



**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

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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.***
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(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*.***

**The correct answer was C.**

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.**

*To statement 1: This is the presumption of the center of main interest ("COMI"). The EIR Recast stipulates in Art. 3(1) that COMI is the place where the debtor's interest is regularly located in relation to the interests of third parties. The EIR Recast has established the determination of the COMI by various presumption. The definition of COMI is made less strict in order to make the determination of COMI more predictable and flexible in practice. The main presumption regarding the COMI is its determination by the place of the registered office in the case of companies or legal persons. The presumption can only be rebutted if the objective evidence indicates that the administration of the debtor's interests is carried out in a state other than the state in which the registered office is located (e.g., in the case of a "letterbox" company). For example, if it appears from a third party's perspective that the place where the company's head office is located does not coincide with the jurisdiction of its seat, the presumption may be rebutted. This principle from the ECJ case law is also reflected in recital 30 of the EIR Recast.*

*To statement 2: This statement is an expression of the material scope of the EIR Recast, as it already follows from Art. 1. It follows from this that the Recast is not only geared towards liquidation but focuses in particular on procedures for rescuing economically viable but financially distressed companies. This precisely concerns those debtors who are at a stage where only the probability of insolvency is given. This principle also follows from recital 10 of the EIR Recast. This orientation is an innovation compared to the EIR 2000, which in such cases provided only for the partial or complete sale of a debtor and the appointment of an insolvency administrator ( Art. 1 EIR 2000). The EIR Recast follows a European trend to promote restructuring proceedings.*

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.**

*Example 1: Article 3 sec. 2 EIR Recast*

*Article 3(2) of the EIR Recast states that even if the debtor's COMI is established, courts of another Member State may open insolvency proceedings against the debtor, provided that the debtor has an establishment in the said Member State. However, the effects of these proceedings shall be limited to the debtor's assets located in the territory of that Member State. The possibility of being able to conduct such secondary proceedings alongside the main proceedings according to Art. 3 (1) of the EIR Recast is an expression of modified universalism.*

### **Example 2: Article 19 sec. 2 EIR Recast**

*Pursuant to Art. 19 (1) of the EIR Recast, any judicial decision opening insolvency proceedings shall be recognised by all other Member States of the European Union. Art. 19 (2) of the EIR Recast states in this context that the recognition of main proceedings under Art. 3 (1) of the EIR Recast does not preclude the opening of secondary proceedings under Art. 3 (2) of the EIR Recast. The possibility of parallel main and secondary proceedings is an expression of modified universalism, as the EIR Recast provides for the possibility of main insolvency proceedings in a multitude of secondary proceedings.*

### **Example 3: Chapter V EIR Recast, Art. 56 - 77 EIR Recast**

*While the EIR 2000 did not contain provisions for dealing with the insolvency of multinational groups and the consequence of the insolvency of cross-border groups was always a fragmentation of the company into its constituent parts, the EIR Recast contains an entire section, Chapter V, for the regulation of group insolvencies. Articles 56-77 of the EIR Recast provide for the possibility of consolidation of responsibilities, according to the newly added recital 53. The EIR Recast reserves the possibility for a court to open insolvency proceedings for several companies of the same group of a single jurisdiction. Against this background, it should also be possible to appoint one insolvency practitioner for all proceedings concerned, provided this is compatible with the applicable rules. Thus, it should be possible to create a single procedure while respecting local territorial procedures, so that this section is also an expression of modified universalism.*

### **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. Provision, Article 56 EIR Recast***

***Art. 56 of the EIR Recast obliges insolvency practitioners of different companies belonging to a group of companies to cooperate to facilitate the effective administration of the group insolvency, provided that the cooperation is compatible with applicable rules and does not lead to a conflict of interest.***

## **2. Provision, Article 57 EIR Recast**

*Art. 57 of the EIR Recast also obliges the different courts involved in a group insolvency to cooperate to ensure effective administration of the insolvency. In this context, Art. 57 of the EIR Recast lists cases in which cooperation is considered desirable, such as coordination in the appointment of insolvency practitioners or also coordination in the approval of protocols.*

## **3. Provision, Article 58 EIR Recast**

*Art. 58 of the EIR Recast concludes the communication duties by lastly determining the duty of communication cooperation between insolvency practitioners and the court. Thus, insolvency practitioners shall cooperate and communicate with any court where insolvency proceedings are conducted in relation to the assets of another member of the group. Again, this duty to cooperate as well as to communicate is intended to serve the effectiveness of the administration of the 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.***

