SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2B

THE EUROPEAN INSOLVENCY REGULATION

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

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
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6.1 If you selected Module 2B as one of your **compulsory modules** (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is **23:00 (11 pm) GMT on 1 March 2023**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2023. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.

6.2 If you selected Module 2B as one of your **elective modules** (see the e-mail that was sent to you when your place on the course was confirmed), you have a **choice** as to when you may submit this assessment. You may either submit the assessment by **23:00 (11 pm) GMT on 1 March 2023 or by 23:00 (11 pm) BST (GMT +1) on 31 July 2023**. If you elect to submit by 1 March 2023, you **may not** submit the assessment again by 31 July 2023 (for example, in order to achieve a higher mark).

7. Prior to being populated with your answers, this assessment consists of **10 pages**.

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total]

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph **in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

The EIR 2000 was the first European initiative to ever attempt to harmonise the insolvency laws of EU Member States.

Select the correct answer from the options below:

(a) True, before the EIR 2000, the EU has not sought to harmonise the insolvency laws of EU Member States.

(b) False, there was another EU Regulation regulating insolvency law at EU level before the EIR 2000.

(c) False, an EU Directive regulating insolvency law at EU level existed before the EIR 2000.

(d) False, the EU sought to draft Conventions with a view to harmonising the insolvency laws of EU Member States as early as the 1960s, but these initiatives failed.

Question 1.2

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

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

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

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

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

Question 1.3

In 2017, the EIR Recast replaced the EIR 2000. Recasting the EIR 2000 was deemed necessary by various stakeholders. Why?

(a) Through its case law, the CJEU had altered the literal meaning of several provisions of the EIR 2000. Newly formulated rules, in line with the CJEU interpretation, were therefore needed.

(b) The EIR 2000 was generally regarded as a successful instrument in the area of European insolvency law by the EU institutions, practitioners and academics. However, a number of its shortcomings were identified by an evaluation study and a public consultation.

(c) The fundamental choices and underlying policies of the EIR 2000 lacked support from the major stakeholders (businesses, public authorities, insolvency practitioners, etc.). A new Regulation was therefore needed to meet their expectations.

(d) The EIR 2000 proved to be inefficient and incapable of promoting co-ordination of cross-border insolvency proceedings in the EU.

Question 1.4

Why can it be said that the EIR Recast did not overhaul the *status quo*?

(a) The EIR Recast is a copy of the EIR 2000. Its structure and the wording of all articles are similar.

(b) Although the EIR Recast includes relevant and useful innovations, it has stuck with the framework of the EIR 2000 and mostly codified the jurisprudence of the CJEU.

(c) The EIR Recast has not added any new concept to the text of the EIR 2000.

(d) It is incorrect to say that the EIR Recast has not overhauled the *status quo* at all. On the contrary, the EIR Recast has departed from the text of its predecessor and is a completely new instrument which has rejected all existing concepts and rules.

Question 1.5

The EIR Recast is an instrument of a predominantly procedural nature (including private international law issues). Nevertheless, it contains a number of substantive provisions. Which one of the following provisions constitutes a harmonised (stand-alone) rule of substantive law?

(a) Article 18 EIR Recast ("Effects of insolvency proceedings on pending lawsuits or arbitral proceedings").

(b) Article 40 EIR Recast ("Advance payment of costs and expenses").

(c) Article 7 EIR Recast ("Applicable law").

(d) Article 31 EIR Recast ("Honouring of an obligation to a debtor").

Question 1.6

The EIR 2015 does not provide a definition of "insolvency" or "likelihood of insolvency". What are the consequences of this?

(a) The ECJ has provided a definition of "insolvency" in recent case law.

(b) The European Commission has provided a definition of "insolvency" in its Recommendation on a "New Approach to Business Failure" published in 2014.

(c) Each Member State will define "insolvency" in national legislation.

(d) Deciding whether a debtor is "insolvent" or not is a matter for the ECJ to determine.

Question 1.7

The EIR Recast introduced the concept of “synthetic proceedings”. What are they?

(a) “Synthetic proceedings” means that when an insolvency practitioner in the main insolvency proceedings has given an undertaking in accordance with Article 36, the court asked to open secondary proceedings should not, at the request of the insolvency practitioner, open them if they are satisfied that the undertaking adequately protects the general interests of local creditors.

