



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2B

THE EUROPEAN INSOLVENCY REGULATION

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

If you selected this module as one of your elective modules, please read instruction 6.2 on the next page very carefully.

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

1. ***You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.***
2. ***All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters - please do not change the document settings in any way. DO NOT submit your assessment in PDF format as it will be returned to you unmarked.***
3. ***No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).***
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- 6.1 ***If you selected Module 2B as one of your compulsory modules (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is 23:00 (11 pm) GMT on 1 March 2023. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2023. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.***
- 6.2 ***If you selected Module 2B as one of your elective modules (see the e-mail that was sent to you when your place on the course was confirmed), you have a choice as to when you may submit this assessment. You may either submit the assessment by 23:00 (11 pm) GMT on 1 March 2023 or by 23:00 (11 pm) BST (GMT +1) on 31 July 2023. If you elect to submit by 1 March 2023, you may not***

submit the assessment again by 31 July 2023 (for example, in order to achieve a higher mark).

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

ANSWER ALL THE QUESTIONS

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

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

Question 1.1

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

Select the correct answer from the options below:

- (a) True, before the EIR 2000, the EU has not sought to harmonise the insolvency laws of EU Member States.**
- (b) False, there was another EU Regulation regulating insolvency law at EU level before the EIR 2000.**
- (c) False, an EU Directive regulating insolvency law at EU level existed before the EIR 2000.**
- (d) False, the EU sought to draft Conventions with a view to harmonising the insolvency laws of EU Member States as early as the 1960s, but these initiatives failed.**

Question 1.2

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

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

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

Question 1.3

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

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

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

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

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

Question 1.4

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

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

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

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

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

Question 1.5

The EIR Recast is an instrument of a predominantly procedural nature (including private international law issues). Nevertheless, it contains a number of substantive

provisions. Which one of the following provisions constitutes a harmonised (stand-alone) rule of substantive law?

- (a) Article 18 EIR Recast ("Effects of insolvency proceedings on pending lawsuits or arbitral proceedings").**
- (b) Article 40 EIR Recast ("Advance payment of costs and expenses").*
- (c) Article 7 EIR Recast ("Applicable law").*
- (d) Article 31 EIR Recast ("Honouring of an obligation to a debtor").*

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.**

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.**

The correct answer was A.

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 : 8 out of 10.

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks] **2**

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

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

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

Statement 1 is referring to the COMI presumptions introduced under the EIR Recast in Article

3(1). One of the main COMI location presumptions included in Article 3(1) is the registered

office presumption. With regard to a company or legal person, the place of the registered office is

presumed to be the place of COMI, under Article 3(1) of the EIR Recast.

Statement 2 is referring to the provision for the restructuring of financial distressed but economically

viable businesses under Article 1 of the EIR Recast. Article 1 provides for restructuring of a debtor at

a stage where only a likelihood of insolvency exists, and for proceedings which allow for the debtor to

retain full or partial control of its assets and affairs (Recital 10).

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 provision from the EIR Recast which highlights the modified universalism approach that the EIR Recast has adopted is in regard to main insolvency proceedings and a debtor's centre of main interests ("COMI"). Article 3(1) of the EIR Recast states that the courts of the Member State in which the debtor's COMI is located have the jurisdiction to open the main insolvency proceedings. These main insolvency proceedings have universal scope and aim to encompass all the debtor's assets. Under the EIR Recast, the COMI shall be the place where the debtor carries out the administration of its interests on a regular basis and which can be verified by third parties.

The concept of modified universalism comes into play under the EIR Recast in that, at the same time, the EIR Recast allows for the opening of secondary proceedings - running in parallel to the main proceedings - to produce effects only on assets situated within the Member State of the secondary proceedings. These secondary proceedings aim to protect the diversity of interests, mitigate difficulties that arise from differences in national laws and promote the effective administration of complex insolvency estates. Secondary insolvency proceedings can be opened in any country where a debtor has an establishment (Article 3(2) EIR Recast) and there can be as many

secondary proceedings as there are debtors' establishments across the Member States. This is another example of modified universalism under the EIR Recast.

Finally, another example of modified universalism under the EIR Recast is Annex A ("Insolvency proceedings referred to in point(4) of Article 2"). Annex A provides a list of 112 national insolvency procedures taken from the 27 Member States. Under Recital 9 of the EIR Recast, with regard to the national procedures listed in Annex A, it is explained that the EIR Recast will apply without any further scrutiny by the courts of another Member State as to whether the conditions set out in the regulation are met. This is reflective of a modified universalism approach under the EIR Recast.