#### ***Example 1: "Synthetic" Secondary Proceedings***

*Pursuant to Art. 36 of the EIR Recast, the insolvency practitioner in the main insolvency proceedings may, for the purpose of avoiding the opening of secondary insolvency proceedings in another Member State, enter a unilateral commitment whereby he declares, with respect to the assets located in the other Member State, to consider the requirements of the respective national law when precisely distributing these assets or the proceeds resulting from a realisation. Via Art. 36 of the EIR Recast, a "virtual" or "synthetic" secondary procedure is thus carried out. At the same time, control remains with the insolvency administrator of the main proceedings and "real" secondary proceedings are avoided.*

#### ***Example 2: Temporary Stay of Individual Enforcement Proceedings***

*Pursuant to Art. 38 (3) of the EIR Recast, the insolvency administrator or the debtor in own administration of the main insolvency proceedings may file a request for a stay of the opening of the secondary insolvency proceedings. Such a request may be considered if the stay of individual enforcement measures has been decided in the context of the main proceedings. Allowing the secondary insolvency proceedings to*

*be opened nonetheless could frustrate the negotiation process and possibly undermine the rescue of the company.*

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)?**

*Based on Art. 46 of the EIR 2000, the European Commission was required by 1 July 2012 at the latest, on the one hand, to draw up a report on the application of the First EIR, which entered into force in 2002, and in this context to submit proposals on what could be improved and how the improvement and adaptation should take place. With the EIR 2015, after 15 years of testing the first EIR, an adaptation to the needs of insolvency practice could take place. The adjustment was largely made via the ECJ's law-breaking and its interpretation of the EIR.*

*Initially, the focus of the EIR 2000 on classic liquidation-oriented proceedings was seen as essentially in need of revision. This focus on the liquidation of companies was no longer in line with the trend that was emerging in the Member States of the European Union, namely, to place more emphasis on the aspects of restructuring and reorganisation. According to Art. 1 of the EIR Recast, the review also extends to the restructuring of companies in distress but still viable.*

*The definition of COMI was also considered to be in need of revision. Even under the EIR 2000, a main insolvency could only be opened where the centre of the debtor's main interests was located (COMI). However, the EIR 2000 did not define COMI, but only gave indications for the determination via recital 13. However, this framework could not be enforced due to its lack of codification. This has now been made more binding in the EIR Recast by implementing a binding definition in Art. 3 (1) of the EIR Recast. The definition found there follows the case law of the ECJ (esp.: C-341/04, ECLI:EU:C:2006:281) and creates legal certainty in the determination of the COMI.*

*A refinement of the EIR 2000 was made in the EIR Recast regarding the enforceability of decisions in other Member States. Article 32(1) of the EIR Recast provides that insolvency-related judgments must be enforced in accordance with the provisions of*

*the Brussels I Regulation, which means that, in principle, no further declaration of enforceability is required.*

*A significant advance on the EIR 2000 also lies in the creation of binding regulations on the notification of creditors and the establishment of insolvency registers in the EIR Recast. Whereas the EIR 2000 left it up to the insolvency administrator to provide information on the opening of proceedings in other Member States to the public, Art. 28 (1) of the EIR Recast now obliges the insolvency administrator to apply for publication procedures under local law at the debtor's place of establishment. In addition, the EIR Recast moves away from the concept of tolerating the maintenance of separate insolvency register systems in individual countries and, under Art. 24 of the EIR Recast, now obliges Member States to establish and maintain registers within their territory.*

*Finally, significant progress should also be made regarding the regulation on cooperation and communication in connection with main and secondary insolvency proceedings. In addition, for the first time, instruments were comprehensively implemented in the regulatory framework of the EIR Recast, which should contribute to avoiding the opening of secondary insolvency proceedings in favour of effectiveness.*

Question 3.2 [maximum 5 marks] **3.5**

***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.***

*In contrast to the EIR 2000, the EIR Recast was intended to find a regulation for improving the coordination of insolvency proceedings in the case of companies consisting of many individual companies where a fragmentation of the individual proceedings typically occurs in connection with cross-border proceedings. Although the EIR Recast was intended to create efficiency, the result is sometimes described as "modest".*

*Particularly criticised is the overall very open and broad wording of the regulations on the so-called "group coordination procedure". According to the EIR Recast, the coordination procedures are of a voluntary nature and the measures formulated are merely recommendations, in particular the designation of a group coordinator. The practical value is consequently partly denied. It is also considered problematic that members in non-member states are not included in these procedures. In the criticism of the group coordination procedure, the weakest aspect of the regulation is said to be the fact that the individual insolvency practitioner has the right to object to the inclusion of his insolvency proceedings in the group coordination. According to Art. 64 (1) of the EIR Recast, this objection does not have to be justified, which means that this procedure is "only" an opt-out procedure and is thus partly regarded as a "toothless tiger".*

