



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2B

THE EUROPEAN INSOLVENCY REGULATION

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

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

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

## INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

1. ***You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.***
2. ***All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters - please do not change the document settings in any way. DO NOT submit your assessment in PDF format as it will be returned to you unmarked.***
3. ***No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).***
4. ***You must save this document using the following format: [studentID.assessment2B]. An example would be something along the following lines: 202223-336.assessment2B. Please also include the filename as a footer to each page of the assessment (this has been pre-populated for you, merely replace the word "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name. Assessments that do not comply with this instruction will be returned to candidates unmarked.***
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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.**

**The correct answer was D.**

Question 1.9

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

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

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

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

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

Question 1.10

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

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

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

Total marks : 9 out of 10.

QUESTION 2 (direct questions) [10 marks]

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

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

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



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

Statement 1:

Name of Provision/concept: ***COMI "International Jurisdiction" as explained below. In contrast to its predecessor (the EIR 2000), the EIR Recast provides a definition of COMI. The EIR 2000, in Recital 13, merely provided guidance for the courts with respect to the interpretation in connection with COMI-related issues.***

Relevant EIR Recast article: ***Article 3(1) EIR Recast titled "International Jurisdiction," provides, in pertinent part, that "[t]he centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties."***

***By including the definition in the EIR Recast, the definition has force (in contrast to Recital 13 of the EIR 2000) and is also supported by settled CJEU case law (for example, the CJEU (formerly known as the European Court of Justice or ECJ)) addressed the COMI presumption in *Interedil Srl v. Fallimento Interedil Srl*.***

***The presumption need to be rebuttable in order to provide more certainty and predictability (although this point has been criticized as explained below in the answer to Question 3.2. More specifically, as stated in Recital 30 to the EIR Recast (which sets forth guidance previously provided by the courts), "the relevant court of a Member State should carefully assess whether the centre of the debtor's main interests is genuinely located in that Member State. In the case of a company, it should be possible to rebut this presumption where the company's central administration is located in a Member State other than that of its registered office, and where a comprehensive assessment of all relevant factors establishes, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests is located in that other Member State. . . ."***

***In cases where the debtor's registered office and its management activities, from the view point of third parties, does not happen to be in the same Member State, the presumption is rebuttable. However, the mere location, of for example bank accounts, among other things, in another Member States is not sufficient to rebut the presumption.***

SOURCE THROUGHOUT THIS EXAM, UNLESS OTHERWISE INDICATED: Module 2B Guidance Text

Statement 2:

***This inclusion is celebrated as one of the most important adjustments/innovations. As noted in Recital 10 to the EIR Recast, "[t]he scope of this Regulation should extend to proceedings which promote the rescue of economically viable but distressed businesses and which give a second chance to entrepreneurs. . . ." This concept was determined to be important in order to bring the law more in alignment with the***

**realities of cross-border cases, among other things. The inclusion of this concept aids in maximising value for creditors, increase investment opportunities and minimizes costs in connection with formal insolvency proceedings. See also the European Insolvency Regulation 2015 and the EU Directive on Preventive Restructuring Framework 2019 (the "Directive") that co-exists with the EIR Recast and some commentators have also stated that the Directive is "Europe's response to the United States Bankruptcy Code." See footnote 104 in Guidance Text (citing G. McCormack, "The European Restructuring Directive - A General Analysis" (2020) 33 Insolvency Intelligence 11, 12; AFME, "Potential economic gains from reforming insolvency law in Europe" (February 2016), p.2).**

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.**

**Article 3(2) EIR Recast regarding the opening of secondary proceedings, which provides, in pertinent part, "[w]here the centre of the debtor's main interests 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 . . . The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State."**

**Article 19(2) EIR Recast regarding the recognition of the secondary proceeding, which provides in pertinent part, that "[r]ecognition of the proceedings referred to in Article 3(1) shall not preclude the opening of the proceedings referred to in Article 3(2) by a court in another Member State. . . ." Pursuant to Article 35 EIR Recast, "the law applicable to secondary insolvency proceedings shall be that of the Member State within the territory of which the secondary insolvency proceedings are opened."**

**Article 7 EIR Recast and exceptions in connection therewith contained in Articles 8-18 EIR Recast. Article 7(1) EIR Recast provides that "[s]ave as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened (the 'State of the opening of proceeding'." Articles 8-18 EIR Recast "provide otherwise" and therefore constitute exceptions to the general rule provided in Article 7(1) EIR Recast.**