Question 2.3 [maximum 3 marks] **2**

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.

The EIR Recast emphasises the obligation for cooperation between actors in concurrent insolvency proceedings through several provisions.

One such provision is under Recital 9 where it is stated that with regards to the national procedures contained in Annex A (a list of names of 112 insolvency proceedings from all 27 countries covered by the EIR Recast) the EIR Recast should apply without any further examination by the courts of another Member State required to determine whether the conditions set out in the regulation are met. This is clear evidence of a modified universalism approach within the EIR Recast as it mandates that should a proceeding be mentioned in Annex A, it automatically falls within the material scope of the EIR Recast. **This is not showing an obligation to co-operate.**

Another provision which highlights the need for co-operation between actors is Recital 48. Recital 48 states that the efficient administration of an insolvency estate and the effective realisation of its assets requires proper co-operation between all actors involved in the concurrent insolvency proceedings.

This co-operation between parties encompasses the various insolvency practitioners and the courts that are involved and in particular relates to the exchange of relevant information between parties.

Other provisions under the EIR Recast that mandate co-operation and communication include Article 41 (co-operation between insolvency practitioners), Article 42 (co-operation between courts) and Article 43 (co-operation between insolvency practitioners and courts). Articles 56-59 of the EIR Recast further relate to co-operation and communication in insolvency proceedings that relate to two or more members of a group of companies.

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 EIR Recast has introduced a number of legal instruments to avoid and/or control the opening, conduct and closure of secondary proceedings. The law applicable to secondary proceedings is referred to as *lex concursus secundarii* and it governs the opening, conduct, closure and effects of secondary proceedings under the EIR Recast. Because the opening of secondary insolvency proceedings leads to consequences such as the fragmentation of the insolvency estate and increased transaction costs, the EIR Recast contains a number of instruments to avoid the opening of secondary insolvency proceedings.

Article 36 of the EIR Recast ("Right to give an undertaking in order to avoid secondary insolvency proceedings") is one instrument introduced under the EIR Recast aimed at avoiding or otherwise controlling the. Under Article 38(2) of the EIR Recast, where the insolvency practitioner in the main insolvency proceedings has given an undertaking in accordance with Article 36, the court responsible

for opening the secondary insolvency proceedings should not, at the request of the insolvency practitioner, open them if the court is satisfied that the undertaking adequately protects the general interests of local creditors. Party autonomy and centralisation of the insolvency forum are the underpinning concepts of Article 36. Under Article 36, the insolvency practitioner in the main insolvency proceedings may give a unilateral undertaking in respect of the assets located in the Member State in which the secondary proceedings could be opened, thus eliminating the need to open the secondary proceedings.

Another instrument introduced under the EIR Recast to control secondary proceedings is the stay of the opening of the secondary insolvency proceedings. Often, a stay of individual enforcement measures follows the opening of main insolvency proceedings. The stay allows a debtor breathing space to negotiate a restructuring of debt with its creditors and the opening of secondary proceedings may frustrate the business rescue efforts. As a result of this, the EIR Recast provides for the possibility for the court to temporarily stay the opening of secondary insolvency proceedings, where a temporary stay of individual enforcement proceedings has already been granted in the main insolvency proceedings. As stated in Recital 45 of the EIR Recast, the stay of the opening of the secondary proceedings therefore maintains the efficiency of the stay that has been granted in the main insolvency proceedings.

Total marks: 9 out of 10.

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

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

Question 3.1 [maximum 5 marks] **4**

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)?

One of the main elements of the EIR 2000 identified by the European Commission as needing revision was the need to address insolvency proceedings aimed at rescuing economically viable but financially distressed businesses, instead of simply 'traditional' liquidation procedures. The EIR Recast addressed this need under Article 1 in referencing proceedings 'for the purposes of rescue, adjustment of debt, reorganisation or liquidation'. Under Article 1, the EIR Recast introduced provisions for

proceedings that facilitated the restructuring of a debtor at a stage where there was only a mere likelihood of insolvency, and allowed for debtors to retain full or partial control of their assets and affairs (Recital 10).

