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.

The correct answer was D.

Question 1.2

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

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

(b) they are based on laws relating to insolvency for the purpose of liquidation; are public; are collective.

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

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

The correct answer was A.

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.

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*.

The correct answer was C.

Total marks: 5 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: The provision / concept addressed is "Centre of main interests" (COMI), specifically the amendment made by the EIR Recast to make the presumptions rebuttable. The relevant article is Article 3 of the EIR Recast.

Statement 2: The provision / concept addressed is "Rescue proceedings" which are proceedings promoting the rescue of economically viable debtors, especially at a stage where there is a mere likelihood of insolvency. The relevant article is Article 2(h) of the EIR Recast.]

Question 2.2 [maximum 3 marks] 1

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 following are three examples of provisions in the EIR Recast that reflect the modified universalism approach:

1. Article 17: This provision allows for the coordination of multiple insolvency proceedings in different EU Member States, with the aim of achieving a single coordinated proceeding. It requires courts to cooperate and communicate with each other to facilitate this coordination. [Article 17 deals with the protection of third-party purchasers].
2. Article 21: This provision allows for the possibility of secondary proceedings to be opened in a jurisdiction other than the main proceedings, provided certain conditions are met. This allows for a degree of flexibility in insolvency proceedings, while still maintaining coordination between jurisdictions. [Article 21 deals with the IP's powers]
3. Article 25: This provision allows for the recognition of certain insolvency-related judgments from non-EU countries, provided that the country in question has adopted laws that are compatible with the EIR Recast. This recognizes the importance of cross-border cooperation in insolvency matters, while still allowing for differences in legal systems between countries.]

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

1. **Article 41**: This article sets out the obligation of the liquidator or administrator of the main proceedings to cooperate with the liquidator or administrator of any secondary proceedings opened in another Member State.
2. **Article 42**: This article sets out the obligation of the courts in main and secondary proceedings to cooperate with each other, including through the exchange of information.
3. **Recital 32**: This recital emphasizes the importance of cooperation and communication between courts, insolvency practitioners, and other relevant parties involved in cross-border insolvency proceedings. It also calls on Member States to facilitate such cooperation through the establishment of appropriate channels of communication.]

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.

[One example of such instrument is the possibility for the court to refuse to open secondary proceedings if they are not necessary for the protection of the interests of local creditors. This provision is included in Article 36(2) of the EIR Recast and aims to prevent the unnecessary opening of secondary proceedings that would duplicate the main proceedings without providing any additional benefit to the local creditors. In other words, if the debtor's main proceedings already adequately address the interests of local creditors, there is no need to open secondary proceedings.

Another example is the possibility for the court to appoint a liquidator in the main proceedings who is authorized to carry out the liquidation of the debtor's assets located in another member state without the need to open secondary proceedings. This provision is included in Article 36(3) of the EIR Recast and aims to reduce the burden and costs of secondary proceedings by allowing for a more efficient and coordinated administration of the debtor's estate across borders. By appointing a liquidator who can act in other member states, the court can ensure that the liquidation of the debtor's assets is carried out in a more streamlined and coordinated manner, without the need for multiple sets of proceedings in different jurisdictions.]

Total marks: 8 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] 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)?

[During the reform process of the European Insolvency Regulation (EIR) 2000, the European Commission identified several main elements that needed revision within the framework of the Regulation. These elements included:

1. **Scope of the Regulation**: The Commission recognized that the scope of the EIR 2000 needed to be clarified, particularly with respect to the definition of "insolvency proceedings" and the treatment of pre-insolvency proceedings.
2. **Coordinated proceedings**: The Commission identified a need for greater coordination between different insolvency proceedings, particularly in cross-border cases, in order to promote a more efficient and effective administration of the debtor's assets.
3. **Recognition of proceedings**: The Commission recognized that the recognition of foreign insolvency proceedings needed to be improved in order to ensure greater legal certainty and protection for creditors.
4. **Priority of claims**: The Commission identified a need to clarify the rules governing the priority of claims in insolvency proceedings, particularly with respect to the treatment of cross-border claims.
5. **Group insolvencies**: The Commission recognized that the EIR 2000 did not adequately address the issue of group insolvencies, and that a new legal framework was needed to ensure the efficient and effective management of insolvency proceedings involving multiple companies within a corporate group.
6. **Insolvency practitioners**: The Commission identified a need to improve the qualifications and standards of insolvency practitioners, in order to promote greater professionalism and efficiency in insolvency proceedings.

