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").

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 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: 10 out of 10. Very good.

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.**

(1) *This is the registered office presumption. Recital 30 EIR Recast provides that the presumption should be rebuttable. The presumption is set out in Article 3(1), which provides that the registered office shall be presumed to be the centre of its main interests "in the absence of proof to the contrary"*

(2) *This is the objective of business rescue of economically viable businesses. Recital 10 provides that the scope of the EIR should extend to proceedings which promote the rescue of economically viable but distressed businesses, and which should give a second chance to entrepreneurs. Recital 10 notes that the Regulation should extend to restructuring proceedings where there is only a likelihood of insolvency. Article 1 also clearly states that the scope of the Regulation includes proceedings aimed at rescue and provides that, "Where the proceedings referred to in this paragraph may be commenced in situations where there is only a likelihood of insolvency, their purpose shall be to avoid the debtor's insolvency or the cessation of the debtor's business activities."*

Question 2.2 [maximum 3 marks] 2

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.

(1) *The possibility of opening secondary proceedings in a Member State where the Debtor has an establishment (Article 3(2)-(4)) ancillary to main proceedings, which are initiated at the debtor's centre of main interests. This is an example of modified universalism as the main proceedings have universal scope and encompass all of the Debtor's assets throughout the EU and secondary proceedings, which only cover assets within the relevant geographical area and therefore protect local interests.*

(2) *The Regulation provides for co-ordination between Courts, insolvency practitioners and both Courts and insolvency practitioners. This emphasis on exchange of information and co-operation emphasises the notion of trust between Member States whilst nevertheless upholding the application of the lex concursus.* **[What are the legal references?]**

(3) *The Regulation provides a substantial framework for group insolvencies (Articles 61-77); this highlights the approach to modified universalism because the members of corporate groups might be based across Member States with confusingly intermingled assets. A universal approach would be detrimental to creditors and impossible to enforce, given that national laws differ widely on*

issues of priority and ranking of claims. Instead, whilst only voluntary, there are a number of powers included in those provisions, including merging the assets of various members of the group and appointing a single insolvency practitioner, aimed at simplifying and unifying the processes which would otherwise be involved.

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.***

(1) Recital 48 provides that the efficient administration of the insolvent estate and effective realisation of assets requires co-operation between the actors involved in all concurrent proceedings.

(2) Articles 41 to 44 set out in detail the framework of co-operation between insolvency practitioners, between Courts and between insolvency practitioners and Courts in relation to main and secondary proceedings.

(3) Articles 56 to 59 set out in detail the framework of co-operation between insolvency practitioners, between Courts and between insolvency practitioners and Courts in relation insolvency proceedings concerning a member of a group of companies.

Question 2.4 [maximum 2 marks] 2

It is widely accepted that the opening of secondary proceedings can hamper the efficient administration of the debtor's estate. For this reason, the EIR Recast has introduced a number of legal instruments to avoid or otherwise control the opening, conduct and closure of secondary proceedings. Provide two (2) examples ***of such instruments and briefly (in one to three sentences) explain how they operate.***

(1) Synthetic secondary proceedings or undertakings. This is an undertaking provided by the insolvency practitioner in main proceedings pursuant to Article 36 that protects the general interests of local creditors, i.e., providing that local creditors will receive as a minimum as much as they would if secondary proceedings were opened. If the Court asked to open secondary proceedings is satisfied that the undertaking is sufficient to protect local interests, it shall not

open secondary proceedings (Article 38(2)). This avoids secondary proceedings being opened on acceptance of a sufficient undertaking.

(2) Stays of the opening of secondary insolvency proceedings. On the request of the insolvency practitioner or debtor in possession, the Court seised of the request to open secondary proceedings has a discretion to stay secondary proceedings for a period of three months (Article 38(3)). The stay must be lifted if negotiations during the stay result in a restructuring plan. The Court has a discretion to lift or retain the stay if negotiations are unlikely to be successful or the insolvency practitioner or debtor in possession has disposed of or moved assets from the territory of the Member State where the stay was given.