*While there is a clear need to create binding rules to find a particularly uniform solution for groups of companies that fall into cross-border insolvency, this has not been achieved with the EIR Recast. A solution for a set of rules that can lead to more clarity, legal certainty and effectiveness during proceedings requires binding rules that offer little room for interpretation, also taking into account third countries. This is confirmed by the option to bring action against companies based in third countries. It must not be possible to opt out. Although this is an advance towards universalism, it still preserves a modified aspect as a possibility. **What is your recommendation to mitigate the first issue about group coordination and the voluntary nature of it?***

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.***

*First, one difference between the European Insolvency Regulation and the European Restructuring Directive lies in the quality of the different legal acts of the European Union. A "regulation" has the effect of being directly binding on the member states, which applies to the European Insolvency Regulation. A "directive", on the other hand, gives states the scope to develop and implement regulatory structures in their own legal systems, which in turn applies to the restructuring directive.*

*In terms of content, moreover, the European Insolvency Regulation and the Restructuring Directive are geared towards different subjects of regulation, also regarding the time perspective. The idea of creating an insolvency regulation at the European level arose from the realisation of the glaring disadvantages of a Europe divided into many different fragmented insolvency regulations. Unification through a common regulation was intended to bring about harmonisation in that common regulatory structures were to be created for dealing with cross-border insolvency matters. The European Insolvency Regulation thus intervenes much more deeply in the fundamental substantive structures of insolvency law.*

*The Restructuring Directive, on the other hand, intervenes at an earlier stage, as it is intended to prevent insolvency. Thus, it is precisely in restructuring that early warning systems are implemented, which should enable debtors to recognise the deterioration of the business and avoid insolvency through appropriate measures.*

*Since the topic taken up by the Restructuring Directive is predominantly new to the European Union and, as a directive, encourages the states of the European Union to*

*develop their own restructuring concepts, the harmonising effect is less than with the optical Insolvency Regulation. What both legal acts have in common is that in the European Insolvency Regulation, too, the rescue of still lovable but economically distressed companies is an essential aspect to be considered in the assessment of an insolvency situation. The only difference is that based on the European Insolvency Regulation one is already in an insolvency case.*

Total marks: 13.5 out of 15.

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

Scenario

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

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

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

Question 4.1 [maximum 5 marks] 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.***

***A very important difference between the EIR 2000 and the EIR Recast is the more recent focus on the restructuring of companies and thus also on safeguard proceedings. The EIR 2000 did not contain any provisions on safeguard proceedings, so that the EIR 2000 did not contain any provisions on the jurisdiction of a court for such proceedings.***

According to Art. 3(1) of the EIR 2000, the courts of the Member State within the territory of which the debtor has the COMI have jurisdiction to open insolvency proceedings. According to Art. 3(1) S. 2 it is presumed, to prove the contrary, that the centre of main interests of legal persons is the place of the statutory seat. When resolving the jurisdictional conundrum of the case *Eurofood IFSC Ltd* (C-341/04, ECLI:EU:C:2006:281), the CJEU first highlighted the autonomous meaning of the term COMI and then emphasised that it must be identified by reference to criteria that are both objective and ascertainable by third parties.

In the CJEU's interpretation of the EIR 2000, the recognisability of the COMI for third parties was implementable if the COMI could be determined based on visible criteria such as the registration by a member state. The EIR Recast also adopted this and established a presumption of COMI with the registration of the company. Against this background, it could be assumed that the High Court in Strasbourg would also have jurisdiction under the EIR 2000 based on Art. 3 (1) of the EIR 2000 due to the registration of *BELLA SARL* in France.