(b) “Synthetic proceedings” means that for the case at hand, several main proceedings can be opened, in addition to several secondary proceedings.

(c) “Synthetic proceedings” means that when secondary proceedings are opened, these are automatically rescue proceedings, as opposed to liquidation proceedings.

(d) “Synthetic proceedings” means that insolvency practitioners in all secondary proceedings should treat the proceedings they are dealing with as main proceedings for the purpose of protecting the interests of local creditors.

Question 1.8

The EIR Recast kept the concept of the “centre of main interests” (COMI) of the debtor, which already existed in the EIR 2000. What were the amendments adopted in relation to this concept?

(a) The COMI of the debtor is not presumed to be “at the place of the registered office” anymore and the debtor will need to confirm where his COMI is before the beginning of each case.

(b) Although the COMI of a debtor is still presumed to be “at the place of the registered office”, it is now possible to rebut this presumption, albeit only by the courts.

(c) The rule that a company’s COMI conforms to its registered office is now an irrefutable presumption.

(d) Although the COMI of a debtor is still presumed to be “at the place of the registered office”, it should now be possible to rebut this presumption based on Article 3 EIR Recast and Recital 31.

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*.

The correct answer was C.

Total marks: 8 out of 10.

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks] 2

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

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

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

[Answer:

Statement 1: According to Recital 30 of Regulation 2015/848 of Article 3(1) it should be rebuttable that the registered office, the principal place of business and the habitual residence are the centre of main interests]

Statement 2: According to Article 1, the EIR Recast should include proceedings promoting the rescue of economically viable but financially distressed debtors, especially at a stage where there is a likelihood of insolvency only.

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.

[Answer:

1- As per Articles 3(1) of EIR Recast, court in states where COMI of a debtor is situated shall have the jurisdiction to open main insolvency proceedings

2- As per Article 19(2) of EIR Recast, court cannot stop the opening of secondary proceedings in another Member State.

3- As per Recital 53 of EIR Recast, in the case of group insolvencies though the COMI of members of group companies will have to be determined for each group member separately court can open insolvency proceedings of the same group companies in one jurisdiction if COMI of these companies lie in the same member state.]

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.

[Answer:

1- According to Article 41(1) EIR Recast, as long as it is compatible with the regulations applicable to the respective processes, the insolvency practitioner in the main insolvency proceeding and the insolvency practitioner(s) in secondary proceedings touching the same debtor shall cooperate with one another. Article 41 EIR Recast, however, explains that this cooperation may take any shape, including the signing of agreements or protocols.

2- The EIR Recast has codified some already-accepted best practises in the areas of cooperation and communication, and it also went a step further by requiring that any court that is considering opening insolvency proceedings or that has already opened such proceedings, cooperate with any other court that is considering doing so (Article 42(1) EIR Recast).81 As a result, cooperation continues before the insolvency processes begin. This prevents

aggressive forum shopping and ensures greater coordination. The cooperation is generally limited only to the degree that it is incompatiable with the rules that apply to each of the relevant proceedings.

3- The EIR Recast adds court-to-court responsibilities (Article 43 EIR Recast) in addition to insolvency practitioner-to-insolvency practitioner and court-to-court co-operation and communication obligations (Article 42 EIR Recast). It outlines three circumstances in which such obligations may arise:

- An insolvency practitioner in main insolvency proceedings shall cooperate and communicate with any court that is considering or has already initiated secondary insolvency procedures;

- A court before which a request to begin main insolvency proceedings is pending, or which has begun such proceedings, must cooperate and communicate with an insolvency practitioner in territorial or secondary insolvency proceedings;

- A court before which a request to open further territorial or secondary insolvency proceedings is ongoing, or which has begun such proceedings, must cooperate and communicate with an insolvency practitioner in territorial or secondary insolvency 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.

[Answer:

1- As per Article 38(2) of EIR Recast, if in a main insolvency proceedings an insolvency professional has given an undertaking as per Article 36 then the court asked to open secondary proceedings cannot open the proceedings if it is satisfied that the undertaking protects general interest of local creditors.

2- As per Recital 45 or EIR Recast, the court can grant temporarily stay on the opening of secondary insolvency proceedings, when a temporary stay has been granted in the main insolvency proceedings.]

Total marks: 10 out of 10.

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

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

Question 3.1 [maximum 5 marks] 1

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)?