**Article 6(1) of the EIR Recast generally prescribes that "[t]he courts of the Member State within the territory of which insolvency proceedings have been opened in accordance with Article 3 shall have jurisdiction for any action which derives directly from the insolvency proceedings and is closely linked with them, such as avoidance actions." However, pursuant to Article 6(2), "[w]here**

***an action referred to in paragraph 1 is related to an action in civil and commercial matters . . . the insolvency practitioner may bring both actions before the courts of the Member State within the territory of which the defendant is domiciled, or, where the action is brought against several defendants, before the Courts of the Member State within the territory of which any of them is domiciled, provided that those courts have jurisdiction pursuant to the Regulation (EU) No 2015/2012.***

***Articles 41-43 and 56-58 regarding the co-operation between (1) insolvency practitioners in main and secondary proceedings, (2) insolvency practitioners and courts in various jurisdictions, and (3) communication between courts in various Member States applicable to insolvencies regarding one debtor and a group of companies respectively.***

***Pursuant to Article 36 EIR Recast, "the insolvency practitioner in the main proceeding may give a unilateral undertaking . . . in respect of the assets located in the Member State in which secondary insolvency proceedings could be opened . . ." to avoid the opening of such secondary proceedings.***

***Pursuant to Article 38(3) EIR Recast, "[w]here a temporary stay of individual enforcement proceedings has been granted in order to allow for negotiations between the debtor and its creditors, the court, at the request of the insolvency practitioner or the debtor in possession, may stay the opening of secondary proceedings for a period not exceeding 3 months, provided suitable measures are in place to protect the interests of local creditors."***

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.***

***Article 41 EIR Recast titled "Cooperation and communication between insolvency practitioners"***

***Article 42 EIR Recast titled "Cooperation and communication between courts"***

***Article 43 EIR Recast titled Cooperation and communication between insolvency practitioners and courts***

**And Recital 48 to the EIR Recast which provides, among other things, that “[w]hen cooperating, insolvency practitioners and courts should take into account best practices for cooperation in cross-border insolvency cases, as set out in principles and guidelines on communication and cooperation adopted by European and international organisations active in the area of insolvency law, and in particular the relevant guidelines prepared by the United Nations Commission on International Trade Law (UNCITRAL).”**

**Chapter V of the EIR Recast addresses “Insolvency Proceedings of Members of a Group of Companies.” This chapter contains its own rules pertaining to the obligation to co-operate:**

**Article 56 EIR Recast titled “Cooperation and communication between insolvency practitioners”**

**Article 57 EIR Recast titled “Cooperation and communication between courts”**

**Article 58 EIR Recast titled “Cooperation and communication between insolvency practitioners and courts.”**

**Recital 52 addresses the cooperation in group of company insolvencies. It provides, in pertinent part, that “w]here insolvency proceedings have been opened for several companies of the same group, there should be proper cooperation between the actors involved in those proceedings. . . .”**

Question 2.4 [maximum 2 marks] **2**

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

**In general, secondary proceedings, although provided for in the EIR Recast, are not ideal as they contradict the universality of the main insolvency proceeding. More specifically, secondary proceedings can complicate the administration of the main proceedings as they create secondary insolvency estates, add to various costs to parties involved, prolong the administration of the debtor's assets, among other things. Below are two examples of mechanisms build into the EIR Recast that provide for the prevention of the opening of secondary proceedings if certain requirements are met.**

**1. Right to give an undertaking (“synthetic” secondary proceedings): Pursuant to Article 36 EIR Recast, “the insolvency practitioner in the main proceeding may give a unilateral undertaking . . . in respect of the assets located in the Member State in which secondary insolvency proceedings could be opened . . .” to avoid the opening of such secondary proceedings. If the insolvency practitioner in the**

**main proceeding has given such an undertaking, then, pursuant to Art. 38(2), “the court . . . shall, at the request of the insolvency practitioner, not open secondary insolvency proceedings if it is satisfied that the undertaking adequately protects the general interests of local creditors.”**