Another element of the EIR 2000 that was subsequently revised was the notion that the territorial framework of the EIR 2000 covers only intra-community effects of insolvency proceedings and that its provisions are restricted to relations between Member States. In the case *Christopher Seagon v Deko Marty Belgium NV*, it was ruled that the courts of the Member State within the territory of which the insolvency proceedings were opened have jurisdiction to consider an action to set a transaction aside that is brought against a person whose registered office is in another Member State. The CJEU took an opposing view to this in *Ralph Schmid v Lilly Hertel* which involved a transaction between Germany and Switzerland (a non-Member State). Under this ruling, the CJEU extended the scope of the EIR 2000 (and equally the EIR Recast) to include actions against a person whose place of residence was in a non-EU Member State.

The EIR 2000 also did not contain a definition of COMI. In contrast to this, the EIR Recast stated that the COMI shall be the place where the debtor conducts the administration of its interests on a regular basis and which can be ascertained by third parties (Article 3(1) EIR Recast). The EIR 2000 included almost identical wording in Recital 13 EIR 2000, however by including them in the main text of the regulation in the EIR Recast, the definition garnered more authority as a recital itself is not enforceable and rather only provides guidance for the courts to interpret. The COMI definition within the EIR Recast is further supported by the settled case law of the CJEU.

Secondary insolvency proceedings were another element of the EIR 2000 that were subsequently reformed under the EIR Recast. The definition of 'establishment' with respect to secondary proceedings was further defined in the EIR Recast for the addition of a relevant time period. Another vital improvement under the EIR Recast was the abolition of the requirement that secondary proceedings must be winding-up proceedings, under Article 3(3) of the EIR 2000. This previous requirement under EIR 2000 significantly hindered business restructuring attempts

In the European Commissions' 2014 Recommendation, the Commission highlighted the following substantive elements that were considered desirable for a harmonised insolvency approach: (i) to introduce flexibility in national preventive restructuring procedures by restricting the requirement for court formalities to only where necessary and proportionate; (ii) to provide for a stay of individual enforcement actions; (iii) to protect the interests of dissenting creditors, namely that the court should reject any restructuring plan that would reduce the rights of dissenting creditors below what they would reasonably expect to receive, should the debtor's business not be restructured; (iv) to maintain that the preventive restructuring process be on a debtor-in-possession model; (v) to include the potential for cross-class cram-down provisions and; (vi) to protect new and interim financing. There was a limited take-up of the

Recommendation by Member States. Yes but this was for what was then to become the Directive on Preventive Restructuring (2019/1023).

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 could be considered by some as a ‘missed opportunity’ or ‘modest’ due to the fact that it did not introduce any radical changes to the EIR 2000 framework.

The EIR Recast aimed to address the exclusion of pre-insolvency or hybrid proceedings from the EIR 2000 by including such proceedings in its scope of application, to allow for the rescue, adjustment of debts, reorganization or liquidation of companies. In order to extend its scope to include these proceedings, the EIR Recast included a new definition of “insolvency proceedings” in Article 1. This definition could be criticized as, on the one hand, it broadens the scope of application to national proceedings of a very different nature and content, however on the other hand, it sets out some limits to national solutions, through taking the view that not all national proceedings related to insolvency should benefit from the application of the EIR Recast. Under Article 1 of the EIR Recast, the insolvency proceedings that are within scope are: (i) collective; (ii) public; (iii) include interim proceedings; (iv) are based on a law related to insolvency; and (v) must entail certain limitations on the individual rights of the debtor and/or the creditors. **How could this be corrected?**

Another area that could be identified as a shortcoming of the EIR Recast is the amendments it makes to the COMI definition and presumptions. The EIR Recast provided an autonomous definition of COMI, derived from the Recital 12 of the EIR 2000. Under Article 3(1) of the EIR Recast, COMI can be defined as ‘the place where the debtor conducts the administration of his interests on a regular basis and which is ascertainable by third parties’. The EIR Recast provides for three rebuttable presumptions to facilitate application of the rule, one that was taken from the EIR 2000 and two that are new. In addition to this, the EIR Recast introduces certain safeguards on the applicability of the presumptions in order to prevent forum shopping. The presumptions are as follows: (i) in relation to a company or legal person, the territory of the registered office shall be presumed to be the COMI in the absence of evidence to the contrary; (ii) in relation to an individual exercising an independent business or professional activity, the COMI is presumed to be that of the individual’s principal place of business, in the absence of contrary evidence; and (iii) in relation to any other individual, the COMI shall be presumed to be the individual’s habitual residence, in the absence of evidence to the contrary. However, these amendments to the EIR 2000 are not altogether cogent as neither the principal place of business or the habitual residence is necessarily useful as a formal presumption of a debtor’s COMI. The proof of location of the habitual residence of an individual can prove cumbersome as the proof of the location of their COMI, particularly as the ‘location of the habitual

residence' is not defined under the EIR Recast, whereas COMI is. For this reason, an interested party is therefore likely to choose to demonstrate the location of the debtor's COMI rather than the debtor's habitual residence, or principal place of business. Perhaps here there was scope to establish these concepts as definitions of the COMI for natural persons.

