INSOL INTERNATIONAL
FOUNDATION CERTIFICATE
IN INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2B

THE EUROPEAN INSOLVENCY REGULATION

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

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

1. ***You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.***
2. ***All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters*** – please do not change the document settings in any way. DO NOT ***submit your assessment in PDF format as it will be returned to you unmarked.***
3. ***No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).***
4. ***You must save this document using the following format:*** [studentID.assessment2B]***. An example would be something along the following lines: 202223-336.assessment2B.*** Please also include the filename as a footer to each page of the assessment ***(this has been pre-populated for you, merely replace the word "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name.*** Assessments that do not comply with this instruction will be returned to candidates unmarked.
5. ***Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments.*** Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.

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").

The correct answer was D.

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 /ex 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 /ex 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 /ex 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.

[Statement 1 shows the concept of "Centre of Main Interests" which the provision can be revealed in Article 3(1) of the EIR Recast.

Statement 2 is the concept of "Rescue Proceedings" which can be referred in Article 2(h) of the EIR Recast.]

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.

[The concept of modified universalism in the EIR Recast recognizes the need for a coordinated and cooperative approach to cross-border insolvency proceedings while acknowledging the practical limitations of pure universalism. The following are the three examples of provisions in the EIR Recast that reflect this modified universalism approach:

First of all, the Recognition of Proceedings in Article 19. This provision allows for the recognition of foreign insolvency proceedings in EU Member States. It enables an insolvency practitioner appointed in one Member State to seek recognition and assistance in other Member States where the debtor has assets or operations. This provision promotes cooperation among Member States and facilitates the coordination of insolvency proceedings across borders.

Secondly, coordination of proceedings according to Articles 37-40. These articles address the coordination of concurrent insolvency proceedings involving the same debtor in different Member States. They provide mechanisms for

cooperation and communication among the relevant courts and insolvency practitioners. The provisions aim to avoid conflicts and ensure the efficient administration of cross-border insolvencies by promoting coordination and cooperation between different jurisdictions.

Thirdly, group coordination proceedings under Articles 61-67. These articles introduce a framework for the coordination of insolvency proceedings involving members of a corporate group. The provisions allow for the appointment of a "group coordinator" who will facilitate cooperation and communication among the various insolvency practitioners and courts dealing with the group companies' insolvency proceedings. The objective is to streamline the administration of group insolvencies and promote a unified approach across jurisdictions.

These provisions exemplify the modified universalism approach by encouraging coordination, recognition, and cooperation among different jurisdictions and stakeholders involved in cross-border insolvency cases. They strike a balance between the need for international cooperation and the practical realities of varying national legal systems.]

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.***

[Under the European Insolvency Regulation (EIR) Recast, there are provisions that address the obligation to cooperate between key stakeholders involved in concurrent insolvency proceedings. Here are three provisions that deal with this obligation: cooperation and communication between insolvency practitioners (Article 41 EIR Recast), between the Courts (Article 42 EIR Recast) and between the insolvency practitioner and the Courts (Article 43 EIR Recast).

1. Article 41(1) - General duty to cooperate and communicate between insolvency practitioners

Under Article 41(1) of the EIR Recast, the insolvency practitioner in the main insolvency proceedings and that of the secondary proceeding initiating such actions against the same debtor are required to corporate together. They are required to cooperate to the extent necessary to ensure the efficient administration of the debtor's assets or the equitable treatment of the creditors. This provision establishes a general duty to cooperate among the various Insolvency practitioners involved in insolvency proceedings to ensure the effective proceedings of the debtor's assets and impartial treatment of creditors.

2. Article 42 - Communication and cooperation between courts

Article 42 of the EIR Recast deals with communication and the exchange of information between the courts-to-court. It requires that, they shall cooperate, to the extent that it is necessary to ensure the efficiency of the administration of the debtor's assets and the impartial treatment of the creditors. The courts are empowered to co-ordinate the administration and conduct the supervision of debtor's assets and state of affairs as well as conduct hearing and the approval of protocols where necessary. This provision therefore emphasizes the importance of communication and information sharing between the different insolvency practitioners involved in the main and secondary proceedings.