[Answer:

Following elements were identified by the European Commission:

1. The variety of options accessible to debtors experiencing financial difficulties in order to restructure their businesses varies substantially according to national insolvency legislation. Businesses can only restructure at a somewhat late stage, in the context of official insolvency proceedings, in some Member States due to a limited range of methods. In several other Member States, restructuring is possible early in the process, but the existing methods are less efficient than they may be or involve differing degrees of formality, particularly when using out-of-court techniques. This was mostly discussed in the Directive.

2. National laws that provide entrepreneurs a second chance, particularly by releasing them from debts accrued during the course of their business, vary in terms of the duration of the release period and the circumstances under which a release may be granted. This was mostly discussed in the Directive.

3. The disparities between the national restructuring frameworks and the national rules granting honest businesspeople a second chance result in different recovery rates for creditors, higher costs and uncertainty when determining the risks of investing in another Member State. They make it more challenging to establish and implement consistent restructuring strategies for cross-border groups of enterprises. In general, the differences could act as a deterrent for companies looking to establish themselves in various Member States.
This was mostly discussed in the Directive.

4. Only jurisdiction, recognition, and enforcement, applicable law, and cooperation in cross-border bankruptcy procedures are addressed in Council Regulation (EC) No 1346/2000 (1). The scope of the Regulation should be expanded to include preventive measures that encourage the rescue of an economically viable debtor and provide entrepreneurs with a second opportunity.

5. The Union's insolvency laws should be modernized as a major measure in the Communication on the Single Market Act II (4) of October 2012 in order to support business survival and give entrepreneurs a second opportunity. Ways should be examined to make national insolvency rules even more effective in order to level the playing field for businesses, entrepreneurs, and private individuals inside the internal market.

6. The 12 December 2012 Communication of the Commission on a new European approach to business failure and insolvency (1) identifies a few areas where divergences in country insolvency legislation may prevent the development of an effective internal market. It was stated that establishing fair competition in these areas will boost business, entrepreneur, and individual confidence in the systems of other Member States, increase access to finance, and promote investment.

7. On January 9, 2013, the Commission passed the Entrepreneurship 2020 Action Plan (2), in which the Member States are urged to, among other things, offer support services to businesses for early restructuring, advice to prevent bankruptcies, and support for small and medium-sized enterprises to restructure and relaunch. This plan also calls for the Member States to reduce, whenever possible, the discharge time and debt settlement for honest entrepreneurs after bankruptcy to a maximum of three years by 2013.

8. In order to reduce divergences and inefficiencies that obstruct the early restructuring of viable

businesses in financial difficulty and the possibility of a second chance for sincere entrepreneurs, as well as to lower the cost of restructuring for both debtors and creditors, it is necessary to encourage greater coherence between the national insolvency frameworks. The returns to all categories of creditors and investors would be maximised, and cross-border investment would be encouraged, if those national insolvency regulations were more coherent and efficient. Greater coherence would also make it easier to restructure groups of businesses, regardless of where the group's members are located within the Union.

9. Removing obstacles to efficient restructuring of viable businesses in financial trouble helps to save jobs and is advantageous for the whole economy. Higher self-employment rates in the Member States would result from making it simpler for entrepreneurs to get a second chance. Furthermore, effective insolvency procedures will reduce the economic and social costs associated with the deleveraging process for over-indebted enterprises by easing the transition for them and supplying a better assessment of the risks involved in lending and borrowing decisions.

10. A more cogent strategy at the Union level would be advantageous for small and medium-sized businesses, as they lack the capacity to manage high reorganisation costs and benefit from the more effective reorganisation processes in some Member States.

11. Member States should be able to take the necessary steps to guarantee that tax revenue is collected and recovered while upholding the fundamental principles of tax justice and that effective action is taken in the event of fraud, evasion, or abuse.

12. A restructuring framework should make it possible for debtors to deal with their financial issues before they become insolvent so that their firm can continue. However, in order to eliminate any dangers of the procedure being abused, the debtor's financial issues must be likely to result in its insolvency and the restructuring plan must be able to stop it while maintaining the sustainability of the company.

13. National preventive restructuring frameworks should include flexible procedures limiting court formalities to where they are necessary and proportionate in order to safeguard the interests of creditors and other interested parties likely to be affected. This will increase efficiency, decrease delays, and cut costs.