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 European Insolvency Regulation 2015 and the Directive on Preventive Restructuring Frameworks 2019 differ in a number of ways.

One such difference between the Regulation and the Directive is that unlike EU regulations, EU directives do not take automatic effect in Member States and so each Member State must implement the Directive into national law in order for it to come into effect. The EU Member States have some leeway in their implementation of the Directive, as is characteristic for EU directives. In this way, the Directive acknowledges that the current diversity in Member States' legal systems with regard to insolvency proceedings seems too large to bridge, and so offers the Member States flexibility to achieve the objectives by applying the principles in a way that is suited to their respective national contexts.

Another difference between the two is that the EIR Recast 2015 provided for rules governing the allocation of jurisdiction for the commencement of insolvency proceedings - and once opened, the rules applicable to those proceedings - but did not address disparities in national law amongst the Member States, as stated above. The Directive differs in this way, with an aim to provide for a harmonised minimum restructuring standard across the EU with a view to giving viable businesses a 'second chance'. The Directive further aims to bring greater predictability, transparency and legal certainty to restructuring in the EU by reducing the substantive differences in pre-insolvency regimes across the Member States.

The Directive and its policy options largely reflect the proposed solutions under the Recommendation on a New Approach to Business Failure and Insolvency, published by the European Commission in 2012. These provisions consist of early warning systems and access to information; preventive restructuring, with (i) easy access to preventive restructuring procedures for debtors; (ii) the possibility for debtors in preventive restructuring procedures to retain control of their assets and day-to-day business operations (a 'debtor-in-possession' model); (iii) a stay on creditor actions;

(iv) cross-class cram-down; (v) the 'best interests of creditors' test; and (vi) the protection of new and interim financing.

The Directive sets out minimum standards for a restructuring plan and has introduced a number of provisions and concepts from existing successful restructuring framework, such as the US Chapter 11 Bankruptcy Code, the Irish Examinership, the UK Scheme of Arrangement and the French *sauvegarde* process. The Directive differs from the EIR 2015 in that it is the first instrument that substantively harmonises insolvency law throughout the EU, albeit only with regard to preventive restructuring.

The Directive offers a formalised restructuring plan with an option for a moratorium and cross-class cram-down (a mechanism taken from the US Chapter 11 plan). Although it is a matter for the national law of the Member States to determine class segments, under the Directive, classes are to be divided between secured and unsecured creditors at the very minimum. Under the cross-class cram-down, if the restructuring plan is not approved by a class, it may still be approved by the courts so long as dissenting creditor classes are treated 'at least as favourably as any other classes of the same rank' and 'more favourably' than any classes more junior to them, and then plan is approved by: (i) one class of affected parties that are not equity holders; and (ii) a majority of the voting classes of affected parties, including at least one class of secured creditors or creditors more senior to unsecured creditors.

Total marks: 14 out of 15.

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

Scenario

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

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

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

Question 4.1 [maximum 5 marks]

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

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

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

The EIR 2000 established that main insolvency proceedings could be initiated at the debtor's centre of main interest ("COMI"). The EIR 2000 did not include a definition of "COMI" as this was only introduced subsequently under the EIR 2015 (Recast).

If it can be determined that Bella SARL's main operations were in France (it is a French-registered company and opened its first store there) then under EIR 2000 the COMI of Bella SARL is in France and French law, the law of the state of the opening of proceedings i.e., the *lex concursus* would determine the effects of insolvency proceedings for the company throughout the other EU states where the debtor has assets (in this case Germany, Ireland, Portugal, Italy and Spain). Irrespective of whether or not France could in fact be determined to be the COMI of Bella SARL, the EIR 2000 allows for the possibility of opening secondary proceedings in another Member State where the debtor has an establishment (e.g., Ireland), and for coordination between the main and secondary insolvency proceedings. However, unlike the main insolvency proceedings, the secondary proceedings could only cover assets falling under their limited geographic scope, (e.g., only in Ireland). The EIR 2000 also prescribed the automatic recognition of judgements of the opening insolvency proceedings and their effects, in addition to judgements related to the course and closure of the insolvency proceedings.

