



**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).***
4. ***You must save this document using the following format: [studentID.assessment2B]. An example would be something along the following lines: 202223-336.assessment2B. Please also include the filename as a footer to each page of the assessment (this has been pre-populated for you, merely replace the word "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name. Assessments that do not comply with this instruction will be returned to candidates unmarked.***
5. ***Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.***
- 6.1 ***If you selected Module 2B as one of your compulsory modules (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is 23:00 (11 pm) GMT on 1 March 2023. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2023. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.***
- 6.2 ***If you selected Module 2B as one of your elective modules (see the e-mail that was sent to you when your place on the course was confirmed), you have a choice as to when you may submit this assessment. You may either submit the assessment by 23:00 (11 pm) GMT on 1 March 2023 or by 23:00 (11 pm) BST (GMT +1) on 31 July 2023. If you elect to submit by 1 March 2023, you may not***

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

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

**ANSWER ALL THE QUESTIONS**

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

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

Question 1.1

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

**Select the correct answer from the options below:**

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

Question 1.2

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

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

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

Question 1.3

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

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

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

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

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

Question 1.4

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

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

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

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

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

Question 1.5

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

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

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

Question 1.6

**The EIR 2015 does not provide a definition of "insolvency" or "likelihood of insolvency". What are the consequences of this?**

- (a) The ECJ has provided a definition of "insolvency" in recent case law.**
- (b) The European Commission has provided a definition of "insolvency" in its Recommendation on a "New Approach to Business Failure" published in 2014.**
- (c) Each Member State will define "insolvency" in national legislation.**
- (d) Deciding whether a debtor is "insolvent" or not is a matter for the ECJ to determine.**

Question 1.7

**The EIR Recast introduced the concept of "synthetic proceedings". What are they?**

- (a) "Synthetic proceedings" means that when an insolvency practitioner in the main insolvency proceedings has given an undertaking in accordance with Article 36, the court asked to open secondary proceedings should not, at the request of the insolvency practitioner, open them if they are satisfied that the undertaking adequately protects the general interests of local creditors.**
- (b) "Synthetic proceedings" means that for the case at hand, several main proceedings can be opened, in addition to several secondary proceedings.**
- (c) "Synthetic proceedings" means that when secondary proceedings are opened, these are automatically rescue proceedings, as opposed to liquidation proceedings.**

**(d) "Synthetic proceedings" means that insolvency practitioners in all secondary proceedings should treat the proceedings they are dealing with as main proceedings for the purpose of protecting the interests of local creditors.**

Question 1.8

**The EIR Recast kept the concept of the "centre of main interests" (COMI) of the debtor, which already existed in the EIR 2000. What were the amendments adopted in relation to this concept?**

**(a) The COMI of the debtor is not presumed to be "at the place of the registered office" anymore and the debtor will need to confirm where his COMI is before the beginning of each case.**

**(b) Although the COMI of a debtor is still presumed to be "at the place of the registered office", it is now possible to rebut this presumption, albeit only by the courts.**

**(c) The rule that a company's COMI conforms to its registered office is now an irrefutable presumption.**

**(d) Although the COMI of a debtor is still presumed to be "at the place of the registered office", it should now be possible to rebut this presumption based on Article 3 EIR Recast and Recital 31.**

**The correct answer was D.**

Question 1.9

**In which of the following scenarios may the recognition of a foreign insolvency proceeding be denied under the EIR Recast?**

**(a) Where the decision to open the insolvency proceedings was taken in flagrant breach of the right to be heard, which a person concerned by such proceedings enjoys.**

**(b) The judgment, subject to recognition, was passed with incorrect application of the applicable substantive law.**

**(c) The court, which has opened insolvency proceedings (originating court), most certainly did not have international insolvency jurisdiction to do so under the EIR Recast.**

**(d) The rule applied by the court, which has opened insolvency proceedings (originating court), is unknown or does not have an equivalent in the law of the jurisdiction in which recognition is sought.**

Question 1.10

**In a cross-border dispute, the main proceedings before the German court concerns Schatz GmbH (registered in Germany) and Canetier SARL (registered in France). The case deals with an action to set aside four contested payments that amount to EUR 900,000. These payments were made pursuant to a sales agreement dated 29 December 2021, governed by Italian law. The contested payments have been made by Schatz GmbH to Canetier SARL before the former went insolvent. The insolvency practitioner of the company claims that the contested payments should be set aside because Canetier SARL must have been aware that Schatz GmbH was facing insolvency at the time the payments were made.**