14. A debtor should have the option to ask the court for a stay of individual enforcement actions and a suspension of insolvency proceedings whose opening has been requested by creditors if such actions may negatively impact negotiations and impair the likelihood of a restructuring of the debtor's business. However, the stay should only be initially given for a period of no more than four months in order to ensure a just balance between the rights of the debtor and creditors, and taking into consideration the experience of previous reforms in Member States

15. In order to fully comply with the freedom to conduct business and the right to property as enshrined in the Charter of Fundamental Rights of the European Union, court confirmation of a restructuring plan is required to ensure that the reduction of creditors' rights is proportionate to the benefits of the restructuring and that creditors have access to an effective remedy. A plan that is likely to decrease the interests of dissenting creditors below what they may reasonably expect to obtain in the absence of a restructuring of the debtor's business should thus be rejected by the court.

16. Even though research indicates that entrepreneurs who have filed for bankruptcy have a higher chance of being successful the second time around, the effects of bankruptcy, particularly the social stigma, legal repercussions, and the ongoing inability to pay off debts, serve as significant inhibitors for entrepreneurs looking to start a business or get a second chance. Therefore,

measures should be adopted to limit the detrimental impacts of bankruptcy on business owners, such as providing for a full discharge of debts after a set amount of time.]

You discuss too many elements that were not linked to the Regulation.
The relevant ones were:

- ***COMI*. Despite the fact that the essence of the concept of COMI has not changed in the EIR Recast (compared to the EIR 2000), some important additions were made. First of all, the definition of COMI has been codified in Article 3 EIR Recast (in the EIR 2000 a similarly worded indication of COMI appeared in Recital 13). Secondly, a 'suspect period' was added in Article 3(1) EIR Recast, supplementing the rule on the registered office presumption in a fight against abusive forum shopping. These changes should improve predictability of the international insolvency jurisdiction, ensure maximization of estate value and material efficiency.**

- ***Groups of companies*. The EIR 2000 did not contain any rules dealing with insolvencies of enterprise groups. The basic premise of the EIR 2000 was that separate proceedings must be opened for each individual member of the group and that these proceedings are entirely independent of each other (entity-by-entity approach). The EIR Recast introduced two specific sets of provisions to promote the efficient administration of insolvency proceedings relating to different companies forming part of a group of companies. These are: 1) cooperation and communication in a group setting (Articles 56-60) and 2) group coordination proceeding (Articles 61-77). These novelties should streamline group insolvencies and make them more coordinated.**

- ***Information and publication*. Access to information is indispensable for effective exercise of creditors' rights. Under the EIR 2000, there were no mandatory EU-level publication requirements concerning decisions opening insolvency proceedings. There was also no European insolvency register which would permit searches in several national registers at the same time. The EIR Recast provides both for the compulsory establishment of national insolvency registers (Article 24) and creation of the interconnection of insolvency registers via the e-Justice Portal (Article 25). The resulting improved access to information should enhance the degree of creditor participation and lower the monitoring costs, thus making the European insolvency regime more cost-efficient.**

Question 3.2 [maximum 5 marks] 2

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.

[Answer:

1- **Concept of COMI:**

The RR continues to support the COMI idea while attempting to make ambiguity clear. Although the Commission's objectives are clear, it is unclear whether legal issues still exist. Some of the contentious aspects are still present. For instance, by defining COMI, the presumption in favour of the registered office is strengthened and clarified. While the assumption is being refined, it may be subject to abuse and manipulation if the RR guidelines are included when the presumption is to be refuted. It is stated that explaining COMI was obviously not intended to be a priority among the steps towards a rescue-friendly regime, putting aside the discussion concerning COMI's suitability as a jurisdictional trigger and its purported mismatch with the freedom of establishment. The RR's text makes clear that the Commission's top priority was to stop unfair forum shopping. As a result, by adding ascertainability and time-related safeguards in favour of creditors and other parties, the RR has tightened the COMI concept. Since the debtor may easily extend the number of restructuring options by "COMI shifting," it is true that the incorporation theory or a more lenient COMI choice could raise the chances for corporate rescue within the EU. The scales have tipped this time, however, in favour of creditor protection. But as a side effect, legal clarity can help create circumstances that are conducive to corporate rescue. Investors should be aware of the danger of insolvency, a crucial step in their decision-making process. Therefore, even if fresh investment is directed towards insolvent enterprises, a platform that enables investors to plan and estimate costs might be alluring for accommodating it. Similar to that, it enables struggling businesses to design a rescue strategy without worrying about having it thwarted by unfavourable court rulings that relocate the company's COMI. After all neither the OR (what is the OR?) nor the RR prohibit shifting of COMIs. provided the decision is made promptly and safeguards the rights of creditors.
You were also required how you they could be corrected.