Overall, these elements were identified by the European Commission as needing revision in order to promote greater legal certainty, efficiency and effectiveness in cross-border insolvency proceedings within the European Union. Many of these elements were addressed in the EIR Recast, which was adopted in 2015 and replaced the EIR 2000.]

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 Recast European Insolvency Regulation (EIR Recast) aimed to improve the existing framework for cross-border insolvency proceedings in the European Union. Although the EIR Recast was generally welcomed, it has also been criticized for some flaws and shortcomings. The following are two such flaws:

1. **Limited scope**: Article 3 of the EIR Recast provides for the recognition of insolvency proceedings opened in a member state other than the state where the debtor has its COMI. However, this provision only applies to debtor proceedings, leaving out creditor-initiated proceedings. This limitation has been criticized by some stakeholders who argue that it leaves creditors with fewer options to recover their claims in cross-border insolvency cases.

To address this shortcoming, the EIR Recast could be revised to include provisions for creditor-initiated proceedings. This could be achieved through the introduction of a new category of proceedings, such as a "secondary proceedings" or "creditor-initiated proceedings," which would enable creditors to initiate insolvency proceedings against a debtor in a different jurisdiction. These provisions would provide greater flexibility and choice when it comes to cross-border insolvency proceedings, thereby facilitating cross-border debt recovery and reducing costs.

2. **Lack of clarity in the definition of COMI**: Article 3(1) of the EIR Recast requires that the debtor's COMI be located in a member state in order to initiate cross-border insolvency proceedings. However, the definition of COMI is not clearly defined, leading to legal

uncertainty and potential abuse. However, the definition of COMI is vague and can be subject to interpretation, leading to legal uncertainty and potential abuse.

To address the above shortcoming, the EIR Recast could be revised to provide clearer guidance on how to determine a debtor's COMI. This could include establishing objective criteria for determining a debtor's COMI, such as the location of its headquarters, the majority of its assets, or the place where it conducts most of its business activities. Additionally, the EIR Recast could provide for greater scrutiny of the debtor's activities and assets to ensure that the determination of COMI is not abused.

Furthermore, the EIR Recast could provide for a centralized database or platform to enable easy access to information about insolvency proceedings, including information on the debtor's COMI. This would improve transparency and provide greater legal certainty for all parties involved in cross-border insolvency proceedings.
Overall, addressing these shortcomings would require a revision of the EIR Recast, which could help to improve the effectiveness of the regulation in facilitating cross-border insolvency proceedings in the European Union.]

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 two ways in which the European Insolvency Regulation (EIR) and the Directive on Preventive Restructuring Frameworks (PRD) differ are as follows:

1. **Scope**:

The EIR, established by Regulation (EU) 2015/848, is a regulation that applies to insolvency proceedings of a debtor that has its center of main interests (COMI) in a member state of the European Union (EU). The EIR provides for the coordination of insolvency proceedings in different member states and the recognition of judgments in other member states. Article 1(1) of the EIR defines the regulation's scope as follows:

"The Regulation shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator."

In contrast, the PRD, established by Directive (EU) 2019/1023, is a directive that aims to establish a common framework for preventive restructuring procedures across the EU. The PRD applies to companies and other legal entities that are in financial difficulty but are not yet insolvent. Article 1 of the PRD provides the following scope:

"This Directive lays down rules on preventive restructuring frameworks, measures and procedures to enable viable enterprises in financial difficulty to prevent insolvency, or to limit the effects of insolvency where it cannot be prevented, with the aim of ensuring the continuation of their activities."

2. **Approach**:

The EIR is a choice-of-forum instrument that provides for the coordination of insolvency proceedings in different member states. The regulation does not harmonize the substantive

insolvency laws of the member states, but instead aims to facilitate the cooperation and coordination of different insolvency proceedings. The EIR also provides for the recognition of judgments and the enforcement of rights in other member states. Article 1(2) of the EIR states:

"The Regulation shall not affect the application in any Member State of the rules of law relating to the validity, voidability or unenforceability of legal acts detrimental to all the creditors."

In contrast, the PRD is a harmonization instrument that aims to establish common principles and rules for preventive restructuring frameworks across the EU. The directive requires member states to introduce a preventive restructuring framework that includes early warning mechanisms, preventive restructuring plans, and discharge of debt, among other things. Article 4 of the PRD provides the following:

"Member States shall ensure that the preventive restructuring framework enables debtors to initiate preventive restructuring procedures at an early stage of financial difficulty, including as an alternative to insolvency proceedings, and in any event before the debtor is insolvent."

