



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.**

The correct answer was D.

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").**

The correct answer was D.

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 : 6 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 relates to Article 3(1) of the EIR Recast titled International Jurisdiction.
Statement 2 relates to Article 1 of the EIR Recast titled Scope.*

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 main principles of both universalism and territorialism are combined across the EIR Recast to create a modified universalism approach.

One of the ways this is shown is through the Article 3 of the recast which sets out the ability for both main and secondary insolvency proceedings to be opened in Member States allowing for a universalist approach while also leaving room for Member states to express their jurisdictional sovereignty through application the laws of their jurisdiction.

Another example is Article 19(2) of the EIR Recast which holds that recognition of a main proceeding from another Member State will not prevent the opening of a secondary proceeding in that jurisdiction. This modified approach leans towards universalism though still allows an opportunity for a jurisdictions court to have a say.

Thirdly Article 33 of the Recast further highlights this approach by providing an exception to the automatic recognition of judgements from proceedings in Member States if it is contrary to that state's public policy. Thereby providing an element of sovereignty to the jurisdiction to.

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.

Article 41 - Cooperation and communication between insolvency practitioners

Article 42 - Cooperation and communication between courts

Article 43 - Cooperation and communication between insolvency practitioners and courts

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.

Articles 36 & 38(2) EIR Recast detail how a "synthetic" secondary proceeding can be used by the insolvency practitioner of the main proceeding to prevent the opening of secondary proceedings. Given the magnitude of such an action there are several requirements that must be undertaken before a court grants an order. Firstly, the practitioner should present the facts of the proceedings as well as options for realisation of assets, the undertaking application must be made in the official language of the jurisdiction and the undertaking must be approved by "known local creditors". In general terms the application must be in compliance with Article 36 EIR Recast and must protect the position of local creditors in order for the court to not open secondary proceedings.

Secondly Article 38(3) provides that a stay on the opening of secondary proceedings may be used for a period not exceeding 3 months on condition that measures are used to protect the position of creditors in the secondary jurisdiction. This procedure does not happen automatically, but rather at the request of the insolvency practitioner. Furthermore, during this time, the court may prevent the insolvency practitioner from disposing or removing any assets located in the jurisdiction unless done during the ordinary course of business. The stay can be lifted in three ways: by the court if a restructuring plan is agreed or if it is found that the insolvency practitioner has infringed on the prohibition or disposal and/or removal of assets from the jurisdiction. Alternatively, it can be lifted by the court by its own motion or at the behest of a creditor if it is found that the continuing of the stay is detrimental to creditor rights.

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)?

The general consensus among stakeholders and lawmakers alike was that the EIR 2000 had been a success, by being able to underpin one of the European Commission's main goals of modified universalism. It lasted 15 years, a period of longevity that was regarded as one of its greatest successes and weaknesses, due to its ability to stand for such a long period but the extended period without substantive reform.

One of the main elements requiring revision identified by the European Commission ("EC") was the need to improve information available to creditors. This was implemented in Article 24 of the EIR which mandated that Member States were required not only to create but also to maintain at least one register which contained information regarding the opening, ongoing activity and closing of insolvency proceedings, this information was required to be published as soon as practicably possible for creditors to have the ability to file claims and actions within prescribed timelines.

The increased scope of restructuring proceedings was also identified by the EC as an area needing reform and was included within the EIR Recast through Article 1 by the extension of proceedings to include restructuring of debtors where insolvency is likely as well as proceedings that allow the debtor to retain control of its affairs.

Improved communication between actors within insolvency proceedings was introduced upon recommendation of the EC via Articles 41-43 of the EIR Recast. These sought to introduce obligations for cooperation and communication between various insolvency practitioners and courts thereby carrying on the principles enshrined within the EU of mutual trust and cooperation.

Furthermore, the EC also sought to tackle a growing issue within the field of insolvency, corporate group insolvencies. Despite the growing globalisation of companies across borders being a success in modern business, it is often considered one of the largest hurdles in the execution of international insolvencies due to the entity-by-entity approach that is generally used by default in many jurisdictions. The EIR Recast addresses this with the introduction of over 20 Articles which deal with addressing jurisdictional consolidation of proceedings across multiple Member States.

Finally, the EC also identified data protection as an area that needed to be overhauled given the increased global scrutiny on usage of personal information, this was implemented through Chapter VI of the EIR aptly titled, Data Protection.

The EC reform process took several years and through it, was able to identify many areas that required attention in the coming reforms. Although many of these were implemented successfully as previously discussed, other areas are still in need of improvement and will likely be a source of scrutiny in the next set of reforms.

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.

Despite the general success of the EIR Recast, concerns have been brought from stakeholders about several sections of the Regulation. Although there is room for bias in some of these concerns due to the subjective view on how insolvency proceedings should be carried out, the following areas, I believe, are valid shortcomings identified within the EIR Recast.

Chapter V of the EIR Recast allows for the appointment of the same insolvency practitioner across multiple jurisdictions in an effort to combat this issue and consolidate procedures, provided of course that the appointments are allowed by that Member State’s rules. Methods such as this attempt to minimise wasted costs and duplication of efforts by limiting proceedings to one insolvency practitioner within a group, however given that varying requirements that need to be met for the eligibility of insolvency practitioners it is often difficult to achieve appointment in multiple jurisdictions as discussed.

A solution to this issue would be the harmonisation of insolvency practitioner eligibility requirements to either a baseline test or set of requirements set within the EIR, or alternatively, to allow qualified insolvency practitioners in a single Member State to be eligible insolvency practitioners in any other Member State, thereby eliminating this shortfall of the system.