**Considering the facts of the case and relevant provisions of the EIR Recast, which one of the following statements is the most accurate?**

- (a) The insolvency practitioner will always succeed in his claim if he can clearly prove that under the *lex concursus*, the contested payments can be avoided (Article 7(2)(m) EIR Recast).**
- (b) The contested transactions cannot be avoided if Canetier SARL can prove that the *lex causae* (including its general provisions and insolvency rules) does not allow any means of challenging the contested transactions, and provided that the parties did not choose that law for abusive or fraudulent ends.**
- (c) The contested payments will not be avoided if Canetier SARL proves that such transactions cannot be challenged on the basis of the insolvency provisions of Italian law (Article 16 EIR Recast).**
- (d) To defend the contested payments Canetier SARL can rely solely, in a purely abstract manner, on the unchallengeable character of the payments at issue on the basis of a provision of the *lex causae*.**

Total marks: 9 out of 10.

QUESTION 2 (direct questions) [10 marks]

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

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

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



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

*Statement 1*

This statement deals with the 'centre of main interest' (COMI) presumption and its rebuttal.

Article 3(1) of the EIR Recast states that in the case of a company or legal person, the place of the registered office shall be presumed to be the place of the debtor's COMI.<sup>1</sup> Article 3(1) further states that in the case of a company or legal person, the presumption shall only apply if the registered office has not been moved to another Member State within the 3-month period prior to the request for the opening of insolvency proceedings.

As a result of the CJEU case of *Interedil Srl v Fallimento Interedil Srl*,<sup>2</sup> the EIR Recast includes Recital 30, which repeats the guidance given by the CJEU in that case, and states that the COMI presumption should be rebuttable, so long as from the viewpoint of third parties, the place in which the company's central administration (meaning the actual centre of management and supervision, and of the management of its interests) is located, does not coincide with the jurisdiction of its registered office.<sup>3</sup> However, this will require a comprehensive assessment of all the relevant facts.<sup>4</sup>

*Statement 2*

This statement deals with the concept of restructuring and rescuing stressed debtors under the EIR Recast.

The scope of the EIR Recast is set out by Article 1. By way of summary, it states that the EIR Recast applies to proceedings which are based on the laws relating to insolvency. In particular, Article 1 states that proceedings may be commenced in situations where there is only a likelihood of insolvency, the purpose of which shall therefore be to avoid the debtor's insolvency.<sup>5</sup>

Recital 10 expands on this further by noting that the EIR Recast should extend to proceedings which promote the rescue of economically viable but distressed businesses and extend to proceedings which provide for restructuring of a debtor at a stage where there is only a likelihood of insolvency.<sup>6</sup>

**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.***

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<sup>1</sup> Professor Bob Wessels and Mr Ilya Kokorin, *Module 2B Guidance Text – The European Insolvency Regulation*, September 2022, p 17.

<sup>2</sup> Case C-396/09, ECLI:EU:C:2011:671 (Oct. 20, 2011), as cited in Professor Bob Wessels and Mr Ilya Kokorin, *Module 2B Guidance Text – The European Insolvency Regulation*, September 2022, p 17.

<sup>3</sup> Wessels and Kokorin, *supra* note 1, p 18.

<sup>4</sup> *Ibid.*

<sup>5</sup> Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), <<<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R0848&from=en>>>, accessed 16 February 2023.

<sup>6</sup> *Ibid.*

Some examples of provisions from the EIR Recast which highlight the modified universalism approach are:

1. Article 3(2), which allows for the opening of one or more secondary insolvency proceedings against a debtor in any Member State where it possesses an establishment. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.<sup>7</sup>
2. Recital 23, which states that the EIR Recast permits "*secondary insolvency proceedings to be opened to run in parallel with the main insolvency proceedings*", in order to "*protect the diversity of interests*".<sup>8</sup>
3. Article 19(2), which clarifies that the opening of secondary insolvency proceedings shall not be precluded by the fact that insolvency proceedings pursuant to Article 3 shall be recognized in all Member States, this recognition being effective from the opening of those main proceedings.<sup>9</sup>
4. Article 45(1), which states that any creditor may lodge its claims in both the main and secondary insolvency proceeding.<sup>10</sup>

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.***

Three provisions of the EIR Recast that deal with the obligation to co-operate are:

1. Article 41(1), which states that the insolvency practitioner in main insolvency proceedings and insolvency practitioner(s) in secondary proceedings concerning the same debtor shall co-operate with each other to the extent such cooperation is not incompatible with the rules applicable to the respective proceedings.<sup>11</sup>
2. Article 42(1), which states that the court before which a request to open insolvency proceedings is pending, or which has opened such proceeding, must co-operate with any other court faced with the issue of opening insolvency proceedings or which has already opened such proceedings.<sup>12</sup>
3. Article 43 sets out co-operation obligations between insolvency practitioners and courts.<sup>13</sup> In particular, article 43(1) sets out that the obligation to co-operate arises in

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<sup>7</sup> Wessels and Kokorin, *supra* note 1, p 18.