2- <u>Groups of Companies:</u>

The introduction of provisions for group insolvencies is undoubtedly an improvement. However, being limited to matters of an administrative nature, it falls short of boosting a rescue-friendly regime. The main problem is that without any actual binding effect, group coordination is a 'blunt sword'. Although an explicit framework is finally set for cooperation and communication, it is subject to procedural limits and reservations in favour of the law of the MS to which courts and IPs are subject, leaving room for recalcitrant jurisdictions to refuse cooperation. In the same manner, procedural coordination reliant on the IPs' initiatives and a liberal opt-in mechanism does not effectively prevent IPs from ring-fencing local creditors at the cost of value-maximisation. It is submitted, however, that the 'comply-or-explain' obligation set out in article 70(2) RR and the revocation mechanism provided in article 75 RR could deter any abuse of powers. Furthermore, the RR fails to clarify to what extent a court can scrutinise the appropriateness of a restructuring plan and does not address actions for disputes arising from the coordination. This uncertainty, along with the aforementioned points, could seriously hamper the restructuring of GoCs. This article argues that procedural coordination is the least interventionist and ambitious approach, protecting the Commission from exposure to the difficulties of substantive or procedural consolidation. It could be understood as an extrapolation of the cooperation principles governing the concept of main and secondary insolvency proceedings. Group insolvencies will probably not achieve meaningful outcomes, since they fail to mirror the reality of economically integrated groups and interrelated business activities. Moreover, the complexity of the procedure adds to the overall cost. Given that the remuneration of the coordinator is calculated in accordance with the law of the MS in which coordination proceedings have been opened and borne by each member of the group proportionately, the reimbursement of the coordinator as well as the extra cost borne by each IP will probably constitute a deterrent for opening coordination proceedings. Although substantial consolidation has been almost unanimously rejected, procedural consolidation is the nearest feasible alternative. It is much more resource-effective to align parallel

proceedings by having the same individual in charge of them, besides also facilitating the implementation of a rescue plan. The difficulty of the task is not a convincing argument as to why the Commission restrained itself from such an initiative. RR explicitly dismissed any form of consolidation. The approach of procedural consolidation has probably been the outcome of compromise between Parliament and the Commission. Generally, the new provisions are formalistic and fail to provide viable solutions with regards to group restructuring, despite a range of solutions being put forward. Taking into consideration the exclusion of horizontally integrated groups and the aforementioned concerns, the new provisions could be useful in limited cases and provided mutual respect of parties involved exists. In all other cases, opening group proceedings is of marginal value, since they only offer some leverage to the IP against the creditors with regard to the legitimacy of his decisions] You were also required how you they could be corrected.

Question 3.3 [maximum 5 marks] 1

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.

[Answer:

With key similarities to the procedures used in EU countries, the Directive aims to standardise restructuring regimes throughout all of the Member States. It accomplished this by adopting a variety of ideas and clauses linked to strong and effective pre-existing restructuring frameworks, like Chapter 11 of the US Bankruptcy Code, the Irish Examinership, the UK Scheme of Arrangement, and the French sauvegarde procedure. It is a turning point in the evolution of European bankruptcy law because it is the first instrument to substantively harmonise insolvency law throughout the EU, albeit just a small portion of it, namely preventive restructuring. The Directive's harmonisation strategy in its ultimate version is to provide minimal requirements for preventive restructuring mechanisms.

Therefore, Although the Directive on Preventive Restructuring addresses some crucial restructuring-related issues, it will not result in the harmonisation envisioned in the 2014 Recommendation. The Directive is a good first step in the harmonisation of EU bankruptcy systems.

Firstly, the key elements of substantive insolvency law, such as a single definition of insolvency, the prerequisites for initiating insolvency proceedings, the ranking of claims, avoidance actions, and the identification and tracing of assets pertaining to the insolvency estate are not harmonised by the Directive. Instead, it admitted that: "the current diversity in Member States" legal systems regarding insolvency procedures "seems too large to bridge given the numerous links between insolvency law and connected areas of national law, such as tax, employment, and social security law."