In conclusion, while the EIR and the PRD both aim to improve the effectiveness of insolvency proceedings in the EU, they differ in scope and approach. The EIR is a choice-of-forum instrument that aims to coordinate insolvency proceedings in different member states, while the PRD is a harmonization instrument that aims to establish common principles and rules for preventive restructuring frameworks across the EU. These differences are reflected in the legal provisions of the EIR and the PRD.]

Total marks: 15 out of 15. Very good.

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

Scenario

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

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

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

Question 4.1 [maximum 5 marks] 2

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

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

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

[Under the EIR 2000, the Strasbourg High Court would have jurisdiction to open the requested safeguard proceedings for Bella SARL. Article 3(1) of the EIR 2000 provides that "the courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings." In the case of a company, the center of main interests (COMI) is presumed to be the place where the company has its registered office, unless the company can prove that its actual COMI is elsewhere. In this case, Bella SARL is a French-registered company, so its COMI is presumed to be in France unless it can prove otherwise. However, the fact that Bella SARL has a warehouse in Ireland could be used to argue that its actual COMI is in Ireland.

In the Eurofood case (C-341/04), the CJEU established a test to determine a debtor's COMI. The court stated that the COMI must correspond to the place where the debtor conducts the administration of its interests on a regular basis and is therefore ascertainable by third parties. The court also stated that in order to determine the debtor's COMI, all the relevant factors relating to the debtor's situation must be taken into account.

In this case, although Bella SARL has a warehouse in Ireland, it appears that the center of its main interests is in France because it has its first store there and all of its employees are located in France and other countries except for Ireland. Therefore, the Strasbourg High Court would have jurisdiction to open the requested safeguard proceedings.]

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

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

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

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

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

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

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

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

Question 4.2 [maximum 5 marks] 1

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 governs insolvency proceedings opened on or after 26 June 2017, so if the French High Court opens safeguard proceedings on 30 June 2017, the EIR Recast would be applicable to those proceedings.

To determine whether the EIR Recast applies, we must first consider its scope. The EIR Recast applies to "collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator," as well as "proceedings relating to the winding-up of insolvent companies or other legal persons, including judicial arrangements, compositions and analogous proceedings" (Article 1(1) of the EIR Recast).

Safeguard proceedings are a form of collective insolvency proceedings that allow a debtor to restructure its business and continue operating while under the supervision of a court-appointed administrator. The EIR Recast specifically includes safeguard proceedings within its scope (Article 1(1)(b) of the EIR Recast). Therefore, if the French High Court opens safeguard proceedings on 30 June 2017, those proceedings would fall within the scope of the EIR Recast.

Once we have established that the EIR Recast applies, we must then consider the rules on jurisdiction. Under the EIR Recast, the court of the Member State where the debtor has its "centre of main interests" (COMI) has jurisdiction to open insolvency proceedings (Article 3(1) of the EIR Recast). The COMI is presumed to be the place where the debtor conducts the administration of its interests on a regular basis and is ascertainable by third parties (Article 3(1) of the EIR Recast).

In the case of Bella SARL, it is not clear where its COMI is located based on the facts provided. However, the location of the debtor's COMI is a factual issue that must be determined by the court on a case-by-case basis (CJEU, C-341/04, Eurofood IFSC Ltd). If the French High Court determines that Bella SARL's COMI is in France, it would have jurisdiction to open the safeguard proceedings under the EIR Recast.]

Several elements are missing.

- ***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] 4

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.

[Secondary insolvency proceedings can be opened in Italy under the EIR Recast, but only if certain conditions are met. Article 3(2) of the EIR Recast states that "a debtor who is not domiciled in a Member State shall be subject to the insolvency proceedings of the Member State within the territory of which the debtor has an establishment." An establishment is defined in Article 2(f) of the EIR Recast as "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods."

In the Eurofood case (C-341/04), the CJEU stated that a debtor may have more than one establishment and that the COMI test only applies to the opening of main proceedings. The court also stated that secondary proceedings can only be opened in a Member State where the debtor has an establishment. Therefore, in this case, if Bella SARL has an establishment in Italy, the Italian bank could file a petition to open secondary insolvency proceedings in Italy. However, the fact that some online purchases are coming from the Netherlands and Poland does not necessarily mean that Bella SARL has an establishment in those countries. It would depend on whether Bella SARL carries out a non-transitory economic activity with human means and goods in those countries.]

It would seem that 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.

Total marks: 7 out of 15.

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

Total marks: 35 out of 50.