<sup>8</sup> Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), <<<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R0848&from=en>>>, accessed 20 February 2023.

<sup>9</sup> Wessels and Kokorin, *supra* note 1, p 32.

<sup>10</sup> *Idem*, p 36.

<sup>11</sup> *Idem*, p 44.

<sup>12</sup> *Idem*, p 46.

<sup>13</sup> *Ibid*.

the following three situations, to the extent it is not incompatible with the rules applicable to each proceeding and does not entail any conflict of interest:<sup>14</sup>

- a. An insolvency practitioner in main insolvency proceedings shall co-operate and communicate with any court before which a request to open secondary insolvency proceedings is pending or which has opened such proceedings;
- b. An insolvency practitioner in territorial or secondary insolvency proceedings shall co-operate and communicate with the court before which a request to open main insolvency proceedings is pending or which has opened such proceedings;
- c. An insolvency practitioner in territorial or secondary insolvency proceedings shall co-operate and communicate with the court before which a request to open other territorial or secondary insolvency proceedings is pending or which has opened such proceedings.

**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.***

Two examples of instruments which avoid or otherwise control the opening, conduct, and closure of secondary proceedings are:

1. Article 36, which states that in order to avoid the opening of secondary insolvency proceedings, 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 secondary insolvency proceedings could be opened, that when distributing those assets or the proceeds received as a result of their realisation, he or she will comply with the distribution or priority rights under the national law that creditors would have if secondary insolvency proceedings were opened in that Member State.<sup>15</sup> Such undertaking must be:<sup>16</sup>
  - a. made in the official language of the Member State where secondary proceedings could have been opened;
  - b. in writing;
  - c. in compliance with any other prerequisites relating to the form and approval requirements as to distributions (if dictated by the *lex concursus* of the main insolvency proceeding); and
  - d. be approved by known local creditors.
2. Article 38(3), under which a stay on the opening of secondary insolvency proceedings may be granted at the request of an insolvency practitioner, in circumstances where a temporary stay of individual enforcement proceedings has

<sup>14</sup> *Idem*, p 46 to 47.

<sup>15</sup> Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), Article 36(1), <<<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R0848&from=en>>>, accessed 20 February 2023.

<sup>16</sup> Wessels and Kokorin, *supra* note 1, p 49, citing EIR Recast articles 36(3) to (5).

been granted in the main insolvency proceedings.<sup>17</sup> The purpose of the stay is to preserve the efficiency of the stay granted in the main insolvency proceeding.<sup>18</sup> The stay may be imposed for a period not exceeding three months and on condition that suitable measures are in place to protect the interests of local creditors.<sup>19</sup>

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)?***

Due to Article 46 of the EIR 2000, the European Commission had to present a report on the application of the EIR 2000 with a proposal for its adaptation no later than 1 June 2012.<sup>20</sup> Whilst the European Commission acknowledged the success of the EIR 2000, it had become clear that some provisions required adjustment, while other issues required entirely new rules.<sup>21</sup>

The main elements identified as needing revision were:<sup>22</sup>

- 1) The EIR 2000's scope did not cover national procedures which provide for the restructuring of a company at a pre-insolvency stage or proceedings which leave the existing management in place. Furthermore, at the time of the reform process, a number of personal insolvency proceedings were outside the EIR 2000's scope.
- 2) There are difficulties in determining which Member State is competent to open insolvency proceedings as there have been difficulties applying the concept of the debtor's COMI in practice. The EIR 2000 was also criticized for allowing forum shopping by companies and natural persons through intentional COMI-relocation.
- 3) Secondary proceedings were seen as problematic due to the detrimental effect on the efficient administration of the debtor's estate. Given that under the EIR 2000, the liquidator in the main proceeding no longer had control over assets located in the other member state, the sale of the debtor on a going concern basis was made more difficult. In addition, secondary proceedings under the EIR 2000 were required to be

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<sup>17</sup> *Idem*, p 50.