Total marks: 9 out of 10.

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

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

Question 3.1 [maximum 5 marks] 3

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 European Commission identified the lack of any harmonised approach to restructuring as a flaw in the EIR 2000; the availability and legal framework of restructuring plans adopted in Member States differed significantly (A new European approach to business failure and insolvency https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0742:FIN:En:PDF p.7 accessed March 2023) The EIR 2000 was limited to collective insolvency proceedings "which entail the partial or total divestment of a debtor and the appointment of a liquidator." (Article 1). It did not, therefore, further the aims of rescue and restructuring, which are key objectives of the Regulation.

The Executive Summary produced by the European Commission expressed concern that rescue-orientated procedures were not adequately reflected in the EIR framework, even though the benefits were "widely recognised". The effect of this was to prevent recognition of negotiation and rescue attempts (as considered in Omar, Paul, Upstreaming Rescue https://irep.ntu.ac.uk/id/eprint/27262/1/4626_Omar.pdf p.63 accessed March 2023). A solution included Annex A, which vastly expands the "insolvency proceedings" which fall within the Regulation to include restructuring and rescue procedures.

The definition of "centre of main interests" also came under scrutiny by the European Commission which was concerned about fraudulent forum shopping. It was recommended that the Regulation include a formal definition, including the ability of third parties to ascertain it (Report with recommendations to the Commission on insolvency proceedings in the context of EU company law https://www.europarl.europa.eu/doceo/document/A-7-2011-0355_EN.html#_section3 Recommendation 2.2, accessed March 2023) The Regulation tightened the concept of COMI by requiring third party ascertainability and including temporal restrictions which help to prevent forum shopping.

There are other elements which you could have discussed: **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. **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. **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. **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. **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. **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.

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) ***Epeoglou describes the EIR Recast as being hampered by the disparity of national insolvency legislation, leading to her conclusion that it is "an ambitious yet modest attempt for an efficient and rescue-friendly EU insolvency regime." (Epeoglou, Maria-Thomais; (2017) The Recast European Insolvency Regulation: A Missed Opportunity for Restructuring Business in Europe. UCL Journal of Law and Jurisprudence, 6 (1), Article 2. Accessed March 2023).***

In the article (p.50), Epeoglou particularly identifies the provisions relating to group co-ordination, describing them as a "blunt sword" in light of its non-binding nature.

Recital 56 provides that group coordination proceedings are voluntary. Article 64 provides that an insolvency practitioner appointed in respect of any group member may object to inclusion in group coordination proceedings or a

proposed coordinator without any limitation on that objection (save for obtaining any relevant approval (Article 64(3)). Article 70 provides that an insolvency practitioner may object to the coordinator's proposals, again without any limitation on that objection. It can be seen that these provisions render the group coordination provisions weak.

A number of solutions to this problem are explored by Professors Wessels and Madaus (*Wessels and Madaus, Instrument of the European Law Institute - Rescue of Business in Insolvency Law, 2017*. Accessed March 2023) at Part 9 (p.360). Notably, the Court deciding on a request to open insolvency proceedings in respect of a member of a corporate group "*should* verify whether a co-ordinated strategy is being considered for some or all of the members of the group" (i.e., under a mandatory provision). This places a mandatory burden of verification and co-ordination on the Courts seised of the request such that a particular jurisdiction is tasked with some degree of responsibility.

The Report goes on to suggest that European and national legislators should provide that the Courts have a power aimed at disentangling the complex assets and liability structures of members of a group, namely the consolidation of assets (recommendation 9.12). It suggests that this could lead to the creation of a group restructuring plan, which would be extremely time and cost-saving in cases of groups with comingled assets.

(2) Epeoglou also criticises the 'Centre of Main Interests' concept for being uncertain and therefore "vulnerable to manipulation" (*Epeoglou, Maria-Thomais; (2017) The Recast European Insolvency Regulation: A Missed Opportunity for Restructuring Business in Europe. UCL Journal of Law and Jurisprudence,* 6 (1), Article 2. at p. 43-44. Accessed March 2023).

