



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.

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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.***
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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*.***

Total marks: 10 out of 10. Very good.

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 comes from Recital 30 of EIR Recast and possibly relates the concepts of “COMI presumptions” and “forum shopping”.

Statement 2 comes from Recital 10 of EIR Recast which concerns the material scope of EIR Recast and its emphasis on restructuring.]

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.

[Firstly, Article 3(2) of EIR Recast allows the opening of secondary proceedings in any country in which a debtor has an “establishment” (as defined in Article 2(10)). As a result, there may be a multiplicity of parallel insolvency proceedings across the EU in respect of the same debtor, which coincides with the concept of modified universalism.

Secondly, consistent to the above, according to Article 19(2) of EIR Recast, recognition of main proceedings shall not preclude the opening of secondary proceedings. It clearly encourages the opening of concurrent insolvency proceedings in line with the modified universalism concept.

Thirdly, Article 45(1) of EIR Recast also allows creditors to lodge their claims in both main proceedings and parallel proceedings, which is one of the most important safeguards to protect creditors’ rights in the event of multiplicity of proceedings under the modified universalism approach.]

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.

[Firstly, Article 41 of EIR Recast provides for the obligations for the insolvency practitioners in main proceedings and the insolvency practitioners in the secondary

proceedings to cooperate with each other "to the extent such cooperation is not incompatible with the rules applicable to the respective proceedings".

Secondly, Article 42 of EIR Recast provides for the Court's obligation to cooperate and envisages their communication and request for assistance from each other.

Thirdly, Article 43 of EIR Recast provides for the cooperation and communication between the Courts and insolvency practitioners in both main and secondary proceedings again "to the extent that such cooperation and communication are not incompatible with the rules applicable to each of the proceedings" and "do not entail any conflict of interest".]

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.

[Firstly, under Article 38 of EIR Recast, where the insolvency practitioner in the main proceedings has given an undertaking (in accordance with Article 36), the court receiving a request to open secondary proceedings shall not open secondary proceedings if it is satisfied that the said undertaking adequately protects the general interests of local creditors. Such undertaking shall cover the assets located in the country with intended secondary proceedings as if such intended proceedings have been opened. It has been said that, in such circumstances, there would only be "virtual" or "synthetic" secondary proceedings, and actual secondary proceedings may be avoided.

Secondly, under Article 46 of EIR Recast, upon the request of the insolvency practitioner from the main proceedings, a court may temporarily grant a short-term stay on the opening of the secondary proceedings (when the Court in the main proceedings has already granted a stay on individual enforcement proceedings). Meanwhile, the court may require the said insolvency practitioner (in the main proceedings) to take any appropriate action to protect the interests of the local creditors. As a result, this may protect the interests of creditors from both the main proceedings and the secondary proceedings.]

Total marks: 10 out of 10. Very good.

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)?

[In the report from the European Commission in 2012 (COM/2012/0743 final), the European Commission has suggested areas in which the discrepancies among the domestic insolvency laws of Member States would result in legal uncertainty, thus advocating a harmonised approach in national insolvency frameworks. To this end, the Commissions has identified the following elements necessitating reforms:-

Firstly, the Commission has suggested extending the scope of the EIR by revising the definition of insolvency proceedings so as to recover hybrid and pre-insolvency proceedings and insolvency proceedings for individuals, which were not covered by EIR 2000. In this regard, Annex A to EIR Recast has included a list of insolvency proceedings that are covered by EIR Recast. In particular, by virtue of Recital 10 of EIR Recast, the EIR Recast has extended its scope to cases where there is only a likelihood of insolvency, which in turn covers more cases of restructuring. Also, EIR Recast also covers insolvency proceedings concerning individuals (see Recital 9).

Secondly, the Commission proposed to clarify the meaning of COMI as well as the application of the COMI rules on individuals. To this connection, EIR Recast has adopted an official definition of COMI and offered COMI presumptions (see Article 3(1) as well as guidance in Recital 30). Further, as proposed, the EIR Recast also extends the jurisdiction of the courts to "related actions", thereby reducing possibility of insolvency forum shopping (see Article 6).

Thirdly, insofar as notification of creditors is concerned, as per the Commission's suggestions, the EIR Recast obliges insolvency practitioners to publish notices/decisions at the place of debtors' establishment (see Article 28) and mandating the use of electronic register (see Article 54).

