



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2B

THE EUROPEAN INSOLVENCY REGULATION

This is the **summative (formal) assessment** for **Module 2B** of this course and is compulsory for all candidates who **selected this module as one of their compulsory modules from Module 2**. Please read instruction 6.1 on the next page very carefully.

If you selected this module as **one of your elective modules**, please read instruction 6.2 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).
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- 6.1 If you selected Module 2B as one of your **compulsory modules** (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is **23:00 (11 pm) GMT on 1 March 2023**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2023. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
- 6.2 If you selected Module 2B as one of your **elective modules** (see the e-mail that was sent to you when your place on the course was confirmed), you have a **choice** as to when you may submit this assessment. You may either submit the assessment by **23:00 (11 pm) GMT on 1 March 2023 or by 23:00 (11 pm) BST (GMT +1) on 31 July 2023**. If you elect to submit by 1 March 2023, you **may not** submit the assessment again by 31 July 2023 (for example, in order to achieve a higher mark).
7. Prior to being populated with your answers, this assessment consists of **10 pages**.

ANSWER ALL THE QUESTIONS

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

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.**

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.**
- (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.
- (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.
- (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").

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.
- (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.
- (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.

The correct answer was D.

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.
- (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*.

The correct answer was C.

Total marks: 8 out of 10.

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks] 2

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

This relates to the Centre of Main Interest (COMI). In accordance with Article 3(1) the COMI shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.

Recital 30 states that the presumptions that the registered office, the principal place of business and the habitual residence are the centre of main interests should be rebuttable, and the relevant court of a Member State should carefully assess whether the centre of the debtor's main interests is genuinely located in that Member State.

Statement 2

Article 1 deals with scope and extends the EIR Recast to cover public collective proceedings, including interim proceedings, which are based on laws relating to insolvency and in which, *for the purpose of rescue, adjustment of debt, reorganization* or liquidation the conditions specified at (a) to (c) are met.

Question 2.2 [maximum 3 marks] 2

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.

1. The preservation of member states to open secondary proceedings where there is an establishment within that member state (Article 3(2) and Recital 23 and Recital 40);
2. The law of the state opening the insolvency proceedings determines the effect of such proceedings (Article 4) as opposed to any common law across Europe;
3. The specific exclusion of certain actions from the EIR Recast, for example, insurance undertakings, credit institutions, investment firms and other firms (Article 1(2)) to preserve local laws in relation to their insolvency.

The last point is not as illustrative as other recitals and articles would be (e.g.: Articles 23; 34; 35; 36; 37).

Question 2.3 [maximum 3 marks] 3

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.

1. Article 41(1) - this compels cooperation and communication between insolvency practitioners in main or secondary proceedings relating to the same debtor

providing such communication/cooperation is not incompatible with the rules of the respective proceedings.

2. Article 42(1) - this compels cooperation and communication between courts to facilitate the coordination of main, territorial and secondary insolvency proceedings concerning the same debtor to the extent that such cooperation/communication is not incompatible with the rules of the respective proceedings.
3. Article 43(1) - this compels cooperation and communication between insolvency practitioners and courts in order to facilitate the coordination of main, territorial and secondary insolvency proceedings opened in respect of the same debtor.

Question 2.4 [maximum 2 marks] 2

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.

1. Article 36 allows for the giving of a unilateral undertaking by the insolvency practitioner in the main proceedings in respect of the assets located in the Member State in which secondary insolvency proceedings could be opened, that when distributing those assets or the proceeds received as a result of their realisation, he/she will comply with the distribution and priority rights under national law that creditors would have if secondary insolvency proceedings were opened in that Member State. In order for this to operate the undertaking has to 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.
2. In accordance with Article 38(3) where a temporary stay of individual enforcement proceedings has been granted in order to allow for negotiations between the debtor and its creditors, the court, at the request of the insolvency practitioner or the debtor in possession, may stay the opening of secondary insolvency proceedings for a period not exceeding 3 months, provided that suitable measures are in place to protect the interests of local creditors. Such measures may include requiring the insolvency practitioner or the debtor in possession not to remove or dispose of any assets which are located in the Member State where its establishment is located unless this is done in the ordinary course of business.

Total marks: 9 out of 10.

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

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] 5

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)?

Although the success of the EIR 2000 was widely recognized, so was the need for change and development in relation to specific aspects. One fundamental area identified by the European Commission was the need to accommodate restructuring proceedings in order to facilitate the rescue of distressed businesses and maximise the benefit to the estate. Such a change was incorporated in the EIR Recast and Article 1, dealing with scope, includes reference to proceedings for the purpose of rescue, adjustment of debt, reorganization as well as liquidation.