Second, In the form of guiding principles or, when appropriate, specific rules, the Directive

"establishes common objectives. The Directive provides Member States with the flexibility to achieve the objectives by applying the principles and targeted laws in a way that is appropriate in their national situations, while also attempting to achieve the required coherence of frameworks across the EU. Given that certain Member States already have components of effective frameworks in place, this is especially crucial.

This is because the Directive's final text finally represents a great deal of compromise. Numerous changes to the legal language were made as a result of the negotiations, which took place in the Council and the European Parliament, particularly with regard to some of the most contentious clauses that are essential to a successful preventive restructuring.. The governance of restructuring proceedings and the precedence of creditors' interests under a plan, for instance, differ greatly between the Member States, reflecting different regulatory traditions. The majority of the modifications made throughout the negotiation process lessened the harmonisation impact of the Directive, primarily by allowing for more derogations than would be typical of a full harmonising instrument. A "puzzling variety of diverging options" has been described as the final outcome.

In view of the above, it is envisaged that the Directive's harmonising effect will be minimal. The implementation of the Directive by Member States will likely lead to distinct restructuring models, which will lead to the availability of systems that are situated at various places along the spectrum. The introduction of minimum standards means that the Directive's scope accommodates the status quo in a jurisdiction, allowing only minor or incremental changes to the practises already in place in a legal system rather than the introduction of completely new frameworks that are consistent with those established in other Member States.]

You spoke only about the Directive but you were meant to specifically differentiate the Regulation and the Directive. You could have discussed:

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

Total marks: 4 out of 15.

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

Scenario

Bella SARL is a French-registered company selling cosmetic products. The company had opened its first store in Strasbourg, France in 2010 and has warehouses across Europe, including in Germany, Ireland, Italy, Spain and Portugal. Its main warehouse is located in Cork,

Ireland. All of its employees are located in these countries and most of its customers are also located in these countries, yet some online purchases are coming mainly from the Netherlands and Poland.

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

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

Question 4.1 [maximum 5 marks] 1

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

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

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

[Answer:

The Strasbourg High Court has the authority to begin the desired insolvency proceedings on an international level. According to Article 3 of the EIR 2000, the courts in members states where the debtor's primary area of interest is located have the authority to initiate insolvency procedures. The article also states that the COMI shall be presumed to be the debtor's registered office in the case of businesses or other legal entities, without evidence to the contrary.

It is possible to refute the assumption of COMI based on the location of the registered office. However, the rebuttal can only be made successfully if it can be proven that a situation actually exists that is different from what situating it at that registered office is judged to reflect based on characteristics that are both objective and transparently ascertainable by third parties. Additionally, when deciding the COMI question, CJEU, in *Interedil Srl Vs. Fallimento Interedil Srl* ruled that para 53 of judgment " *In that context, the location, in a Member State other than that in which the registered office is situated, of immovable property owned by the debtor company, in respect of which the company has concluded lease agreements, and the existence in that Member State of a contract concluded with a financial institution – circumstances referred to by the referring court – may be regarded as objective factors and, in the light of the fact that they are likely to be matters in the public domain, as factors that are ascertainable by third parties. The 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."*

The facts of the present case are similar to the facts of case of *Interedil Srl Vs. Fallimento Interedil Srl.* Bella SARL has a commercial location in Spain and a French registered office.

Bella SARL is the owner of the business establishment, not a separate corporation. The CJEU ruled in the Interedil case that the mere existence of assets or credit facilities in another member other than the location of the registered office is insufficient to disprove the COMI presumption. In light of this, the Strasbourg High Court is in a position to initiate bankruptcy proceedings against Bella SARL in accordance with Article 3 of the EIR 2000 based on the company's registered office. The Strasbourg High Court-initiated procedures will be regarded as the main proceedings.]

- Some of your reasoning is sound but this is incorrect. The Strasbourg High Court does not have international insolvency jurisdiction to open insolvency proceedings.
- Students are 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.

[Answer:

Due to the EIR recast coming into effect on June 26, 2017, it will be applicable to the proceedings started by the Strasbourg High Court on June 30, 2017. The international jurisdiction for initiating insolvency proceedings and actions that directly result from them is governed by the EIR reform, a piece of EU private international law. A procedural legislation known as EIR Recast coexists with the member state's sustaining national laws.