**In general terms, an undertaking constitutes a unilateral promise by the insolvency practitioner in the main proceeding to local creditors with respect to the avoidance of the opening of a secondary proceeding when certain criteria have been met. These requirements are set forth in Article 36 EIR Recast. Importantly, pursuant to Article 36 EIR Recast, if an undertaking has been given, “the law applicable to the distribution of proceeds from the realisation of assets referred to in paragraph 1 [of Article 36 EIR Recast], to the ranking of creditors’ claims, and to the rights of creditors in relation to the assets . . . shall be the law of the Member State in which secondary insolvency proceedings could have been opened. . . .”**

**Notably, the concept of an “undertaking” was absent in the EIR 2000, however, the concept originated from court innovation. See *Collins & Aikman Europe SA and other companies*, [2006] EWHC 1343 (Ch).**

**See also Recital 4 to the EIR Recast that addresses the concept of an undertaking. It provides, among other things, that “[t]he insolvency of such undertaking also affects the proper functioning of the internal market, and there is a need for a Union act requiring coordination of the measures to be taken regarding the insolvent debtor.”**

**2. Stay of Opening Proceedings: The EIR Recast also provides for the implementation of a stay of opening proceedings in the event a stay of individual enforcement actions has been granted in the main proceeding. The stay, if imposed, is limited to a three-months period and can be lifted if certain requirements are met. Notably, a stay of opening proceedings must be initiated by the insolvency practitioner in the main proceedings. It does not happen automatically.**

**Pursuant to Article 38(3) EIR Recast, “[w]here a temporary stay of individual enforcement proceedings has been granted in order to allow for negotiations between the debtor and its creditors, the court, at the request of the insolvency practitioner or the debtor in possession, may stay the opening of secondary proceedings for a period not exceeding 3 months, provided suitable measures are in place to protect the interests of local creditors.”**

**Lastly, a stay, if implemented, may be lifted if (1) the debtor and its creditors reach an agreement, for example a restructuring plan), (2) if the negotiations came to a halt and are likely to be detrimental to the rights of creditors, and (3) if an infringement on the prohibition regarding on disposal or removal of the assets from the territory of the Member State has occurred.**

**See also Recital 11 to the EIR Recast that addresses the stay of opening proceedings by providing that “[t]his Regulation should also apply to procedures which grant a temporary stay on enforcement actions brought by individual creditors where such actions would adversely affect negotiations and hamper the prospects of a restructuring of the debtor’s business. . . .”**

Total marks: 10 out of 10. Very good.

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

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

Question 3.1 [maximum 5 marks] 5

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

**Although the EIR 2000 was generally viewed as a success after its implementation, a review after about 15 years of its application identified various shortfalls that needed adjustments or entirely new rules to account for the evolving economic realities of cross-border insolvency cases. Indeed, Recital 3 specifically states that “[t]he proper functioning of the internal market requires that cross-border insolvency proceedings should operate efficiently and effectively. This Regulation needs to be adopted in order to achieve that objective . . . .”**

**As stated in Recital 1 to the EIR Recast, in pertinent part, “[t]he report on the application of Council Regulation (EC) No 1346/2000] . . . concluded that the Regulation is functioning well in general but that it would be advisable to improve the application of certain of its provisions in order to enhance the effective administration of cross-border insolvency proceedings. . . .”**

**As a result, many new rules were adopted and the EIR Recast is twice as long as the EIR 2000. Among other things, experts agreed that new and/or stronger rules regarding,**

- **the co-operation between insolvency practitioners, insolvency practitioners and courts and among courts should be implemented;**
- **and that provisions in respect to creditor information; and**
- **data protection needed improvements or be implemented.**
- **There was also consensus that rules regarding the insolvency of group of companies needed to be addressed.**
- **Another major improvement was the consensus that the scope of the EIR Recast should also include the goal of rescuing economically, but financially distressed businesses; a concept that was not recognized in the EIR 2000. This concept is addressed in Recital 10 to the EIR Recast which provides, in pertinent part, that “[t]he scope of this Regulation should extend to proceedings which promote the rescue of economically viable but distressed businesses and which give a second chance to entrepreneurs. It should, in particular, extend to proceedings which provide for the restructuring of a debtor at an early stage . . . .”**

**Importantly, even after the EIR Recast went into force on 26 June 2017, the previously developed CJEU case law and the Virgós-Schmit report remain critical in its interpretation.**