Fourthly, as proposed by the Commission, Article 45 of EIR Recast allows (foreign) creditors to lodge claims in both main proceedings and secondary proceedings. Specifically, the Commission also proposed that standard forms should be used (see Article 55) and that deadlines for lodging claims should be long enough to allow creditors to lodge claims.

Last but not least, the Commission did address the issue of group insolvency by proposing to incorporate specific rules in the EIR to increase the efficiency in this regard. An example would be to facilitate the cooperation between insolvency practitioners and courts across different jurisdictions. Issues relating to group insolvency has been addressed in Chapter V of EIR Recast (and specifically Articles 56 to 58 insofar as cooperation and communication are concerned.)

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.

[Firstly, notwithstanding the introduction of Chapter V of EIR Recast, there may be further reforms in respect of insolvency of group companies. Admittedly, the EIR Recast has introduced procedural rules on the (voluntary) coordination of insolvency proceedings of companies in a large group of companies (see Articles 61 to 77). That said, the group coordination proceedings as provided for in the EIR Recast are voluntary in nature (subject to an “opt-out” mechanism (see Article 64)). Recommendations by the group coordinator the EIR Recast also do not have any actual binding force (see Article 70). More importantly, the EIR Recast also does not provide for the possibility of the actual consolidation of insolvency proceedings of group companies (from both procedural and substantive perspectives).

While the absence of consolidation of proceedings may be justified by the adoption of the traditional “entity-by-entity approach” (and the notion of separate legal entities), this may in some cases give rise to a waste of time and resources for insolvency practitioners (in proceedings for different group members) to coordinate with each other and, in some instances, to gain control of assets from the other subsidiaries of the group. It is also conceivable that the return to creditors may not be maximized when the estates of different member companies are separately pursued (especially the proceedings involved are subject to the law of different jurisdictions)

In this regard, the EU may explore the possibility for consolidation of insolvency proceedings of group companies (especially in case of groups with a less complex structure but with a large amount of holding companies). In such cases, notwithstanding the doctrine of separate legal entities, it may be possible for the EIR to expressly provide for instances where the Court may exercise its discretion in allowing multiple companies within the same group to be considered together in the insolvency context (for instance, by allowing the existence of a “group estate” and the consolidation of the formal insolvency proceedings). In such circumstances, in contrast with the group coordination proceedings and the group coordinators under the EIR Recast, the consolidated insolvency proceedings and the insolvency practitioners appointed thereunder may be equipped with stronger powers to administer the group estate with binding force.

Secondly, the EIR Recast has clearly delineated its scope by virtue of Article 1 and Annex A. While it should have brought about legal certainty to the scope of EIR Recast, it may have also introduced inflexibility to the application of EIR Recast (especially in respect of restructuring attempts).

Under Article 1, to trigger the application of EIR Recast, the proceedings involved must be, among other things, of a “public” and “collective” nature. Also, the proceedings in question must fall within the list as set out in Annex A to EIR Recast. In the premises, the EIR Recast may not apply to (a) private or informal conciliation procedures (such as those involving the debtor and selected creditors only) or (b) restructuring procedures with cramdown effect (such as those similar to the Chapter 11 procedures in the United States). Meanwhile, as regards the exhaustive list of proceedings covered by Annex A, it may be also noted that the EIR Recast does not expressly provide for mechanism for amendment of EIR Recast including Annex A thereto (see, for instance, Article 45 of EIR 2000).

In view of the above, it is suggested that both Article 1 and Annex A may be reviewed such that the scope of the EIR Recast may be expanded, say, to cover more informal proceedings relating to restructuring. Also, it may be possible to retain the list of proceedings in Annex A while incorporating a mechanism for regular review of the list by the EU so that the list in Annex A can be updated more frequently without an overhaul of the entire EIR.]

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.