Epeoglou notes that the solution is not as simple as replacing COMI with the incorporation doctrine (as proposed by commentators referenced in the article, p.44) as it is likely to be equally vulnerable to forum shopping and manipulation. Nonetheless, Epeoglou considers that the incorporation theory or more flexible approach to the choice of COMI would favour the key objective of business rescue, by increasing rescue options by way of "COMI shifting" (*idem*, p.45). On the other hand, Epeoglou considers that legal certainty could contribute to business rescue by allowing for more certainty in rescue plans without fear of COMI relocation. An increased degree of certainty in respect of the rebutting of the COMI presumption, including requirements rather than mere guidelines set out in recital 30 (which are not binding) in respect of rebutting the COMI presumption, would surely further the overall aim of modified universalism and permit proper rescue planning as well as decrease abusive forum shopping.

Question 3.3 [maximum 5 marks] 3

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 two instruments differ in that they are intended to co-exist and in that the chief aim of the Directive was to effect harmonisation, whereas the Regulation did not achieve this. One of the harmonising powers provided for in the Directive provides is the creation of early warning systems to creditors, enabling access to early-stage restructuring processes and, as a result, increasing the prospects of success of such processes.

(2) An example of the harmonisation in practice can be seen by the concept of a harmonised stay on creditor action, which shares common values with the French sauvegarde process. Whilst the Regulation refers to sauvegarde in Annex A as an "insolvency process", the Directive introduces the concept to all Member States.

Point 2 is slightly too specific. You cannot compare specific concepts of either instrument as they are not comparable because each instrument's aim is completely different. Rather, your discussion could have focused on:

- The difference between a Regulation and a Directive, as an instrument of EU law;
- The EIR 2015 is a choice-of-forum instrument which harmonised the procedural aspects of cross-border insolvency law / the Directive aimed to harmonise substantive aspects of insolvency law across the EU;
- Due to the nature of the Regulation, all Member States must comply with its provisions / the Directive is a minimum standard instrument, which means that it merely establishes a threshold under which the Member States cannot legislate. However, this minimum harmonisation approach also leaves the Member States with substantive leeway in how they want to adopt the provisions of the Directive.

Total marks: 11 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] 4

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.

French safeguarding proceedings (*sauvegarde*) are voluntary court-administered proceedings that can be commenced when a company is still solvent. It involves freezing past due receivables and stays individual legal proceedings against the debtor (https://www.simmons-simmons.com/en/publications/ck0bffdht7iez0b94wf4kl9ft/280519-what-creditors-should-know-about-the-rallye-holding-companies-safeguard-proceedings accessed March 2023).

Article 1 of the EIR 2000 provides that it shall apply to collective insolvency proceedings "which entail the partial or total divestment of a debtor and the appointment of a liquidator." Sauvegarde proceedings do not anticipate the appointment of a liquidator. Nor do they entail the divestment of the debtor's assets. As such, the proceedings do not fall within the scope of Article 1 EIR 2000.

Notably, the EIR 2000 contains a list of proceedings which fall within its scope; the sauvegarde proceedings are not listed.

The jurisdiction of the courts which can open insolvency proceedings will also extend to related actions. This has been the case long before the EIR 2000; an example of the

CJEU ruling on this issue can be seen in the case of Henri Gourdain v Franz Nadler Case C-133/78, ECLI:EU:C:1979:49 (Feb. 22, 1979). The issue in the case was whether an order against the manager of a company to pay into the assets of a company in liquidation under Article 99 of the French Law fell within the scope of

(a) Article 1(2) of the 1968 Convention providing that the Convention shall not apply to bankruptcy, proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings (as summarised at p.742 of the judgment) or
(b) Article 1(1) of the 1968 Convention and was instead a "judgment given in a civil and commercial matter."

The Court held that the order fell within Article 1(2); an order under Article 99 of the French Law was for the benefit of the general body of creditors.

The Court referred to that decision in Christopher Seagon v Deko Marty Belgium NV Case C-339/07, ECLI:EU:C:2009:83 (Feb. 12, 2009), noting that recital 6 of the EIR 2000 provides that it is limited to "judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings."