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

- **The Strasbourg High Court does not have international insolvency jurisdiction to open insolvency proceedings.**
- **You were expected to mention that under the EIR 2000 (Article 3), the determination of international jurisdiction to open main insolvency proceedings is linked to the debtor's centre of main interest (COMI). According to Article 3 EIR Recast, COMI shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties (see also Recital 28). The place of the registered office shall be presumed to be the COMI in the absence of proof to the contrary.**
- **Relevant case law: *Eurofood IFSC Ltd*, Case C-341/04, ECLI:EU:C:2006:281 (May 2, 2006) and *Interedil Srl, in liquidation v Fallimento Interedil Srl*, Case C-396/09, ECLI:EU:C:2011:671 (Oct. 20, 2011).**
- **However, Article 1 of the EIR 2000 states that 'this Regulation shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator.**
- **Article 2 EIR 2000 states that "'insolvency proceedings" shall mean the collective proceedings referred to in Article 1(1). These proceedings are listed in Annex A.**
- **Annex A of the EIR 2000 only listed two French insolvency proceedings which came under the scope of the EIR 2000: (i) liquidation; (ii) redressement judiciaire (rehabilitation).**

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



Question 4.2 [maximum 5 marks] **1**

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

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

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

*For the applicability of the EIR Recast, Art. 1 of the EIR Recast provides that this set of rules shall initially apply only (1) to public collective proceedings, including provisional orders, based on insolvency law provisions and in which, for the purpose of rescue, debt settlement, reorganisation or liquidation, (2) a debtor is expropriated and an insolvency administrator is appointed, (3) the assets and business of the debtor are subjected to judicial control or supervision and, finally, (3) a stay of enforcement proceedings is granted by the court or by operation of law.*

*By way of subsumption with the facts of this case, it must be determined that the EIR Recast is applicable. The safeguard proceedings are, first, public collective proceedings, which are also listed in Annex A. The EIR Recast is a public collective procedure. It must be considered that the EIR Recast lists the procedures permitted under Art. 1 for the application of the EIR Recast in Annex A, so that the identification of the procedure is simplified in this way. According to Annex A, the safeguard procedure in French is the "Procédure Sauvegarde", which is listed among the French procedures.*

*Since the debtor is typically deprived of the power to manage and dispose of his company by means of these safeguarding proceedings and an administrator is appointed to manage the company, the requirement under paragraphs 2 and 3 is also fulfilled. This corresponds to an interpretation of the French procedure. As these are French safeguard proceedings, the provision would need to be examined under French law to verify this interpretation. Typically, enforcement measures are also suspended in safeguard proceedings, as otherwise the goods and other assets would be at risk of no longer being available because of the enforcement. Against this background, it can be assumed that the requirements for the applicability of the EIR Recast are met.*

**Some 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.**

*According to Art. 3(2) of the EIR Recast, courts of another Member State have the jurisdiction to open insolvency proceedings if the debtor has an establishment within the territory of that Member State. As secondary insolvency proceedings, the effects of these procedures are limited to the assets located in that Member State.*

*The term "establishment" is defined in Art. 2(10) of the EIR Recast. According to this definition, establishment means any place of business where the debtor carries out an economic activity of a non-transitory nature, involving the use of personnel and assets. In the "Interedil" case, the ECJ confirmed that the definition of the exercise of an economic activity is linked precisely to the existence of human resources, which must arise from a minimum level of organisation and a certain degree of stability. The mere existence of goods or bank accounts does not meet the requirements for the definition of establishment (C-396/09, ECLI:EU:C:2011:671). The activity in the other member state may not only be of a temporary nature. The decisive factor is how the activity appears to third parties (paragraph 71 Virgós-Schmit Report).*

*The activity of Bella SARL in Italy must therefore be an establishment for the scope of application under Article 3(2) of the EIR Recast for the opening of secondary insolvency proceedings to be opened at all.*

*Bella SARL has warehouses in Germany, Poland Spain, Portugal and in Italy, among others. All employees of this company work outside France, where the company is registered and operates its first shop in Strasbourg.*

*The warehouse set up in Italy, like the warehouses in other countries, has not been created on a temporary basis, but serves as a starting point for the distribution of cosmetic products in the country of Italy. The Company's assets are in this warehouse and the Company's personnel are employed there as well as at the locations of the other warehouses.*

*Due to the economic activity conducted by Bella SARL from this location in Italy, it can be assumed that it is an establishment within the meaning of Art. 2 (10) of the EIR Recast.*

*Since, according to Art. 3 (2) of the EIR Recast, the establishment is in a Member State other than the one in which the COMI of the company is located, the conditions for opening secondary insolvency proceedings in Italy are met.*

*Insofar as the Italian bank wishes to secure interests as a creditor by opening such secondary insolvency proceedings and also a corresponding ranking of its claims, the secondary insolvency proceedings are the means created for this purpose. Thus, the secondary insolvency proceedings are designed precisely to preserve local interests of creditors.*

***Your reasoning is sound, however, 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 *Interedii*) is evidently missing.***

Total marks: 7 out of 15.

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

Total marks: 39.5 out of 50.