INSOL INTERNATIONAL
FOUNDATION CERTIFICATE
IN INTERNATIONAL INSOLVENCY LAW

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.

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 /ex 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 /ex 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 /ex causae.

The correct answer was C.

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

Article 3 named International Jurisdiction, sub paragraph (1) of the EIR Recast states that the center of main interest ("COMI") is presumed to be the registered office in the case of a legal person or entity, the principal place of business for individuals exercising an independent business, and the habitual residence for any other individual. Recital 30 states that these assumptions should be rebuttable and it is down to the relevant court of the Member State to assess.

Statement 2

Article 1 of the EIR Recast named scope, refers to the scope of which the EIR Recast applies. Point 1 of Article 1 includes wording that states that in instances where there is only a likelihood of insolvency the proceedings should have the purpose of avoiding insolvency or ceasing of business activities. Recital 10 clearly states that the scope includes proceedings which promote the rescue of economically viable debtors and also includes for the stage where there is only a likelihood of insolvency.

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.***

Three provision examples which highlight the modified universalism approach are:

- ***Article 3(2) and 3(3) states that other Member States have jurisdiction to open insolvency proceedings if the debtor has an establishment outside of the state where the debtors COMI is located, and these proceedings will be secondary to the proceedings in the Member State where the COMI is located. The secondary proceedings are restricted to the assets situated in that secondary Member State.***
- ***Article 19(1) states that an insolvency proceeding in a Member State (main proceedings) shall be recognised by all other Member States and 19(2) states that recognition of the proceedings will not prevent proceedings from taking plan in another Member State which will be considered a secondary proceeding.***
- ***Recital 53 allows for insolvency proceedings of groups of companies to be brought in a single jurisdiction where other group entities are located in other Member States providing that the COMI for all group entities is situated in one***

Member State. Also the same insolvency practitioner ("IP") can be appointed over all the concerned proceedings. This is in line with the principles of modified universalism avoiding a group to be broken up into parts and resulted in a diminished chance of restructuring.

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.***

The following three provisions deal with the obligation to co-operate:

- *Article 42 provides that the court of a Member State where a request to open insolvency proceedings or where proceedings are already open should co-operate with any other court where proceedings are pending or already open.*
- *Recital 52 of the EIR Recast requires that all of the courts and IPs involved in group insolvencies have the same obligation to communicate and co-operate as those involved in the main and secondary proceedings of the debtor.*
- *Article 41 states that the IP of the main proceedings shall co-operate with the IP of the secondary proceedings and also provides how the co-operation should be implanted.*

Question 2.4 [maximum 2 marks] 1.5

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.***

A synthetic secondary proceeding is one way to avoid secondary proceedings. An IP of the main proceeding can give a unilateral undertaking ("UU") , as per Article 36, agreeing to realise the assets located in another Member State and then distribute those funds realised in line with the priority rights and distribution rules of that Member State. Following this UU, Article 38(2) states that the IP can then request the court to not open a formal secondary proceeding.

Another way to avoid a secondary proceeding in the short term is when the court grants a temporary stay of secondary proceedings being opened when a temporary stay of individual enforcement proceedings has been granted in the main proceedings. This allows the debtor breathing room to negotiate with its

creditors and means keeps the effectiveness of the main proceedings stay. ***[Provide the legal reference for this.]***

Total marks: 9.5 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] 3.5

During the reform process of the EIR 2000, what main elements were identified by the European Commission as needing revision within the framework of the Regulation (whether adopted or not)?

The EIR 2000 took 30 years in the making following a number of failed attempts by the European Union ("EU") to harmonise cross-border insolvency regulation with instruments such as the Brussels Convention in the 1960s and The Istanbul Convention of the 1990s. The EIR 2000 was adopted on 29 May 2000 and entered force on 31 May 2002. It was the first major binding instrument that dealt with EU cross-border insolvencies and was adopted by all Member States except for Denmark.

Whilst the EIR 2000 was generally acknowledged as a success, it was clear after 15 years that it needed a revamp as some provisions needed some adjustments and some other developments needed new rules. The European Commission highlighted the need to modernise the legal rules (such as data protection), improve creditor information (such as the interconnectivity of insolvency registers) and provide more in regard to insolvency practice such as expanding the scope to include restructuring proceedings, provide for the possibility of proceedings related to multiple group members and stronger co-operation rules between IPs and Courts.

To address these points the EIR Recast was created which was adopted in 2015 and entered into force on 26 June 2017 replacing the EIR 2000. The EIR Recast was not a complete overhaul of the EIR 2000, maintaining its modified universalism approach and key aspects such as COMI, main and secondary proceedings and lex concursus.

Other points which were important was the extension of the scope of the instrument and the matters pertaining to secondary proceedings and the judgments of the CJEU around the concept of the COMI.

