



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.***
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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.***
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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.**

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 : 9 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 - Centre of the debtor's main interests is a key term to determine which proceeding is the main one. Related to the international jurisdiction of a certain country (article 3 of the EIR Recast).

Statement 2 - Scope of the Regulation (article 1 of the EIR Recast). This indicates that the purpose of the EIR Recast is not to deal exclusively with bankruptcy (liquidation), but also with restructuring / rescue of the debtor in order to prevent the bankruptcy / end of the economic activity.

Question 2.2 [maximum 3 marks] **3**

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.

The first and the most evident example of the adoption of the modified universalism is the possibility of the opening of a secondary (non-main) proceeding where the debtor has an establishment. Thus, the secondary proceeding limits the effects of the main proceeding (article 3 (2) of the EIR Recast). The secondary proceeding creates an estate separate from the state of the main proceeding.

*Another example is that the opening of the secondary proceeding limits the *lex concursus* of the main proceeding. The secondary proceeding has its own *lex concursus* (*lex concursus secundarii*) and it's applicable in the territory of the country where the secondary proceeding is opened (art. 7 of the EIR Recast).*

Another example is that the creditors may present their claims in the main proceeding and in the secondary proceeding, but the creditor must comply with article 23 of the EIR Recast (hotchpot rule).

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.

There are several provisions in the EIR Recast dealing with the obligation of co-operation among the actors involved in cross-border insolvency proceedings. Let's check three examples:

1) Article 41 establishes the need of cooperation and communication between insolvency practitioners. The insolvency practitioner in the main insolvency proceeding and the insolvency practitioner or practitioners in secondary insolvency proceedings shall cooperate with each other as much as it is possible. Such cooperation may take any form, including the conclusion of agreements or protocols. Protocols are important and successful instruments that have been used since Maxwell Communication Case. The co-operation must be between: (i) different courts, (ii) different insolvency practitioners and (iii) courts and insolvency practitioners.

2) Another way of co-operation is by coordinating the appointment of insolvency practitioners. Different courts may appoint a a single insolvency practitioner for several insolvency proceedings concerning the same debtor or for different members of a group of companies, as long as this is compatible with the rules applicable to each of the proceedings (Recital 50 of the EIR Recast).

3) A new instrument that has been created by the EIR Recast is the possibility to request to open group coordination proceeding (article 61 of the EIR Recast). Group coordination proceedings may be requested before any court having jurisdiction over the insolvency proceedings of a member of the group. This new proceeding seeks a greater co-operation among the proceedings of the different members of the business group and a better outcome to the group and its creditors as a whole.

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.

The first example is the right to give an undertaking in order to avoid secondary insolvency proceedings, based on article 36 of the EIR Recast. This is an instrument available to the insolvency practitioner ("IP") to avoid the opening of a secondary proceeding by giving an undertaking to local creditors that the IP 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 other words, local creditors would benefit themselves of the legal consequences of the secondary proceeding, even though a secondary proceeding is not opened.

The second example is the stay order foreseen in article 38 (3) of the EIR Recast. The insolvency practitioner of the main insolvency proceeding may request the stay of the secondary proceeding in order to allow for negotiations between the debtor and its creditors. This aims to assure the integrity of the insolvency estate, because the stay of the main proceeding provides a breathing space to debtor and creditors to negotiate. The opening of the secondary proceeding would limit the stay order of the main proceeding in the Member-State where the secondary proceeding is opened. However, the stay order foreseen in article 38 (3) of the EIR Recast is limited to a 3-month period and provided that suitable measures are in place to protect the interests of local creditors.

Total marks: 10 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)?

After 12 years of the EIR 2000, a specific commission made a study and concluded that some improvements should be made in the EIR 2000, despite the fact that EIR 2000 was seen as a good resolution in the EU. These improvements were made by enacting the EIR Recast (Regulation 2015/848).

Among the changes, we may point out: (i) the focus on restructuring / rescue proceeding and not only in bankruptcy (liquidating) proceedings, (ii) the establishment of rules concerning debtors of the same business group (iii) stronger rules of cooperation between insolvency practitioners and courts and (iv) improvement of creditor information (data protection and interconnectivity of insolvency registers).

While the EIR 2000 was focus on liquidation (bankruptcy), the EIR Recast expand its scope to other type of insolvency proceedings, such as rescue, adjustment of debt and reorganisation proceedings (article 1 (1)). The goal is to preserve the economic activity and not only liquidate the assets. The scope of the EIR Recast is expressly extended to proceedings which promote the rescue of economically viable but distressed businesses, and which give a second chance to entrepreneurs (Recital 10 of the EIR Recast).