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. COMI and COMI Presumption

**Some commentators have criticised that the EIR Recast continues to be based upon, among other things, the COMI concept. See, e.g., Wolf-George Ringe, *Insolvency Forum Shopping, Revisited*, HAMBURG LAW REVIEW 2017, at p. 44 (available at [Insolvency Forum Shopping, Revisited by Wolf-Georg Ringe :: SSRN](#)) (stating that “As a general matter, the revised EIR sticks to the ‘COMI’ principle as the primary jurisdictional connecting factor, which itself is by its very nature susceptible to manipulation, for better or worse.”); see also Francisco Garcimartin, *The EU Insolvency Regulation Recast: Scope and Rules on Jurisdiction*, at p. 14 (available at [The EU Insolvency Regulation Recast: Scope and Rules on Jurisdiction by Francisco Garcimartin :: SSRN](#)) (In connection with the three rebuttable presumption in the EIR Recast in connection with COMI, the author argues that “[t]hese amendments . . . are not altogether cogent: Neither the principle place of business nor the habitual residence is really useful as a formal presumption of the debtor’s COMI. . . . The presumed fact is usually difficult and costly to prove”).**

**I agree with commentator Ringe, who argues that a better approach might have been to introduce a clear “registered office rule.” Ringe at 44. He stated, that “[a]n alternative would have been to introduce a more radical change by abandoning the COMI concept in favour of a pure ‘registered office’ test for insolvency jurisdiction” to achieve more predictability in terms of jurisdiction venue and applicable law. *Id.* Although such an approach would indeed be radical and not ideal either as it would take away the opportunity to rebut the presumption, it might make the administration more efficient in most of the cross-border cases. However, as Ringe identified, such an approach might result in “much reduced information costs and enhanced efficiency . . . and would entail coherence of both company law and insolvency law, avoiding frictions between the two, since both would be equally governed by the law of the company’s place of incorporation.” *Id.***

2. Provisions related to the Rescue of viable, but financially distressed companies

**Pursuant to EIR Recast Recital 10, “[t]he scope of the Regulation should extend to proceedings which promote the rescue of economically viable but distressed businesses and which give a second chance to entrepreneurs.” However, the EIR**

**Recast is devoid of any specific articles with respect to this goal. Although the EIR Recast co-exist with the newly introduced *Directive on Preventive Restructuring (2019.1023)*, which established certain minimum standards applicable to preventive restructurings across Member States, the Directive itself has its limitations as it is believed that its goal of harmonising laws with respect to its goal might be limited. Unlike the EIR Recast which is applicable to all Member States except of Denmark, the Directive must be implemented by the various states which might implement it in different ways resulting in different restructuring models, which, in turn, can be counterproductive to the initial goal of the Directive, *i.e.* harmonising EU insolvency frameworks. The EIR Recast should be amended to include rules regarding to the rescue of viable, but financially distressed companies, to give them force, compared to the non-binding guidance currently provided in the Recital.**

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 Directive on Preventive Restructuring (2019/1023) (“Directive”) is a newly-introduced directive to implement minimum standards aimed at furthering the goal of providing the opportunity for financially distressed companies to avoid insolvency and to restructure at an early stage. Among other things, it provides for these companies to continue operating while restructuring and to avoid unnecessary costs in connection with formal insolvency proceedings, among other things. However, the Directive must be implemented by each individual Member State (in contrast to the EIR Recast, which is a regulation that did not need ratification by all member states, and applies to all Member States, except of Denmark, in its entirety). There are already signs that various Member States implemented the Directive, albeit not consistently, because of, among other things, cultural differences and differing policy considerations.**

**Secondly, compared to the EIR Recast, the Directive harmonises insolvency laws across the EU, albeit only with respect to a few narrow aspects of it. Indeed, it is considered to be a welcomed first step towards the harmonisation of insolvency laws in the EU; however, it is not comprehensive in its current form as it does not harmonise core aspects of substantive insolvency law. The EIR Recast, in contrast, is mostly considered to be an instrument procedurally in nature. It therefore co-exists with the Directive and the Brussels I Recast, among others.**

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.***

***Although the EIR 2000, in contrast to the EIR Recast, did not contain a definition of COMI; it provided guidance for the Courts in interpreting COMI-related issues in Recital 13 (although not binding). Recital 13 provided that "the 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties." Paragraph 32 in *Eurofood IFSC Ltd.*, Case C-341/04, ECLI:EU:C:2006:382 (May 2, 2006) (hereinafter referred to as "Eurofood"). In Eurofood, which is considered settled case law that remains applicable even after the adoption of the EIR Recast, the CJEU (formerly known as the European Court of Justice or ECJ) held "[t]hat definition shows that the centre of main interests must be identified by reference to criteria that are both objective and ascertainable by third parties. That objectivity and that possibility of ascertainment by third parties are necessary in order to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction***