The second flaw identified in the EIR Recast stems from the group co-ordination proceedings under Chapter V of the EIR Recast. Recital 56 EIR Recast sets out the procedure for the use of group co-ordination proceedings and although general consensus agrees that the use of group co-ordination proceeding is typically beneficial to creditors, through the decrease of transaction costs and maximisation of estate value, this procedure is entirely optional to insolvency practitioners. They have the option to “opt-out” of the group proceedings and object against their inclusion, remarkably, without providing and substantiated reason for the objection. In order to amend this shortcoming, it would be easy to say that an automatic consolidation of

proceedings into the co-ordination proceedings without any option for an “opt-out” would be optimal. However, this does not consider the modified universalism approach as adhered to in the EIR Recast. As a result of this an approach that leaves an “opt-out” scheme in place but adds significant barriers to exit would be preferred, thereby leaving an option for the exit of group proceedings although now on more transparent, substantiated grounds.

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 Directive on Preventative Restructuring Frameworks in 2019 (the “Directive”) produced with the goal of reaching an increased level of harmonisation in insolvency laws to create a better functioning single market within the EU and create more legal certainty for stakeholders.

One of the key ways in which the Directive differs from the regulation is the implementation of new restructuring procedures that provide debtors with tools to allow them to restructure debts at earlier stages and provide them with access to more information among other things. A substantial development between the EIR 2000 and the EIR Recast was the inclusion of restructuring into Article 1 as a process under the EIR Recast, however as explained further within Article 3, the court of the Member State where the main proceeding is opened will have jurisdiction over the proceedings.

As a result of this, although restructuring is now included in the recast, which restructuring regime used is different based on every jurisdiction. With the new Directive being adopted, a common set of restructuring procedures is now available across Member States regardless of where the proceeding was opened as was the case prior.

Secondly the Directive and the EIR Recast differ significantly in terms of their scope, as previously discussed, much of the focus of the Directive relates to harmonisation of Restructuring procedures which contrasts with the EIR Recast.

The EIR Recast relates to public collective proceedings, insolvency and liquidation amongst other proceedings while providing guidance on the unified rules across member states for matters such as recognition of foreign judgements and

proceedings, international jurisdiction and international cooperation. This is in stark contrast to the Directive which despite its optimistic initial proposals, was trimmed down significantly resulting in substantial modifications that created a Directive with little scope focused primarily on preventative restructuring tools.

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

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.

Given this proceeding is under the EIR 2000 it should be noted that EIR 2000 did contain a definition of COMI, although it did provide guidance for COMI in Recital 13, furthermore substantial case law exists from the CJEU which can provide relevant jurisprudence to help answer this question.

One of the major pieces of case law for this issue relates to Eurofood IFSC Ltd, an insolvent Irish subsidiary of Parmalat SpA an Italian company. Both entities were successfully placed into insolvency procedures in their registered countries however the Italian District Court of Parma held the view that Eurofood 's COMI was in Italy, and it had jurisdiction over its insolvency proceedings. In the end the case was brought to the CJEU which ruled that Eurofood's COMI was its place of registration (Ireland) and Ireland therefore had jurisdiction.

In making this decision it was stressed by the CJEU that the criteria used to decide COMI must be both objective and determinable to foster legal certainty and facilitate uniform applications among Member States. Furthermore, the presumption of COMI could not simply be refuted by the existence of a foreign parent entity.

Therefore, taking this jurisprudence into account I would argue that the Strasbourg High Court did have correct jurisdiction to open the relevant insolvency proceedings against Bella SARL. This is since the CJEU held that in the case of Eurofood it's COMI was reflected by its place of registration, meanwhile in this case Bella Sarl is registered in France.

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.

Although the scope of the EIR Recast can be discussed at length in minute details, there are four main matters to consider when answering whether the EIR Recast is applicable to a proceeding. Firstly, the debtor in question must have a COMI in a Member State of the EU (excluding Denmark). In this case the COMI is France, therefore this requirement is met.

Secondly the debtor must not be excluded from the scope of the EIR Recast. Most of the types of entities excluded relate to financial markets such as investment firms, insurance companies, credit institutions etc., in this case Bella Sarl, a cosmetics company, is not an excluded entity for these purposes.

Thirdly the proceeding opened must be listed in Annex A of the EIR Recast, in this case the Safeguard (Sauvegarde) procedure is listed in Annex A, thereby meeting this requirement.

Finally, the proceeding must be opened after 26 June 2017, as the proceeding was opened on 30 June 2017 (despite being petitioned prior to this date), the requirement is met.

As a result of the previously discussed steps being met it is safe to say that the EIR Recast would be applicable to these proceedings.

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

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.

Article 2 & 3 alongside Chapter III of the EIR Recast provide some guidance on the opening of secondary insolvency proceedings that are relevant in this case.

Under Article 2 a secondary proceeding may be opened in a Member State where a debtor has an establishment and in the 3-month period prior to the request to open main proceedings has carried out a “non-transitory economic activity with human means and assets”. Furthermore Article 37 elaborates that the opening of proceedings may be requested by any person empowered to request the opening of proceedings under the law of that Member State. In this case we are told that the company had employees and had activity in Italy, meaning that a secondary proceeding could be opened there. With respect to the ability of the bank to open proceedings, although the case study does not explicitly state the Italian bank is a creditor, it can only be assumed that they are a creditor in this case and that the Italian insolvency regime allows for creditors to bring winding up proceedings.

Nonetheless, it is possible for the secondary proceedings of the Italian Bank to be blocked either by way of a “synthetic proceeding” under Article 36 & 38(2) or by way of a stay on opening of proceedings (not in excess of 3 months) under Article 38(3).

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: 9 out of 15.

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

Total marks: 40 out of 50.