A completely new chapter in the EIR Recast is the dealing with proceedings of groups of companies. This was an important improvement, since many economic activities are explored by groups of companies (holdings and its subsidiaries, for instance) and not only by a single entity. Thus, it was necessary to regulate these situations (for example: how the courts or IP should communicate and co-operate?). The rules of insolvency proceedings of members of a group of companies are set forth in articles 56 to 77 of the EIR Recast).

Besides, the EIR Recast has created other rules concerning co-operation and communication to be made between, (i) courts, (ii) insolvency practitioners and (iii) courts and insolvency practitioners (articles 42 and 43 of the EIR Recast).

Finally, the EIR Recast has created a whole new chapter regarding data protection (article 78 to 83 of the EIR Recast). Matters as (i) responsibilities of Member States regarding the processing of personal data in national insolvency registers, (ii) responsibilities of the Commission in connection with the processing of personal data, (iii) information obligations, (iv) storage of personal data and (v) access to personal data via the European e-Justice Portal were set forth in the new regulation.

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.

The EIR Recast was an improvement when compared to its predecessor (the EIR 2000). However, indeed, some opportunities were missed, specially when dealing with enterprise groups. The new regulation could have provided more efficient / complete rules.

For example, there is no rule regarding procedural or substantive consolidation between the debtors. For instance, can all the debtors (different entities) file together a single insolvency proceeding? Can all the assets and liabilities of the group be mixed up on a recovery plan? These aspects could have been addressed in the EIR Recast.

Although there is no rule regarding procedural or substantive consolidation, this is still an option and should be considered when certain conditions are met. For example, when all the entities have their COMIs in the same country, they should consider filling a single insolvency proceeding all together (procedural consolidation) in order to be a more efficient proceeding. For the same reason, when the activities of the debtors are so mixed up and all the different entities are seen as one single debtor, a substantive consolidation should be considered.

Another flaw is that, despite article 61 of the EIR allows to request to open group coordination proceedings, to ensure a better communication and co-ordination

between the proceedings, this is not mandatory. In other words, the group co-ordination may not be opened. Article 65 of the EIR Recast states that where an insolvency practitioner has objected to the inclusion of the proceedings in respect of which it has been appointed in group coordination proceedings, those proceedings shall not be included in the group coordination proceedings.

However, we understand that the objection to the inclusion in group coordination is not an absolute right that may be exercised at the sole discretion of the insolvency practitioner. The decision to object to the inclusion in the group co-ordination must be justified and have grounds in the real situation of that certain debtor. For example, the IP must demonstrate that the group co-ordination somehow would be detrimental or cause any kind of loss to that specific entity. Hence, an objection without any justification is not valid.

Question 3.3 [maximum 5 marks] **5**

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 first difference is the scope of each instrument. The EIR Recast is not an instrument to harmonise substantive insolvency law of the Member States. Differences in each Member State national law still exist. The EIR Recast set rules of international jurisdiction (which national court has jurisdiction to open a main or secondary proceeding), replace national laws regarding the conflict of laws rules (which law should govern the insolvency proceeding and its exceptions) and establishes rules regarding the co-ordination and co-operation among the different proceedings.

The Directive on Preventive Restructuring Framework, on the other hand, establishes a set of minimum standards for preventive restructuring procedures across Member States. The goal is to enable debtors in financial difficulties to rescue themselves in an early state and prevent their liquidation. Thus, the Directive deals with preventive restructuring frameworks, discharge of debt and disqualifications, measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, among other things. These are minimum standards for preventive restructuring proceedings and to reduce the fundamental difference among the insolvency laws of different Member States.

The second difference is the form of each instrument, which is, the kind of European rule (Regulation x Directive). A Regulation is a binding legislative act. It must be applied in its entirety across the different Member States. In other words, the Member

States shall comply with the regulation as it were an internal law. The Directive, on the other hand, is a legislative act that sets out a goal that all European Union countries must achieve. However, each Country shall review its own internal law do meet the goals settled in the Directive. In other words, the Directive in not directly applicable, whereas the Regulation is.

Total marks: 15 out of 15. Very good.

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] **2.5**

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.

Yes. Article 3 of the EIR 2000 regulates the international jurisdiction of the EU Member States regarding insolvency proceedings. There are two kinds of proceedings.

For main proceedings, states article 3 (1) of the EIR 2000: "The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary".