In either case, whether be it the main or secondary insolvency proceedings, the Strasbourg High Court does have jurisdiction to open the safeguard proceedings under the EIR 2000.

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] **2.5**

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 EIR Recast applies from 26 June 2017 (Article 92 EIR Recast), with some minor exceptions. As Bella SARL’s petition for safeguarding petitions was filed on 20 June 2017, at first glance it therefore does not fall under this temporal scope of the EIR Recast. Article 84(1) of the EIR Recast states that provisions of the EIR Recast shall only apply to insolvency proceedings opened after the indicated date, i.e., 26 June 2017 and that proceedings prior to this date shall be governed by the EIR 2000. However, the question further specified that the French High Court subsequently opened safeguard proceedings on 30 June 2017, after the effective date of the EIR Recast.

Article 2(8) of the EIR Recast states that the ‘time of the opening’ of insolvency proceedings refers to the time at which the judgement opening insolvency proceedings become effective, irrespective of whether the judgement is final or not. Article 2(7) of the EIR Recast further define the ‘judgement opening insolvency proceedings’ as the decision of any court to open insolvency proceedings or to provide confirmation of the opening of such proceedings, or the decision of the court to appoint an insolvency practitioner. As Bella SARL only filed a petition to open

safeguard proceedings on 20 June 2017, and there does not appear to have been 'judgment opening insolvency proceedings', then it brings into question whether the insolvency proceedings would therefore fall under the scope of the EIR Recast, once the judgement opening insolvency proceedings have commenced. However, as previously mentioned, the French High Court opening safeguard proceedings on 30 June 2017 does represent a 'judgement opening insolvency proceedings' and is subsequent to the effective date of 26 June 2017, therefore the EIR Recast is applicable.

Under Article 3(1) of the EIR Recast, a Member State within the territory of which the debtor's COMI is situated has jurisdiction to open insolvency proceedings. It could be argued, under the EIR Recast, that Bella SARL's COMI could be in Ireland (where its main warehouse is and some of its employees) or Spain (where it has opened a bank account and had entered into negotiations with suppliers, signing some memoranda of understanding). If these insolvency proceedings were filed subsequent to 26 June 2017, then they would fall under the scope of the EIR Recast. At the same time, the EIR Recast also allows for the opening of secondary insolvency proceedings to run in parallel with the main insolvency proceedings.

Based on the above and given the 'judgement opening insolvency proceedings' has occurred on 30 June 2017 by way of the French High Court opening safeguard proceedings, the EIR Recast is therefore applicable in this instance.

You are missing some elements.

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

Question 4.3 [maximum 5 marks]

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

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

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

The EIR Recast does allow for the opening of secondary insolvency proceedings to run in parallel with the main insolvency proceedings. The effects of these secondary proceedings are only on assets situated within the state of the secondary proceedings (Recital 23), i.e., in Italy only in this case. Although the case only provides for limited information, it does not appear that Italy could be determined as Bella SARL's COMI under the EIR 2015. In this case, secondary proceedings can be commenced however the *lex concursus* i.e., the law of the territory of the main insolvency proceedings would have automatic recognition of its judgements and their effects in the region where the secondary proceedings have been opened.

Given that Bella SARL has operations in Italy (a warehouse, employees and customers) secondary proceedings can be opened in this case as secondary proceedings can be opened in any country where the debtor, i.e., Bella SARL has an establishment (Article 3(2) EIR Recast). The term 'establishment' refers to the debtor's operational activities in a Member State - in this case Italy - other than the COMI state. The concept of 'establishment' is crucial to the opening of secondary proceedings as proceedings can only be opened if a Member State can prove the debtor has an establishment in their territory. Under Article 2(10) of the EIR Recast, 'establishment' refers to any place of operations where a debtor carries out or has carried out business in the three months prior to the request to open the main insolvency proceedings.

Relevant CJEU jurisprudence in this case are *Eurofood IFSC Ltd* where the CJEU emphasises that a Member State may refuse to recognise insolvency proceedings where the decision to commence the insolvency proceedings was made in flagrant breach of the fundamental right to be heard i.e., the rights of creditors or their representatives to participate in the proceedings in accordance with the equality of arms principle.

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 *Interedi*) is evidently missing.**
- **Therefore, under the EIR Recast, secondary insolvency proceedings cannot be opened in Italy.**

Total marks: 6.5 out of 15.

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

Total marks: 37.5 out of 50.