In addition it was considered that there was a need to strengthen the requirements for cooperation between main, territorial and secondary proceedings relating to the same debtor. This is largely because the EIR 2000 (and the EIR Recast) follow the principle of modified universalism as opposed to pure universalism. As such, multiple proceedings can still be opened in relation to the same debtor and to ensure the best results for the estate, and that no creditor or groups of creditors are treated unfairly, it is important that all insolvency practitioners and the relevant courts are fully abreast of the developments in each of the proceedings. Articles 41-43 of EIR Recast address the requirements for communication and cooperation between insolvency practitioners, between courts, and between both of these groups.

There were also concerns surrounding the notification of the opening of insolvency proceedings in the various Member States, particularly the prejudice that may arise to a foreign creditor, outside of the Member State in which insolvency proceedings were commenced, and their ability to stay informed of the opening of any such proceedings. Article 25 of the EIR Recast therefore mandated that the Commission should "*establish a decentralised system for the interconnection of insolvency registers by means of implementing acts. That system shall be composed of the insolvency registers and the European e-Justice Portal, which shall serve as a central public electronic access point to information in the system. The system shall provide a search service in all the official languages of the institutions of the Union in order to make available the mandatory information and any other documents or information included in the insolvency registers which the Member States choose to make available through the European e-Justice Portal*". This provides uniformity across the Member States and better protects foreign creditors.

A further concern raised in relation to the EIR 2000, which has not been comprehensively addressed in the EIR Recast, is the approach to insolvency of groups of companies. Group companies are exceedingly common and often operate across borders, both Member

States and non-Member States alike. In practice they often operate as a single unit yet despite this, each company is commonly a separate legal entity. The EIR Recast does address group companies, which the EIR 2000 did not and its articles encourage cooperation and communication between insolvency practitioners and courts. It all facilitates a group co-ordination proceeding and the appointment of a group co-ordinator. However, insolvency practitioners acting for a group entity can opt out of the group co-ordination proceeding, it is not compulsory. The group co-ordination proceeding also does not negate the separate legal entity of each group member or compel the pooling of assets or liabilities. As such, some practitioners and academics consider it does not go far enough.

Very good.

Question 3.2 [maximum 5 marks] 5

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.

As stated above, it has been suggested that the revisions in relation to group companies have produced a relatively modest result. The emphasis is very much on communication and cooperation between the insolvency practitioners and courts in relation to the various proceedings, and although the addition of a group co-ordinator is beneficial, the powers are limited as it is a voluntary “opt-in” procedure. There is no compulsory substantive, procedural, or jurisdictional consolidation under the EIR Recast.

I would propose that the scheme is mandatory, not voluntary, unless real prejudice can be shown to the stakeholders of the relevant estate if the estate was to be included in group proceedings. I would also consider that the court opening the main proceedings have the power to treat the whole or part of the group as one and the same for the purpose of assets and liabilities if it could be demonstrated that the true reality was that this was how the group, or specific group entities, had operated in reality. The concern with this, however, is two-fold: (1) group companies are usually carefully and deliberately structured to have separate legal entities and if such entities could, in effect, be merged, this may change the entire way such groups are structured and any negative consequences of that should be carefully considered in advance; and (2) a fundamental purpose of the EIR Recast is to give certainty to stake holders and this could be eroded if assets and liabilities could be merged across entities and borders. This is particularly so where a legal entity is registered and operates in one Member State (e.g. Italy) but the COMI is in another member state (e.g. Germany). Upon liquidation the German courts will then be determining, under German laws, the manner in which such companies are held to have operated. Further, the COMI could in fact change after creditors have entered into legal relations with the debtor, thus creating a different outcome which the creditor had not foreseen and could be detrimental.

There has also been some criticism of the EIR Recast for its modified universalism and a suggestion that it should have moved more towards a position of unity, akin to the 1970 and 1980 Conventions. It is criticized for the ease of opening secondary proceedings which

create complexity. I do not necessarily agree with that criticism but if I were to propose a way to amend it, I would not advocate for blanket application of the *lex concursus* and the jurisdictional reach of the main proceedings but instead would propose that secondary proceedings could not be opened automatically with the presence of an establishment. Instead local courts (not the court of main proceedings) would have to examine whether creditors would truly be prejudiced by the absence of local secondary proceedings – even without an undertaking from the main insolvency practitioners. The main insolvency practitioners should be permitted to make representations at such proceedings which should carry significant weight.

Very good.

Question 3.3 [maximum 5 marks] 3

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 primary purpose of the Directive, as opposed to the EIR Recast, is to promote preventative restructuring, with companies that may genuinely be able to recover financially being given access to restructuring procedures, regardless of where within the European Union they may be located. It aims to do this specifically by creating restructuring frameworks throughout Member States which includes, for example, the protection of new and interim financing and the possibility of debtors accessing any such preventive restructuring procedures to stay in control of the business and the assets through a debtor-in-possession model.