However, in this case, the purpose of the intended proceedings is to rescue the company, which is not anticipated by the EIR 2000. There are no main proceedings in place (as this is a pre-insolvency proceeding) which might mean that the scope of the EIR 2000 was extended to those proceedings.

Your answer is correct. You are only missing a reference to 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).***

Question 4.2 [maximum 5 marks] 2

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.

Recital 10 of the EIR Recast provide that the Regulation extends to proceedings at a stage in which there is only a likelihood of insolvency, including proceedings which leave the debtor in control of its assets and affairs.

Annex A expressly provides that sauvegarde proceedings fall within the definition of "insolvency proceedings" in Article 2(4). The effect of this is that, under Recital 9 of

the EIR Recast, the Regulation does apply to those proceedings without further examination as to whether the conditions set out in the Regulation are met.

Therefore, the EIR Recast does apply to safeguard proceedings, unlike the EIR 2000, and will enjoy automatic recognition in other member states.

The question then is whether main proceedings may be opened in France. Article 3(1) provides that the courts of the Member State in which the debtor's centre of main interests is located has jurisdiction to open main insolvency proceedings.

The centre of main interests is a place where the debtor conducts the administration of its interests on a regular basis and is ascertainable by third parties (Article 3(1)).

There is a presumption that the debtor's COMI is the place in which it has been registered, which is France in this case. However, that presumption can be rebutted if there is objective proof to the contrary (Article 3(1)).

Recital 30 provides that it should be possible to rebut the presumption where the company's central administration is located in a Member State other than that of its registered office. In this case, the company's central administration appears to be located at the site of Bella SARL's main warehouse in Ireland, although it has smaller warehouses throughout Europe. It can be assumed that the location of Bella SARL's main warehouse is a factor which would be readily ascertainable by third parties. It is also, presumably, the location of the majority of the company's assets and, most likely, the biggest concentration of its workforce.

Recital 30 further provides that ascertaining the actual centre of management and supervision and the management of its interests requires a comprehensive assessment of all the relevant factors in a manner that is ascertainable by third parties. In this case, the fact that the company has a bank account in Spain and signed memoranda of sale in Spain would not appear to be ascertainable by third parties and is not, therefore, relevant to the test.

Bella SARL has customers throughout Europe. Its online purchases are mainly made by Polish and Dutch customers, however that does not appear to be directly relevant to the test, given that it does not affect third party ascertainability. Whilst the company opened its first store in 2010 in France, that should not indicate to third parties that this is the centre of management of the company's interests, given that it is now, more than a decade later, a Europe-wide business.

In all the circumstances, the registered office presumption should be rebuttable here in favour of the COMI being based in Ireland.

Several elements are missing here.

- ***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 proceedings may be opened in parallel to main proceedings (Recital 23) and may be opened in any country in which the debtor has an establishment (Article 3(2) EIR Recast). Establishment means "any place of operations where a debtor carried out or has carried out in the 3-month period prior to the request to open main proceedings a non-transitory economic activity with human activity and assets" (Article 2(10)).

The facts of the case provide very little information about Bella SARL's activities or presence in Italy. It can be supposed that it may have a bank account in Italy, as it has a warehouse there and likely a number of workers (although the presence of a bank account alone will not suffice). It can be supposed that its presence there is not transitory and that it has either leased or owns its warehouse. Just as the company's main warehouse is ascertainable by third parties, its warehouse in Italy is also an ascertainable quality. As such, this is evidence of an external business activity by the company in Italy and is likely to be sufficient to satisfy "establishment" for the purpose of secondary proceedings.

It is not an abuse that the bank wishes to commence those proceedings to protect its interests in the distribution; the Virgós-Schmit Report notes that it "makes sense for creditors who cannot rely on the recognition of their rights (or their preferential rank) in proceedings in another…State (to open secondary proceedings) (at para.32).

Your reasoning is correct but 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: 10 out of 15.

*** END OF ASSESSMENT ***

Total marks: 40 out of 50.