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.***

1. *One flaw of the EIR Recast is that it does not sanction substantive, procedural or jurisdictional consolidation of members of a group of companies. The EIR Recast does offer a mechanism for co-ordination called a group co-ordination proceeding which are only voluntary in nature and lead to non binding recommendations of a group co-ordinator. Because of this the new EIR Recast rule, it has been questioned with the majority of legal literature authors stating doubts to their effectiveness, practical value and high costs linked to the complex nature of group co-ordination proceedings.*

   By introducing the concept of a group COMI which would clearly indicate the main court, or allowing for jurisdictional consolidation of members of a group of companies this would improve effectiveness and reduce the costs involved.

2. *Another flaw in the EIR Recast is that the group co-ordination proceeding does not allow for a group entity based in a non Member State to be included in the group co-ordination proceedings and also does not bind the insolvency courts and insolvency practitioners in that non-Member State. Again this limits effectiveness of restructuring an entire group and maximising returns for creditors.*

   To correct this the regulations should allow for group co-ordination proceedings to extend to non-Member States providing the non-Member State's national insolvency laws allow it. Alternatively the introduction of the group COMI would also be effective in improving the current rule in the EIR Recast.

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***

1. *The EIR provides a set of rules to manoeuvre the conflict of laws in the insolvencies taking place in the differing nations in the EU. The Directive differs from the EIR by providing a set of warning tools that will help debtors in detecting the deterioration of their business which would lead to engaging in a restructuring process at an earlier stage. This establishes a minimum set of*

standards for preventative restructuring procedures. The aim is to create a new culture of viable companies that are experiencing financial difficulties to have early access to restructuring processes regardless of their country within the EU.

2. *The aim of the Directive was to create harmonised restructuring frameworks throughout the Member States drawing on the key common processes from these jurisdictions. The Directive achieved this by launching several provisions and concepts associated with strong and successful restructuring frameworks already in existence, such as the US Bankruptcy Code's Chapter 11, the UK Scheme of Arrangement and the Irish Examinership. For this reason the Directive was the first instrument that substantively harmonises insolvency law across the EU. Whilst it is only considered a first step to harmonising EU insolvency frameworks, due to it not harmonising core aspects of substantive insolvency law, it is still considered to achieve some form of harmonisation of substantive law which is not the case for the EIR which is procedural in nature.*

Total marks: 13.5 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] 1

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 can be initiated in the country in which it has its centre of main interest (COMI") as per Article 3(1). These proceedings encompass all of the debtor's assets located throughout the EU, having a universal scope.

The EIR 2000 also provides that it is up to the law of the state that is opening the insolvency proceedings to determine the effects of such proceedings, known as lex concursus as per Article 4. This law governs, among other things, the respective powers of the debtor and the liquidator, the effects of insolvency proceedings on current contracts and ranking of creditors' claims.

The EIR 2000 does not provide a definition of COMI but does provide some guidance in Recital 13 which essentially says that the COMI is where the debtor conducts the administration of its interests on a regular basis and is ascertainable by third parties.

Following the case of *Eurofood IFSC Ltd* where the location of the COMI was disputed, the CJEU highlighted the autonomous meaning of the term COMI and stressed that it should be determined by reference to criteria that are objective and ascertainable by third parties.

Bella is registered in France so it could be assumed that this is where it conducts the administration of its interests as per the guidance in Recital 13. In this case, the Strasbourg High Court would have jurisdiction to open the requested safeguarding procedures.

However, Bella does have a number of warehouses and employees across Europe, with its main warehouse being situated in Ireland. This could cast doubt on whether the COMI should be considered as France and should be Ireland instead. For this reason, the COMI guidance has been expanded on in the EIR Recast to assume the COMI to be the debtor's place of incorporation with the ability to rebut this.

As per lex concursus it would be up to the Strasbourg High Court to determine if it considers Bella's COMI to be France and therefore if it has the jurisdiction to open the proceedings.

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

- ***The Strasbourg High Court does not have international insolvency jurisdiction to open insolvency proceedings.***

- ***You were expected to mention that under the EIR 2000 (Article 3), the determination of international jurisdiction to open main insolvency proceedings is linked to the debtor's centre of main interest (COMI). According to Article 3 EIR Recast, COMI shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties (see also Recital 28). The place of the registered office shall be presumed to be the COMI in the absence of proof to the contrary.***

- ***Relevant case law: *Eurofood IFSC Ltd*, Case C-341/04, ECLI:EU:C:2006:281 (May 2, 2006) and *Interedil Srl, in liquidation v Fallimento Interedil Srl*, Case C-396/09, ECLI:EU:C:2011:671 (Oct. 20, 2011).***

- ***However, Article 1 of the EIR 2000 states that 'this Regulation shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator.***

- ***Article 2 EIR 2000 states that '"insolvency proceedings" shall mean the collective proceedings referred to in Article 1(1). These proceedings are listed in Annex A.***

- ***Annex A of the EIR 2000 only listed two French insolvency proceedings which came under the scope of the EIR 2000: (i) liquidation; (ii) redressement judiciaire (rehabilitation).***

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

Question 4.2 [maximum 5 marks] 5

Assume that the timeline is as explained in the <u>original scenario above</u> 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 <u>all</u> steps taken to answer the question.