Compared to the insolvency processes conducted under EIR 2000, those conducted under EIR recast have a far larger scope. Liquidation actions made up the majority of the EIR 2000

proceedings. Under the EIR recast the scope of the proceedings as defined under Article 1 is very vast. The Article 1 "Scope" states that " This *Regulation shall apply to public collective proceedings, including interim proceedings, which are based on laws relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation:*

(a) a debtor is totally or partially divested of its assets and an insolvency practitioner is appointed;
(b) the assets and affairs of a debtor are subject to control or supervision by a court; or
(c) a temporary stay of individual enforcement proceedings is granted by a court or by operation of law, in order to allow for negotiations between the debtor and its creditors, provided that the proceedings in which the stay is granted provide for suitable measures to protect the general body of creditors, and, where no agreement is reached, are preliminary to one of the proceedings referred to in point (a) or (b).
Where the proceedings referred to in this paragraph may be commenced in situations where there is only a likelihood of insolvency, their purpose shall be to avoid the debtor's insolvency or the cessation of the debtor's business activities"

The EIR recast proceedings include actions targeted at rescuing economically viable debtors who are in financial trouble as well as actions that are only focused on liquidating the debtor. Where there is a likelihood of insolvency, recast proceedings may be started as preventive steps under the EIR. In the current situation, Bella SARL has a high risk of going bankrupt, hence the proposed application for payment suspension is a preventative step. Under EIR recast, this kind of process may be initiated.

The provisions under EIR recast regarding the court's authority to initiate cases are not significantly different from the ones under EIR 2000. The EIR 2000 however did not define the COMI but only provided guidance in Recital 13 of how to ascertain it. Under EIR recast article 3(1) it provides that *"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. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary. That presumption shall only apply if the registered office has not been moved to another Member State within the 3-month period prior to the request for the opening of insolvency proceedings".*

The Amsterdam District Court is authorised to initiate the proposed proceedings by Bella SARL, which has its registered office in the Netherlands, in accordance with the aforementioned provisions of EIR reform. Bella SARL may submit a request for a payment suspension because these actions are under the purview of the EIR recast.]

You have not discussed the relevant steps.

- ***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

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.
[Answer:

The EIR recast allows opening of one or more secondary proceedings in any member state against a debtor. There must be an establishment of the debtor in the member state opening the secondary proceeding (Article 3, International Jurisdiction).

The establishment under Article 2(10) of EIR recast has been defined as "*establishment means any place of operations where a debtor caries our has carried out in the three month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means an assets*".

In the present case Bella SARL has an asset i.e. warehouse in Italy, some of its its employees are located in Italy and some of its customers are also located in Italy.. In the case of *interedil Srl V Fallimento Interedil Srl.*, the CJEU examined the concept of establishment and concluded that the definition of establishment connects the pursuit of any economic activity to the presence of human resources that shows that a minimum level of organisation and a degree of stability. As with the idea of COMI, non-transitory economic activity involving human resources and assets requires that it be objectively ascertainable by outside parties. There should be some consistency and stability in the action. The establishment must be viewed from the perspective of outsiders, not from the debtor's intention. The establishment is not required to have a formal organisational structure under the EIR recast. Any type of business may be conducted in the facility, but it must be a regular activity that may be observed by outside parties. The existence of assets and people indicates business activity.

In the given facts of the case, **the Italian bank can open secondary proceedings in Italy as the presence of warehouse, employees and customers qualify to be establishment as defined in Article 2(10) of the EIR recast** and as explained in the case of Interedil Srl V Fallimento Interedil Srl.]

This is incorrect.

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

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

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

- ***The facts of the case do not support the finding of an establishment of Bella SARL in Italy. The presence alone of assets (leased-out warehouse) in isolation, contractual relations with a local bank (including maintenance of a bank account) and occasional negotiations (whether individual or collective) with local distributors do not qualify as 'non-transitory economic activity with human means and assets'. The requisite minimum level of organisation and a degree of stability (see para. 64 in*** *Interedil*) ***is evidently missing.***
- ***Therefore, under the EIR Recast, secondary insolvency proceedings cannot be opened in Italy, nor Spain.***

Total marks: 3 out of 15

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

Total marks: 25 / 50