**to open main insolvency proceedings. That legal certainty and that foreseeability are all the more important in that, in accordance with Article 4(1) of the Regulation, determination of the court with jurisdiction entails determination of the law which is to apply.” Paragraph 33 Eurofood.**

**Here, Bella SARL is a French-registered company and opened its first store in 2010 in France. Pursuant to the fact pattern, Bella SARL has employees in all of the European Countries listed in the fact pattern. Pursuant to the settled CJEU jurisprudence in Eurofood, the CJEU would likely have found under the EIR 2000 that Bella’s COMI is in France and that the Strasbourg High Court would have had jurisdiction to open the main proceeding. The fact that Bella is registered in France and has a store and employees there are both objective factors that are ascertainable by third parties. Therefore, the criteria set forth in Recital 13 and Eurofood have been met.**

**The fact that Bella attempted to expand into the Spanish market, opened a bank account there and entered into non-binding agreements with a few Madrid-based suppliers does not change this analysis. As stated above, the Eurofood Court determined that “the centre of main interests must be identified by reference to criteria that are both objective and ascertainable by third parties.”**

**The opening of a bank account and the (likely confidential) non-binding agreements are neither objective nor ascertainable by third parties as required under this settled case law.**

**Although the fact pattern is devoid of any information regarding where Bella conducts the administration of its interests on a regular basis or whether it also has a warehouse in France, the Court would likely have found that, because Bella is registered in France and opened its first store there, that the objective factors would have been met by virtue of its registration in France and also that Bella’s COMI in France would have been ascertainable by third parties. The fact that Bella might not also have a warehouse in France (which is unclear under the facts) should not change this analysis. The presence of a warehouse does not necessarily indicate any management or administration of interests on a regular basis. In addition, its main warehouse is located in Ireland further supporting this conclusion.**

**In conclusion, the CJEU would have likely found the COMI to be in France and that the Strasbourg High Court would have had proper jurisdiction to open the main proceeding prior to the adoption of the EIR Recast.**

**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] **2.5**

**Assume that the timeline is as explained in the original scenario above and that the French High Court opens safeguard proceedings on 30 June 2017.**

*Will the EIR Recast be applicable to the proceedings?*

**Your answer should address the EIR Recast’s scope and contain all steps taken to answer the question.**

**The EIR Recast entered into force on 26 June 2017. Proceedings, such as the one in the fact pattern, opened after 26 June 2017, shall be governed, with a few exceptions, by the EIR Recast. See also Article 84 titled “Applicability in Time” which provides that “[t]he provisions of this Regulation shall apply only to insolvency proceedings opened after 26 June 2017. Acts committed by the debtor before that date shall continue to be governed by the law which was applicable to them at the time they were commenced.”**

**Here, the French High Court opened the proceedings on 30 June 2017, as such the EIR Recast applies.**

**The EIR Recast, in contrast to its predecessor, contains a definition of COMI in Art. 3(1) which provides that “[t]he courts of the Member State within the territory of which the centre of the debtor’s main interests is situated shall have jurisdiction to open insolvency proceedings (‘main insolvency proceedings’). The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.” The language is nearly identical to the non-binding Recital 13 to the EIR 2000 which, as explained above,**

aided the courts in its interpretation of COMI and resulted in established, still applicable today, case law and jurisprudence, such as the *Eurofood* case law.

The EIR Recast, in an effort to make proceedings more predictable, also includes a registered office presumption. See Article 3(1) EIR Recast, which provides, among other things, that “. . . the place of the registered office shall be presumed to be the centre of main interests in the absence of proof to the contrary. . . .”