3. Article 43 – Communication and Coordination between insolvency practitioner and courts:

Article 43 of the EIR Recast focuses on the coordination of proceedings in cases where main and secondary insolvency proceedings are ongoing. It states that the insolvency practitioner involved in these proceedings shall cooperate and coordinate with courts to the extent necessary to ensure the efficient administration of the debtor's assets. This provision highlights the need for the Insolvency Practitioner to coordinate between the courts handling the main and secondary proceedings to achieve an efficient administration of the debtor's assets.]

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.***

[Two instruments prevent the opening of secondary insolvency proceedings. First, the insolvency practitioner can give an undertaking known as "synthetic proceedings" under Article 38(2) EIR Recast, allowing them to provide an undertaking in accordance with Article 36 that inhibits the opening of secondary proceedings. Secondly, if the conditions specified in Article 36 EIR Recast are met and local creditor interests are protected, a temporary stay of secondary proceedings for a period exceeding three months can be implemented, thereby preventing their opening]

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] 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)?

[1. Material Scope: An essential aspect identified for enhancement was the expansion and clarification of the scope of the European Insolvency Regulation (EIR). The objective was to encompass a broader range of insolvency proceedings, mitigating jurisdictional conflicts and fostering a more efficient cross-border insolvency framework. Unlike its predecessor, EIR 2000, which solely addressed proceedings involving debtor divestment and liquidator appointment (Article 1 EIR 2000), the revised EIR (Recast Regulation, Regulation (EU) 2015/848) sought to provide a more universally applicable framework, while also allowing for coordination between primary and secondary proceedings within Member States.

2. Group Insolvency: Acknowledging the necessity of addressing insolvency scenarios involving groups of companies with cross-border operations, the European Commission aimed to establish clear and coherent rules for managing group insolvencies. This effort aimed to enhance procedural efficiency and avoid conflicting decisions among entities within the same corporate group.

3. Jurisdiction Rules: The existing jurisdictional rules within EIR 2000 were deemed insufficiently clear and overly complex. To instill greater legal certainty and predictability in cross-border insolvency cases, the European Commission sought to simplify and elucidate these rules, a goal achieved in the Recast Regulation (Regulation (EU) 2015/848).

4. Coordination of Proceedings: Improving the collaboration between insolvency practitioners and courts across different Member States was a primary concern. The European Commission endeavored to facilitate enhanced coordination of insolvency proceedings, particularly in cases where the same debtor was subject to multiple jurisdictions, culminating in effective cross-border cooperation.

5. Interactions with other EU Instruments: The Commission conducted a comprehensive assessment of the interaction between the EIR and other relevant EU instruments, such as the Brussels I Regulation. The objective was to ensure harmonization and consistency, eliminating conflicting provisions that might hinder the efficiency of cross-border insolvency proceedings within the European Union. The resulting Recast Regulation (Regulation (EU) 2015/848) addressed these concerns and paved the way for a more cohesive and effective system]

Question 3.2 [maximum 5 marks] 5

While the EIR Recast was welcomed by most stakeholders, it was also criticised by some as a "missed opportunity" and "modest". List two (2) flaws ***or shortcomings of the EIR Recast and explain how you consider they could be corrected.***

[While the EIR Recast was welcomed by most stakeholders, some criticisms referred to it as a "missed opportunity" and "modest" in terms of achieving full harmonization and effectiveness. Two flaws or shortcomings of the EIR Recast are:

1. Issues relating to the COMI: The EIR Recast continues to rely heavily on the concept of the "Center of Main Interests" (COMI) to determine the jurisdiction of main insolvency proceedings. This may lead to forum shopping, where debtors manipulate their COMI to file for insolvency in a specific jurisdiction that might be more favourable to their interests. To correct this, EIR Recast could introduce additional objective criteria and procedures to determine a debtor's COMI accurately. Such criteria could include the location of the debtor's headquarters, primary assets, or the place where decisions regarding the debtor's assets are made. For instance in the case of Eurofood IFSC Ltd, "the court stressed that the concept of COMI is peculiar to the regulations. It has an autonomous meaning and must therefore be in uniform may, independently of what a similar term may mean in national legislation"[1]. In view of this EIR Recast rely heavily on the concept of the "Center of Main Interests" (COMI) to determine the jurisdiction of main insolvency proceedings.

2. Lack of Harmonization of Insolvency Laws: Despite EIR Recast being a choice-of-forum instrument, the EIR Recast does not harmonize substantive insolvency laws among the Member States. As a result, significant disparities still exist in the treatment of insolvency across different jurisdictions. To address this, the EIR Recast could incorporate more provisions aimed at harmonizing certain aspects of insolvency laws among Member States, particularly concerning the ranking of creditors' claims, treatment of cross-border insolvency claims, and rescue and restructuring mechanisms. This would promote more predictability and fairness in cross-border insolvency cases.]

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.***

[1] see Foundation Certificate in European Insolvency Regulation, *"Eurofood IFSC Ltd [2006] Case C-341/04, ECLI: C: 2006: 28 (May 2, 2006))* INSOL pp 16

[related issues across borders, the European Commission initiated policies aimed at creating business-friendly environments for financially distressed but viable companies. Additionally, the Commission sought to improve the regime for streamlining the recovery of assets among Member States. This led to the development of the European Insolvency Regulation (EIR), which became binding on member states, with applicable rules enacted to aid in the process. Subsequently, the Directive on Preventive Restructuring Frameworks (PRD) was introduced to be adopted into national laws, providing debtors with access to early warning tools that enable the detection of businesses in distress and facilitate proactive restructuring procedures. Both frameworks enable efficient management of insolvency proceedings, but they differ in the following ways:

Firstly, the European Insolvency Regulation (EIR) primarily deals with rules concerning jurisdiction, applicable law, and recognition of insolvency proceedings in the context of cross-border insolvencies within the European Union. Its main objective is to provide a harmonized and coordinated framework for determining the appropriate jurisdiction of a Court over a debtor's insolvency proceedings and the laws of the relevant country that apply. On the other hand, the Directive on Preventive Restructuring Frameworks (PRD) focuses on preventive restructuring frameworks for financially distressed companies, aiming to facilitate early restructuring and turnaround procedures. Unlike the EIR, the PRD does not address the cross-border aspect of insolvencies but instead aims to harmonize procedures and principles for preventive restructuring within each EU member state.

Secondly, EIR is a directly applicable regulation which are enforceable in all EU member states automatically or with direction from the courts without the need for national implementing legislation. This allows for a uniform and consistent application of its provisions across the EU. On the hand, PRD is a directive, which requires each EU member state to adopt and implement it into their national legal systems through their own legislation. PRD focuses on early preventive measures on restructuring, creating a harmonized rescue framework throughout the Member States of EU.]

Total marks: 15 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.

[The relevant regulation governing the jurisdiction to open insolvency proceedings in this scenario is the European Insolvency Regulation (EIR) 2000. Article 3(1) of the EIR 2000 determines that the main insolvency proceedings should be initiated in the Member State where the debtor's "center of main interests" (COMI) is located at the time the proceedings are instituted.

In this case, Bella SARL is a company registered in France, and its first store operates in Strasbourg, France. Despite its main warehouse being situated in Cork, Ireland, and its employees spread across various European countries, the determination of the COMI falls under Article 2(h) of the EIR 2000.

The COMI refers to the place where the company's business decisions are predominantly made and where these decisions are implemented. The mere existence of warehouses, employees, or customers in other countries does not necessarily establish the COMI in those locations. The primary factors considered for determining the COMI include the place where the company's central administration or establishment is situated or where it conducts its principal economic activities.