The EIR Recast, by contrast, although inclusive of some restructuring proceedings, is more procedural in nature and deals with cooperation between proceedings under national laws. The EIR Recast is not addressed at changing specific Member State frameworks.

The Directive also addresses the prevention by dissenting minority creditors and shareholders from endangering genuine restructuring efforts by addressing cross-class cram-down of dissenting creditors which the EIR Recast does not. **This is slightly too specific. You cannot compare specific concepts of either instrument as they are not comparable because each instrument's aim is completely different. Rather, your discussion could have focused on:**

- The difference between a Regulation and a Directive, as an instrument of EU law;
- The EIR 2015 is a choice-of-forum instrument which harmonised the procedural aspects of cross-border insolvency law / the Directive aimed to harmonise substantive aspects of insolvency law across the EU;
- Due to the nature of the Regulation, all Member States must comply with its provisions / the Directive is a minimum standard instrument, which means that it merely establishes a threshold

under which the Member States cannot legislate. However, this minimum harmonisation approach also leaves the Member States with substantive leeway in how they want to adopt the provisions of the Directive.

Total marks: 13 out of 15.

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

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] 5

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.

Bella SARL is a French registered company. In accordance with Article 3(1) of the EIR 2000, main insolvency proceedings should be commenced where the company's centre of main interest ("COMI") lies. In the case of *Eurofood IFSC Ltd*. Case C-341/04 ELCI:EU:C:2006:281 the court considered the meaning of COMI under the EIR 2000 and concluded that the reference to COMI in the EIR 2000 had to be interpreted uniformly across member states, regardless of what COMI may mean within a given member state.

Applying this uniformly, therefore EIR 2000, the place of the registered office shall be presumed to the COMI in the absence of proof to the contrary. It may be possible to rebut this presumption but *prima facie* it would appear France is the COMI and the Strasbourg High Court could open insolvency proceedings.

However, under the EIR 2000 the only insolvency proceedings recognized by for France are: *liquidation judiciaire* and *redressement judiciaire avec nomination d'un administrateur*, not Safeguard Proceedings. It is understood Safeguard proceedings are of a restructuring nature which was not recognized under the EIR 2000. As such if the Strasbourg High Court did open such proceedings, they would not be under the EIR 2000 and as such the EIR 2000 would not be applicable.

Good.

Question 4.2 [maximum 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.

The EIR Recast applies to all proceedings within its scope commenced in a Member State (excluding Denmark) from 26 June 2017 (Article 92 EIR Recast). As such from a temporal perspective the EIR Recast is likely to apply.

In accordance with Article 3(1) of the EIR Recast the court of the Member State in which the COMI is situated shall have jurisdiction to open main insolvency proceedings. Again, there is a presumption that the place of the registered office is the COMI in the absence of proof to the contrary. The presumption, however, only applies if the registered office hasn't been moved within the three months prior to the request to open proceedings.

As the registered office has not changed, *prima facie* France appears to be the COMI and the other countries mentioned would simply be establishments.

Safeguard (or Sauvegarde) proceedings are covered in Annex A to the EIR Recast and as such the Strasbourg High Court does have jurisdiction to open such proceedings under the EIR Recast.

You are missing some elements here:

- **The EIR Recast will be applicable. The logical order of the steps to be taken is the following:**
- **Article 3(1) EIR Recast. COMI of Bella SARL is in the EU (and not in Denmark), i.e. in Ireland (as stated in the answer to Question 4.1.). YES**
- **Article 1(2) EIR Recast. Bella SARL is not a credit institution, insurance undertaking or any other 'excluded' entity. YES**
- **Article 2(4), Recital 9, Annex A EIR Recast. The opened proceeding 'Safeguard' is listed in Annex A to the EIR Recast. YES**
- **Article 2(7), 84(1), 92 EIR Recast. The proceedings in question were opened on 30 June 2017, i.e. after the EIR Recast has entered into force. The filing date (20 June 2017) is not determinative for the temporal scope. YES**

Question 4.3 [maximum 5 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.

In accordance with Article 3(2) even though the COMI of Bella SARL may be situated in France, if Bella SARL has an establishment in Italy, the bank, as an Italian creditor, may be able to petition for the opening of secondary proceedings in Italy. Given Bella SARL has a warehouse in Italy which presumably requires staffing, it is likely the requirement for an 'establishment' in accordance with Article 2(1) has been met as Bella SARL has a place of operations where the company carries out, or has carried out, non-transitory economic activity with human means and assets in the 3-month period prior to the request to open the main insolvency proceedings in France.

While your reasoning is sound to some extent, this is incorrect.

- **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.**

Total marks: 10.5 out of 15.

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

Total marks: 40.5 out of 50.