*[Firstly, in essence, the EIR Recast mainly provides for conflict of law rules for determination of the applicable law and jurisdiction of the Courts. As such, the gist of the EIR Recast is procedural in nature. Insofar as the substantive law is concerned, the main proceedings and secondary proceedings should generally be subject to the law of the jurisdiction in which they are opened (i.e. the *lex concursus* and the *lex concursus secundarii*). Meanwhile, there are only limited provisions in the EIR Recast that touch upon harmonization of substantive law (such as Articles 31 and 45 of EIR Recast).*

In contrast, the main purpose of the Directive on Preventive Restructuring Frameworks (the “Directive”) was to facilitate the harmonisation of the substantive law in respect of insolvency (and specifically restructuring). Although the actual harmonisation effect brought by the Directive may have been limited by the fact that the Member States are only required to implement minimum standards for preventive restructuring mechanism, it remains true that the implantation of the Directive by all Member States shall result in more consistent rules across the EU in respect of, for instance, options available to debtors to restructure their businesses on the edge of insolvency.

Secondly, the EIR Recast and the Directive also have different focuses, with the former focusing on the conduct of formal insolvency proceedings and the latter focusing on (both formal and informal) attempts to restructure.

While Recital 10 of EIR Recast provides that the EIR shall "extend to proceedings which provide for restructuring of a debtor at a stage where there is only a likelihood of insolvency", the proceedings covered by Annex A to the EIR Recast mainly concern formal insolvency proceedings (and proceedings involving any "related actions" (such as avoidance actions) pursuant to Article 6 of EIR Recast). There are very limited provisions that addresses the possibility for debtors to restructure their debts.

In contrast, the Directive, as its name has suggested, has placed its emphasis on restructuring procedures mandating Member States to incorporate a "preventive restructuring framework" in their national law which is, for instance, similar to the Scheme of Arrangement in the English law. In contrast, the formal insolvency proceedings and the relevant conflict of law rules are left to be dealt with by the EIR Recast. As expressly provided for in Recital 13 of the Directive, the Directive "aims to be fully compatible with, and complementary to" the EIR.]

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]

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.

[Under the EIR 2000, based on the limited facts as set out above, the Strasbourg High Court apparently does not have jurisdiction to open the requested safeguard proceedings (unless Bella SARL may prove that its COMI of Bella SARL is located in Strasbourg).

*As starting point, Recital 12 of EIR 2000 provides that the EIR 2000 "enables the main insolvency proceedings to be opened in the Member State where the debtor has the centre of his main interests". In particular, Recital 17 of EIR 2000 expressly states that "prior to the opening of the main insolvency proceedings, the right to request the opening of insolvency proceedings in the Member State where the debtor has an establishment should be limited to local creditors and creditors of the local establishment or to cases where main proceedings cannot be opened under the law of the Member State where the debtor has the centre of his main interest". As such, whether or not the Strasbourg High Court have jurisdiction in the circumstances would depend heavily on whether the COMI of Bella SARL is located in Strasbourg. If the COMI of Bella SARL is not located in Strasbourg, Recital 17 seems to prevent Bella SARL from applying for the opening of main proceedings in Strasbourg before opening the same in the jurisdiction where the COMI of Bella SARL is located in (even though it is also arguable that the recital is not enforceable *per se* and may only serve as guidance to the Member States).*

The next issue is therefore the determination of COMI under the EIR 2000. In this regard, Recital 13 of EIR 2000 succinctly provides that the COMI "should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties". Notably, EIR 2000 does not contain any presumption in respect of COMI (such as the registered office presumption under the EIR Recast). Based on the facts available, it seems that the COMI of Bella SARL may be located in Ireland since its main warehouse is located in Cork, Ireland. As such, from the perspective of third parties, it is more likely than not that third parties would regard Ireland as the place where Bella SARL conducts the administration of its interests on a regular basis and thus the COMI of Bella SARL. Yet, this is of course subject to any contrary evidence showing that the COMI of Bella SARL is indeed located elsewhere (e.g. Strasbourg). For completeness, the absence of registered office presumption (as provided for in the EIR Recast but not EIR 2000), the fact that Bella SARL was incorporated in France only has limited relevance to the analysis above.

In the premises, pursuant to Recital 17 of EIR 2000, Bella SARL should open safeguard proceedings in Ireland (being the main insolvency proceedings) before it may resort to open any secondary proceedings in Strasbourg. Before Bella SARL does so, the French High Court apparently does not have any jurisdiction to open safeguard proceedings.]

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.

[The main issue here is therefore whether the safeguard proceedings fall within the scope of EIR Recast.

First, insofar as temporal scope is concerned, the EIR Recast generally applies from 26 June 2017 (see Article 92). Since the safeguard proceedings was opened on 30 June 2017, it seems to fall within the temporal scope of EIR Recast (see also Article 84(1)).