In the Eurofood IFSC Ltd case, the Court of Justice of the European Communities (CJEC) emphasized that mere control of a subsidiary by its parent company, such as through shareholding or otherwise, is insufficient to rebut the presumption laid down by the EIR 2000 that the place of the registered office is presumed to be the COMI. Similarly,

in the Christopher Seagon v Deko Marty Belgium Nv case[2], it was established that the courts of the Member State where insolvency proceedings have been initiated and have jurisdiction over an action to set aside an action brought against a person whose registered office is in another Member State. The principles applied a universal approach to encompass all debtor assets, even when the debtor's location was in a non-EU country like Switzerland (as in the case of Ms. Hertel).

Considering Bella SARL's COMI is located in France, which is a Member State of the European Union, the Strasbourg High Court has the jurisdiction to open the insolvency proceedings as requested, ensuring compliance with the provisions of the EIR 2000 and safeguarding the proceedings in question.

In conclusion, the court's decision to open insolvency proceedings in France for Bella SARL aligns with the stipulations of Article 3(1) of the EIR 2000 and the relevant jurisprudence, including the Eurofood IFSC Ltd and Christopher Seagon v Deko Marty Belgium Nv cases. The court's adherence to these principles affirms its jurisdiction to safeguard the proceedings under the framework of the EIR 2000.
] ***While your reasoning is sound, unfortunately your answer is incorrect.***

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

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

Question 4.2 [maximum 5 marks] 2

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.

[First of all, the EIR Recast, which came into force on June 26, 2017, applies to insolvency proceedings that are opened after its entry into force. In this scenario, the safeguard proceedings were opened on June 30, 2017, which is after the entry into force of the EIR Recast. Therefore, the EIR Recast is applicable to the proceedings.

Also, the scope of the EIR Recast covers both main insolvency proceedings under Article 3 and secondary insolvency proceedings under Article 27 involving the same

[2] see Foundation Certificate in European Insolvency Regulation, *"Christopher Seagon v Deko Marty Belgium Nv] Case C-339/07, ECLI:EU:2009:83 (F))* INSOL pp 13

debtor. The EIR Recast aims to improve the efficiency and effectiveness of cross-border insolvency proceedings within the European Union.
Thence, since the proceedings were initiated in the French High Court on June 30, 2017, they fall within the scope of the EIR Recast, therefore, the provisions of the EIR Recast would apply to the proceedings.]

There were a few more steps to consider.
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] 2

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.

[Under the EIR Recast, secondary insolvency proceedings can be opened in another EU Member State where the debtor possesses an "establishment." Article 2(h) of the EIR Recast defines an establishment as any place of operations where the debtor carries out a non-transitory economic activity with human means and goods.

In this scenario, an Italian bank is petitioning to open secondary insolvency proceedings in Italy. Since Bella SARL has warehouses across Europe, including in Italy, and it has been negotiating prices with suppliers in Madrid, it can be argued that it possesses an "establishment" in Italy as per the definition in Article 2(h) of the EIR Recast.

The possibility of opening secondary insolvency proceedings in Italy is also supported by the judgment of the Court of Justice of the European Union (CJEU) in the Interedil Srl v Fallimento Interendil Srl case (C-396/09)[3]. In this case, the CJEU clarified that the concept of "establishment" in the EIR should be interpreted broadly and independently from the location of the debtor's COMI.

Under these circumstances and the provisions of the EIR Recast, the Italian bank can file a petition to open secondary insolvency proceedings in Italy in an attempt to secure an Italian insolvency distribution ranking.]

There were more elements to consider.

- ***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: 6 out of 15.

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

Total marks: 39 / 50

[3] see Foundation Certificate in European Insolvency Regulation, *"Interedil Srl v Fallimento Interendil Srl case (C-396/09).* INSOL pp 17