Although the COMI presumption can be rebutted under certain circumstances, the fact that Bella opened a bank account in Spain and entered into a few non-binding agreements with a few Madrid-based suppliers, would likely not be sufficient to rebut the presumption that Bella’s COMI is in France. Indeed, Recital 30 provides guidance as to when the presumption is rebuttable. The Recital provides, among other things, that “. . . the relevant court of a Member State should carefully assess whether the centre of main interests is genuinely located in that Member State. In the case of a company, it should be possible to rebut this presumption where the company’s central administration is located in a Member State other than that of its registered office, and where a comprehensive assessment of all relevant factors establishes, in a manner that is ascertainable by third parties, that the company’s actual centre of management and supervision and of the management of its interests is located in that other Member State.” Moreover, the Court in *Interedil Srl v. Fallimento Interedil Srl*, Case C-396/09, ECLI:EU:C:2011:671 (Oct. 20, 2011) (hereinafter referred to as *Interedil*) held, among other things, that “[t]he fact nevertheless remains that the presence of company assets and the existence of contracts for the financial exploitation of those assets in a Member State other than that in which the registered office is situated cannot be regarded as sufficient factors to rebut the presumption laid down by the European Union legislature unless a comprehensive assessment of all the relevant factors makes it possible to establish, in a manner that is ascertainable by third parties, that the company’s actual centre of management and supervision and of the management of its interests is located in that other Member State” See Paragraph 53 of *Interedil*. Further, as explained in the Guidance Text, the mere presence of, for example, bank accounts, is not sufficient to rebut the COMI presumption. As such, even if the Madrid-based suppliers or the Spanish bank would attempt to rebut the presumption provided for in the EIR Recast, it would likely not prevail. As explained above, the existence of a bank account and a few non-binding agreements are not objective factors and ascertainable by third parties.

Accordingly, the Strasbourg High Court would likely also have jurisdiction to open the main proceeding under the EIR Recast came into force.

**Some 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] **1.5**

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

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

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

**Although Bella has a warehouse in Italy, as explained above, Bella's COMI will likely be found to be in France. The Italian Bank will likely not be able to open a secondary proceeding solely for the purpose of securing an Italian insolvency distribution ranking. Pursuant to Art. 7(2) EIR Recast, "[t]he law of the State of the opening of proceedings [as defined in Art. 7(1) EIR Recast] shall determine the conditions for the opening of those proceedings, their conduct and their closure. In particular, it shall determine the following . . . (i) the rules governing the distribution of proceeds from the realisation of assets, the ranking of claims . . . ." There are a few exception contained in Articles 8-18 EIR Recast to the general rule that the *lex concursus* should apply. None of the listed exceptions appear to apply to the facts at hand. Accordingly, the Italian bank will likely be found to be barred from opening a secondary proceeding for the sole purpose of securing a ranking pursuant to Italian law.**

**The facts are unclear as to what claim the Italian Bank has against Bella. If it is a secured claim related to a mortgage (maybe in connection with the Italian warehouse), the exception set forth in Article 8 EIR Recast may apply. Article 8 EIR Recast (Third parties' rights in rem) provides in pertinent part, that, [t]he opening of insolvency proceedings shall not affect the rights *in rem* of creditors . . . in respect of tangible or intangible . . . assets . . . ." Art. 8(2) (a) states that "the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by lien or a mortgage; (b) the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim . . . by way of guarantee; (c) the right to demand assets from, and/or to require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled. . . ." Recital 68 emphasises that "[t]here is particular need for a special reference diverging from the law of the opening State in the case of rights *in rem*, since such rights are of**

**considerable importance for the granting of credit. The basis, validity and extent of rights *in rem* should therefore normally be determined according to the *lex situs* and not be affected by the opening of insolvency proceedings. . . Where assets are subject to rights *in rem* under the law of *lex situs* in one Member State but the main insolvency proceedings are being carried out in another Member State, the insolvency practitioner in the main insolvency proceedings should be able to request the opening of secondary insolvency proceedings in the jurisdiction where the rights *in rem* arise if the debtor has an establishment there. . . .” Given that the location of a warehouse will likely satisfy the definition of “establishment” set for in EIR Recast Article 1(10) (“any place of operations where a debtor carries out or has carried out in the 3-month period prior to the the request to open main insolvency proceedings a non-transitional economic activity with human means and assets”), a secondary proceeding could be open if the Italian Ban has indeed a right *in rem*.**

**Again, the facts as to whether the Italian Bank has a right *in rem* are unclear. Should the right the Italian Bank has be indeed an *in rem* right, the exception set forth in Article 8 might be applicable.**

**While your reasoning is sound to some extent, you are missing a discussion on the concept of “Establishment”.**

- 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 SARM 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: 6 out of 15.

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

Total marks: 41 out of 50.