*Second, insofar as personal scope is concerned, the safeguard proceedings (Sauvegarde) in France is included in Annex A to EIR Recast, thus triggering the *prima facie* application of EIR Recast. Further, the proceedings also *prima facie* fall within the scope of EIR Recast as specified in Article 1 therein since (i) it is “public” and “collective” in nature and (ii) the assets and affairs of Bella SARL are subject to control or supervision by the French court.*

Notwithstanding the above, it is arguable that the COMI of Bella SARL should be located in Ireland and thus the French court should not have jurisdiction to open the safeguard proceedings. In this regard, Article 3(1) of EIR Recast requires that only the courts of the Member State within the territory of which the COMI is situated shall have jurisdiction to open (main) insolvency proceedings. Same as EIR 2000, Article 3(1) of EIR Recast also expressly provides that the COMI of a debtor “shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties”. That said, Article 3(1) of EIR Recast contains a registered office presumption for companies under which the registered office of a corporate debtor should be presumed to be its COMI unless its registered office has been moved to another Member State within the 3-month period prior to the request for the opening of insolvency proceedings. In any event, as per Recital 30 of EIR Recast, the said presumption is rebuttable “where the company’s central administration is located in a Member State other than that of its registered office, and where a comprehensive assessment of all the relevant factors establishes, in a manner that is ascertainable by third parties, that the company’s actual centre of management and supervision and of the management of its interests is located in that other Member State”.

*In the present case, the registered office of Bella SARL shall be in France and there is no evidence suggesting that it has moved its office after 30 March 2017 (i.e. within the 3-month suspect period before it opened the proceedings in 30 June 2017). As such, the registered office presumption applies. That said, it seems that the presumption can be rebutted given that Bella SARL’s main warehouse is located in Ireland instead of France. It is possible to argue that, from the perspective of third parties, the COMI of Bella SARL is situate in Ireland. In the circumstances, since Bella SARL purported to open the main proceedings in a jurisdiction that does not coincide with its COMI, Article 3(1) of EIR Recast may not have been met. This is so even though the territorial scope of EIR Recast is *prima facie* satisfied in any event (since both France and Ireland are covered by EIR Recast).*

In conclusion, since the COMI of Bella SARL appears to be located outside France, the French court seemingly does not have the jurisdiction to open main proceedings under the EIR Recast.]

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.

*[Under Article 3(2) of EIR Recast, secondary proceedings may be opened against Bella SARL in jurisdictions where it possesses an "establishment". In this regard, "establishment" is defined in Article 2(10) to mean any place of operations where Bella SARL "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". In the case of *Interedil Srl v Fallimento Interedil Srl*, the CJEU explained that a minimum level of organisation and a degree of stability are required. The mere presence of goods or bank accounts may not suffice. Also, according to paragraph 71 of Virgos-Schmit Report, the perception of third parties (rather than the subjective intention of the debtor itself) shall be the determinative factor here.*

On the facts of this case, Bella SARL does have warehouses, employees and customers in Italy. In other words, it does have organisational presence in Italy, which strongly suggests the presence of "non-transitory economic activities with human means and assets". In the premises, it is highly likely that Italy fall within the definition of "establishment" in EIR Recast and thus secondary proceedings may be opened in Italy.

A related issue may be that, for reasons explained in my answer to Question 4.2 above, the French court may lack jurisdiction to open the main proceedings. In this regard, Article 3(4) of EIR Recast provides that secondary proceedings may only be opened after the opening of the main proceedings (subject to limited exceptions). That said, it seems that, regardless of whether the main proceedings in France was validly opened, the opening of the secondary proceedings in Italy may fall within one of the exceptions to Article 3(4) of EIR Recast, that is, the opening of the secondary proceedings is requested by "a creditor whose claim arises from or is in connection with the operation of an establishment situated within the territory of the Member State where the opening of territorial proceedings is requested". As such, even if the main proceedings in France was not validly opened, the Italian bank, as a local creditor of Bella SARL, may benefit from the said exception and should not be barred from opening the secondary proceedings in Italy simply because there was no valid main proceedings at the moment.

In conclusion, given the facts of the case, secondary proceedings can be opened in Italy under the EIR Recast.]

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 out of 15.

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

Total marks: 45 out of 50.