For non-main proceedings, states article 3 (2) of the EIR 2000: "Where the centre of a debtor's main interests 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 he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State".

Thus, to Strasbourg High Court have jurisdiction to open the requested safeguard proceedings under the EIR 2000, we must check if it is located in France the Center of Main interest (COMI) of the debtor or if there is an establishment in France.

According to Recital 13: "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 addition, the CJEU clarifies in the Eurofood Case (Case C-341/04) that the interpretation of the COMI is independent from eventual definition provided by the domestic law of any EU Member State.

The CJEU understands that there is a presumption that the COMI is located where the debtor has its registered office. In Bella SARL's case, the presumption is that the COMI is located in France. However, this presumption is rebuttable. Although Bella SARL has its registered office in France, its main warehouse is located in Ireland. Besides, all of its employees are located in these countries and most of its customers are also located in these countries.

Therefore, we conclude that Bella SARL has its COMI in Ireland, but Bella SARL has an establishment in France (its first store).

Since Bella SARL has an establishment in France, Strasbourg High Court have jurisdiction to open the requested safeguard proceedings, but it will be considered a non-main proceeding (article 3 (2) of the EIR 2000).

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

- The Strasbourg High Court does not have international insolvency jurisdiction to open insolvency proceedings.**
- You were expected to mention that under the EIR 2000 (Article 3), the determination of international jurisdiction to open main insolvency proceedings is linked to the debtor's centre of main interest (COMI). According to Article 3 EIR Recast, 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 (see also**

Recital 28). The place of the registered office shall be presumed to be the COMI in the absence of proof to the contrary.

- **Relevant case law: Eurofood IFSC Ltd, Case C-341/04, ECLI:EU:C:2006:281 (May 2, 2006) and Interedil Srl, in liquidation v Fallimento Interedil Srl, Case C-396/09, ECLI:EU:C:2011:671 (Oct. 20, 2011).**
- **However, Article 1 of the EIR 2000 states that 'this Regulation shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator.**
- **Article 2 EIR 2000 states that "'insolvency proceedings" shall mean the collective proceedings referred to in Article 1(1). These proceedings are listed in Annex A.**
- **Annex A of the EIR 2000 only listed two French insolvency proceedings which came under the scope of the EIR 2000: (i) liquidation; (ii) redressement judiciaire (rehabilitation).**

Therefore, the EIR 2000 would not apply to safeguard proceedings.

Question 4.2 [maximum 5 marks] 5

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.

For the EIR Recast be applicable, certain conditions must be met (material scope, temporal scope, personal scope and territorial scope). All the conditions are met, as we will see below.

Material scope: article 1 of the EIR Recast sets forth that the regulation applies to 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, reorganisation or liquidation.

The safeguard proceeding is a public collective proceeding, since it aims the collective charge and reorganization against the debtor and it is also based on the laws of insolvency of France. This proceeding is expressly listed in Annex A (article 2 (4) of the EIR Recast).

Temporal scope is also met since the safeguard proceeding was opened on 30 June 2017. Article 92 of the EIR Recast foreseen that the regulation is applicable as of 26 June 2017.

Personal scope: Recital 9 of the EIR Recast explains that the regulation is applicable irrespective of whether the debtor is a natural person or a legal person, a trader or an individual. Thus, personal criterium is also met.

Territorial scope is also met. The EIR is applicable to all the EU Member States, except Denmark (Recital 87 of the EIR Recast). France would have international jurisdiction to open a insolvency proceeding if is located in France the centre of main interest of the debtor or an establishment. If the COMI is in France, there will be a main proceeding or if there is in France only an establishment, the proceeding will be considered a secondary proceeding. In any case, the French High Court would have jurisdiction.

In Bella SARL's case, we concluded in question 4.1 above that the debtor has an establishment in France. Thus, the territorial scope is also met, since the debtor has an establishment in France (article 3 (2) of the EIR Recast).

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

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.

No, because the debtor has not (i) its COMI located in Italy nor (ii) any establishment in Italy.

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" (article 2(10) of the EIR Recast).

In Italy there is only a warehouse. The simples presence of assets (like this warehouse) in isolation or contractual obligations or banks accounts is not sufficient to characterize an establishment. Occasion negotiations is not enough, because an establishment is qualified as a "non-transitory economic activity with human means and assets". Hence, we find no minimum level of organization or stability to qualify an establishment. These standards were discussed in the Interedil Srl v Fallimento Interedil Srl case (Case C-396/09).

Total marks: 12.5 out of 15.

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

Total marks: 46.5 out of 50.