<sup>18</sup> *Ibid*, citing Recital 45.

<sup>19</sup> *Ibid*.

<sup>20</sup> *Idem*, p 9.

<sup>21</sup> *Ibid*.

<sup>22</sup> European Commission, Proposal for a Regulation of the European Parliament and of the Council, COM(2012) 744 final, <<[https://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/com/com\\_com\(2012\)0744\\_/com\\_com\(2012\)0744\\_en.pdf](https://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com(2012)0744_/com_com(2012)0744_en.pdf)>>, accessed 16 February 2023.

winding-up proceedings, which was an obstacle to the successful restructuring of a debtor.

- 4) There were issues relating to the rules on publicity of insolvency proceedings. Under the EIR 2000, there was no mandatory publication or registration of the decision in the Member States where a proceeding was opening, nor in Member States in which there was an establishment. There was also no European Insolvency Register, allowing for searches on several national registers.
- 5) The EIR 2000 did not contain specific rules dealing with the insolvency of a multinational enterprise group. Instead, the basic premise of EIR 2000 is that separate proceedings must be opened for each individual member of the group. Ultimately, this meant that these separate proceedings were independent from each other. This was seen as diminishing the prospects of successful restructuring of the group as a whole.

Overall, the objective of the reform of the EIR 2000 was to improve the efficiency of the European framework for resolving cross-border insolvency cases in order to ensure a strong internal market and resilience in the face of economic crises.<sup>23</sup>

### Question 3.2 [maximum 5 marks] 5

***While the EIR Recast was welcomed by most stakeholders, it was also criticised by some as a “missed opportunity” and “modest”. List two (2) flaws or shortcomings of the EIR Recast and explain how you consider they could be corrected.***

As a whole, the EIR Recast has, and continues to be, an improvement of the EIR 2000. One key weakness of the EIR 2000 was its lack of provisions dealing with insolvency of multinational enterprise groups.<sup>24</sup>

While the EIR Recast introduced a whole chapter, with over twenty articles, dedicated to group insolvency in order to address the perceived weakness of the EIR 2000 in this area,<sup>25</sup> the EIR Recast provisions and articles on this matter are not as effective as they could be.

By way of example, articles 41 to 43, as well as Recital 52 of the EIR Recast, set out the legal framework for co-operation and communication in the context of group insolvencies, which closely follow the obligations for co-operation and communication between main and secondary insolvency proceedings relating to the same debtor.<sup>26</sup>

However, this means that such duties are limited to group insolvencies within Member States only. This is a shortcoming as it means that insolvency practitioners and courts involved in group insolvencies are only obligated to co-operate and communicate if the various companies have their COMI or establishment in Member States. This flaw could be corrected by extending the co-operation and communication obligations to be applicable even if some of the subsidiary companies are located in non-Member States.

In addition, the EIR Recast introduced procedural rules on the co-ordination of the insolvency proceedings of members of an enterprise group, in order to improve the co-ordination of insolvency proceedings of members of a group of companies.<sup>27</sup> This co-

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<sup>23</sup> *Ibid.*

<sup>24</sup> Wessels and Kokorin, *supra* note 1, p 54.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Idem*, p 55.

<sup>27</sup> *Idem*, p 57, citing EIR Recast Recital 54.

ordination mechanism is called a 'group co-ordination proceeding' and is regulated by article 61 of the EIR Recast.<sup>28</sup>

While this theoretically is a good idea, group co-ordination proceedings are voluntary in nature and lead to non-binding actions only.<sup>29</sup> As such, the group co-ordination proceedings would be more effective and practical if the EIR Recast was re-worded or included additional articles to the effect that group co-ordinations are compulsory, and lead to binding actions. This would result in additional certainty and provide Member States with assurance that such proceedings will culminate in practical, binding actions.

Notwithstanding the above weaknesses of the EIR Recast, it remains a significant improvement compared to the EIR 2000.

### 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 EIR Recast co-exists with the Directive on Preventative Restructuring (2019/1023) (the Directive).

The Directive establishes a set of minimum standards for preventative restructuring at an early stage to avoid insolvency.<sup>30</sup>

It aims to:<sup>31</sup>

- 1) Enhance the efficiency of early restructuring;
- 2) Improve the negotiation process;
- 3) Facilitate the continuation of the debtor's business while restructuring;
- 4) Prevent dissenting minority creditors and shareholders from jeopardising the restructuring effort, while also safeguarding their interests; and
- 5) Reducing the costs and length of restructuring procedures.