To establish if the EIR Recast is applicable to the proceedings filed by Bella in the Strasbourg High Court there are four key questions to be considered:

1. ***When does is apply in time (temporal scope)? – The EIR Recast only applies to proceedings opened from 26 June 2017, meaning the point at which the proceedings become effective. Whilst Bella filed the petition on 20 June 2017 the Strasbourg High Court opened the proceedings on 30 June 2017. Therefore, the opening of the Bella proceedings is considered after 26 June 2017.***

2. ***To whom does it apply (personal scope)? – The EIR Recast applies to debtors that are either a natural person, legal person, a trader or a consumer and***

excludes banks, insurance companies and other investment firms. Bella is a legal entity that sells consumer products and so the EIR Recast would be applicable in this case.

3. *Which proceedings are covered (material scope) - Annex A of the EIR Recast includes a list of 112 names of insolvency proceedings for all 27 countries that the EIR Recast covers. Recital 9 of EIR Recast explains that the EIR Recast shall apply automatically and without further examination by other Member State courts on whether the conditions in the regulation have been satisfied, providing the national procedure is included in Annex A. Bella has filed for Safeguard Proceedings, also known as procédure de sauvegarde, which is listed in Annex A.*

4. *Is the COMI located in a Member State except for Denmark (territorial scope) – Recital 25 of the EIR Recast contains the provision that the Regulation should apply to a debtor whose COMI is in a Member State (excluding Denmark). The COMI is assumed to be the place of incorporation. In Bella's case the COMI is France which is a Member State.*

All four conditions have been met in the case of Bella and so it can be considered that the EIR Recast is applicable to Bella's proceedings.

Question 4.3 [maximum 5 marks] 3

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 allows for secondary proceedings which run in parallel to the main proceedings. The secondary proceedings are limited to the assets situated in the state of the secondary proceedings. This provision for secondary proceedings is territorial in nature and it promotes effective administration of complex international insolvency estates, protects the diversity of assets and mitigates difficulties arising from divergent national laws as per Recital 40 of the EIR Recast.

A secondary proceeding, as per Article 3(2) of the EIR Recast, can be opened in any Member State where a debtor possesses an establishment. Article 2(10) of the EIR Recast states that establishment means any place of operations that a debtor has carried out a non transitory economic activity with human means and assets in the three month period prior to the main proceedings being opened. The CJEU further examined the concept in the case of /nteredi/ and concluded that the definition

connects the pursuit of economic activity to human resources and the presence alone of goods in isolation does not satisfy the condition for establishment.

The EIR Recast doesn't require the establishment to have an official form and so the organisational presence can take any form of business activity by the debtor. It must however be ascertainable by third parties and meet the Article 2(10) definition of establishment.

Bella has a warehouse located in Italy which is a Member State. Providing the warehouse includes human employees, and the warehouse and employees were present in the three month period prior to the main proceedings being opened, secondary proceedings can be opened in Italy under the EIR Recast.

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

- ***According to Article 3(2) EIR Recast, where the debtor's COMI is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if it possesses an establishment within the territory of that other Member State.***

- ***Under Article 2(10) EIR Recast, 'establishment' means any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets.***

- ***Relevant case law: *Interedil Srl, in liquidation v Fallimento Interedil Srl*, Case C-396/09, ECLI:EU:C:2011:671 (Oct. 20, 2011), *Burgo Group SpA v Illochroma SA*, Case C-327/13, ECLI:EU:C:2014:2158 (Sep. 4, 2014).***

- ***The facts of the case do not support the finding of an establishment of Bella SARL in Italy. The presence alone of assets (leased-out warehouse) in isolation, contractual relations with a local bank (including maintenance of a bank account) and occasional negotiations (whether individual or collective) with local distributors do not qualify as 'non-transitory economic activity with human means and assets'. The requisite minimum level of organisation and a degree of stability (see para. 64 in *Interedil*) is evidently missing.***

- ***Therefore, under the EIR Recast, secondary insolvency proceedings cannot be opened in Italy.***

Total marks: 9 out of 15.

*** END OF ASSESSMENT ***

Total marks: 40 out of 50.