While the EIR Recast and the Directive co-exist, they are not the same and have some key differences between.

For example, one difference between the EIR Recast and the Directive is that the EIR Recast is mostly procedural while the Directive imposes a substantive obligation on Member States to offer a more attractive and flexible restructuring scheme in their respective laws.<sup>32</sup>

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<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

<sup>30</sup> Wessels and Kokorin, *supra* note 1, p 11.

<sup>31</sup> *Ibid.*

<sup>32</sup> Ponseck, Joachim and Swierczok, Artur, "The New European Restructuring Scheme – Update May 2022", <<[202223-916.assessment2B](https://www.bakermckenzie.com/en/insight/publications/2022/05/new-european-restructuring-schemes-update-may-2022#:~:text=Through%20the%20EU%20Directive%20on,had%20been%2017%20July%202021>>, accessed 16 February 2023.</p></div><div data-bbox=)

Secondly, the EIR Recast is wide-ranging in that it governs jurisdiction for opening insolvency proceedings and actions directly deriving from them, as well as recognition and enforcement of judgments issued in such proceedings.<sup>33</sup> On the other hand, the Directive is more minimal in scope as it focuses on minimum standards for preventive restructuring procedures only.<sup>34</sup>

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] 5

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

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

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

The EIR 2000 was adopted by the European Council on 29 May 2000, and entered into force on 31 May 2002. It was binding in its entirety and directly applicable to all EU Member States, including France.

<sup>33</sup> Wessels and Kokorin, *supra* note 1, p 10.

<sup>34</sup> *Idem*, p 11.

As a preliminary point, it appears that safeguard proceedings are not referred to in Annex A of the EIR 2000,<sup>35</sup> and are therefore unlikely to be covered by EIR 2000.

With respect to whether the Strasbourg High Court has jurisdiction, this will depend on Bella SARL's COMI as stipulated by Article 3(1) of the EIR 2000.

While the EIR 2000 does not include a definition of COMI, recital 13 provides some guidance by stating that "*the 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.*"<sup>36</sup> Article 3(1) of the EIR 2000 also includes a presumption that the company's place of registered office shall be presumed to be the centre of its main interest in the absence of proof to the contrary.<sup>37</sup>

The application of the COMI presumption was confirmed in the case of *Eurofood IFSC Ltd*,<sup>38</sup> in which Eurofood IFSC Ltd had its registered office in Ireland, but was owned by another company incorporated in Italy. The Irish High Court confirmed that Eurofood's COMI was in Ireland despite the place of incorporation of the parent company.<sup>39</sup>

However, it is important to note the CJEU's judgment in *Interedil Srl v Fallimento Interedil Srl*,<sup>40</sup> in which Interedil Srl was registered in the UK but the Italian Court accepted jurisdiction on the basis that the registered office presumption was rebutted given:<sup>41</sup>

- The presence of immovable property in Italy owned by Interedil Srl;
- The existence of a lease agreement in respect of two hotel complexes;
- A contract concluded with a banking institution;
- The Italian register of companies had not been notified of the transfer of Interedil's registered office (as it previously was registered in Italy).

Ultimately, the CJEU ruled that the registered office presumption can be rebutted when, from the viewpoint of third parties, the place in which the company's central administration (actual centre of management and supervision, and of the management of its interest) is located, does not coincide with the jurisdiction of its registered office.<sup>42</sup> Furthermore, a mere presence of some assets, such as bank accounts, moveable or immovable assets, is insufficient to rebut the registered office presumption.<sup>43</sup>

Bella SARL is registered in France. Therefore, on the face of it, the Strasbourg High Court has jurisdiction as the COMI presumption under the EIR 2000 applies.

However, it is important to consider whether the presumption can here be rebutted.

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<sup>35</sup> Regulation (EC) 1346/2000 of the European Parliament and of the Council of 29 May 2000 on insolvency proceedings, <<<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000R1346&from=en>>>, accessed 20 February 2023.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> Case C-341/04, ECLI:EU:C:2006:281 (May 2, 2006), as cited in Wessels and Kokorin, *supra* note 1, p 16.

<sup>39</sup> Wessels and Kokorin, *supra* note 1, p 16.

<sup>40</sup> Case C-396/09, ECLI:EU:C:2011:671 (Oct. 20, 2011), as cited in Wessels and Kokorin, *supra* note 1, p 17.

<sup>41</sup> Wessels and Kokorin, *supra* note 1, p 17.

<sup>42</sup> *Idem*, p 18.

<sup>43</sup> *Ibid*, citing paragraph 53 of *Interedil Srl v Fallimento Interedil Srl*.



Bella SARL opened its main store in Strasbourg. It is unclear from the facts provided whether this is the only store.

However, Bella SARL also has warehouses in Germany, Ireland, Italy, Spain and Portugal, with the main warehouse in Ireland. Furthermore, all employees are located in these countries, as well as most customers. As such, from a third party viewpoint, it could be argued that the place of Bella SARL's centre of management and supervision is not Strasbourg, France, but rather, one of the countries in which Bella SARL has warehouses, employees and customers.

Whilst the CJEU has clarified that a mere presence of assets, such as bank accounts, are insufficient to rebut the presumption, given the location of the main warehouse, employees and customers, it is likely that the COMI presumption is here rebutted.

As such, the High Court of Strasbourg would be unlikely to be granted jurisdiction to open safeguard proceedings under the EIR 2000.

#### 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.**

Determining whether the EIR Recast is applicable requires consideration of the following four steps:

##### Step 1 – Territorial Scope

What is Bella SARL's COMI? The EIR Recast will only apply if the COMI is located within the EU.

The question assumes that the French High Court has opened proceedings. As such, we can assume that Bella SARL's COMI has been confirmed to be France. Given France is in the EU, the EIR Recast applies.

In the alternative, and if the COMI had to be determined based on the facts: As discussed in my answer to question 4.1, whilst Bella SARL's registered office is in France, the relevant circumstances suggest that the registered office presumption is rebutted (noting that the COMI presumptions and rebuttals thereof are similar under both the EIR 2000 and the EIR Recast). Instead, it is likely that Bella SARL's COMI is Ireland, given it has its main warehouse there. Given Ireland is in the European Union, the EIR Recast would still apply.

##### Step 2 – Personal Scope

Is the personal scope of the EIR Recast complied with? Article 1(2) sets out that the EIR Recast does not apply to:

- a) insurance undertakings;
- b) credit institutions;
- c) investment firms; and
- d) collective investment undertakings.

Given Bella SARL is a company selling cosmetic products, none of the exclusions apply, and it falls within the personal scope of the EIR Recast.

### Step 3 – Material Scope

In order to fall within the material scope of the EIR Recast, the insolvency proceeding must be listed in Annex A. Annex A mentions safeguard proceedings under 'France'. Therefore, Bella SARL falls within the material scope of the EIR Recast.

### Step 4 – Temporal Scope

The temporal scope requires that insolvency proceedings be opened after 26 June 2017. This proceeding was opened on 30 June 2017 and therefore falls within the temporal scope of the EIR Recast.

Accordingly, the EIR Recast will be applicable to these proceedings.

### Question 4.3 [maximum 5 marks] 3.5

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

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

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

In general, the EIR Recast by virtue of Article 3(2) allows for the opening of secondary insolvency proceedings against a debtor in any Member State where it possesses an establishment.<sup>44</sup>

Given an Italian Bank has filed a petition to open secondary proceedings in Italy, it must be established whether Bella SARL has an establishment in Italy.

According to Article 2(10) of the EIR Recast, 'establishment' is defined as any place of operation where a debtor carries out or has carried out, in the three-month period prior to the request to open main insolvency proceedings, a non-transitory economic activity with human means and assets.<sup>45</sup>

The CJEU in *Interedil* provided additional guidance on the concept of 'establishment' by concluding that a minimum level of organisation and degree of stability are required, and that the presence alone of goods in isolation or bank accounts does not, in principle, satisfy the requirements for the classification of an establishment.<sup>46</sup>

The facts provided are unclear on how long Bella SARL has operated its warehouse in Italy. However, given it opened its first store in 2010, and a request for the opening of the safeguard proceedings was not made until 2017, it is likely safe to assume that the three-month period referred to in article 2(10) is made out.

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<sup>44</sup> Wessels and Kokorin, *supra* note 1, p 18.

<sup>45</sup> *Idem*, p 19.

<sup>46</sup> *Ibid*, citing para 62 of *Interedil Srl v Fallimento Interedil Srl*.

Furthermore, given that Bella SARL also has employees in Italy (in addition to the warehouse) shows that it conducts its activities with the involvement of human resources and assets, which together demonstrate an organisational presence in Italy. As such, an 'establishment' in Italy is likely made out. This means secondary proceedings in Italy can be opened 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: 13.5 out of 15.

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

Total marks: 47.5 out of 50.