



**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 *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.*

*Statement 1 refers to the rebuttable presumptions created by Article 3(1) (International Jurisdiction) which can be used to determine the COMI of a debtor for purposes of opening main insolvency proceedings.*

*Statement 2 is covered off by Article 1 (Scope) of the EIR Recast which widens the scope of what was initially contemplated by the EIR 2000 to also cover off regulation of public collective proceedings based on laws relating to insolvency not only for purposes of liquidation but also of rescue, adjustment of debt, reorganisation.*

Question 2.2 [maximum 3 marks] **1**

**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 first example is that the EIR Recast provides for the ability to open main proceedings as well as other secondary proceedings thereby extending the strict universalism approach to allow for a compromise between universality and territoriality. The main proceedings are to be opened at the place of the debtor's centre of main interests, and such proceedings having a universal scope and covering the assets of the debtor throughout the EU. Whilst there can only be one COMI, secondary proceedings as mentioned above can be opened at the place of the debtor's "establishment". The effects of such secondary proceedings are restricted by territoriality i.e. they are restricted to the assets of the director situated in the territory of the Member state where the secondary proceedings are opened.*

*The second example is that the EIR Recast provides for extending the jurisdiction of the courts (either in main or secondary insolvency proceedings) over actions which derive directly from the insolvency proceedings and are closely linked to them. This extension of jurisdiction is set out in Article 6 of the EIR Recast.*

*The third example is that the ER Recast mandates communication between IPs themselves, courts themselves and between IPs and the courts of the various Member States where the main insolvency proceedings and secondary insolvency proceedings have been opened.*

**You were required to provide examples of provisions. You listed article 6 but not others. You could have referenced, for example, Recital 23, Article 34, Article 35, Article 36.**

Question 2.3 [maximum 3 marks] **3**

**Because pure universalism has not been adopted under the EIR 2015, main and secondary insolvency proceedings can be opened at the same time against the same debtor. In light of this, it is seminal that proper co-operation between the actors involved in concurrent proceedings takes place. It is therefore not surprising that co-operation has been introduced as an obligation on several actors in the EIR 2015. List three (3) provisions (recitals and / or articles) of the EIR Recast that deal with the obligation to co-operate.**

*Article 41(1) of the EIR Recast which provides for the cooperation and communication between insolvency practitioners.*

*Article 42(1) of the EIR Recast which provides for cooperation and communication between courts.*

*Article 42(1) of the EIR Recast which provides for cooperation and communication between insolvency practitioners and courts.*

*In respect of a group of companies the corresponding articles are Articles 56, 57 and 58 (and Article 74 to some extent).*

Question 2.4 [maximum 2 marks] **1**

**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.**

*The first instrument is that of synthetic secondary proceedings or the right to provide an undertaking as contemplated by Article 36 of the EIR Recast. Synthetic proceedings take place where an insolvency practitioner ("IP") in the main solvency proceedings provides an undertaking that when distributing the assets (or proceeds derived from their realisation), the IP will agree that they will comply with the distribution and priority rights under the national law of the Member State where the secondary insolvency proceedings are taking place/ have been opened. This undertaking will be given in respect of those assets (or proceeds derived from their realisation) which are situated in that Member State. The nature of the undertaking is unilateral and is provided by the IP in the main insolvency proceedings directly to the creditors in the specific/ relevant Member State. This cannot be used as a substitute for the*

*opening the main insolvency proceedings, as the purpose of this undertaking is that it is used as a mechanism to avoid opening secondary proceedings.<sup>1</sup> For an undertaking of this nature to be valid and accepted, there are certain requirements which need to be met, namely: (i) the undertaking should set out the parameters within which it will operate by specifying the factual circumstances which have been assumed prior to giving said undertaking (this will largely relate to the value of the assets situated in the relevant Member State, and the courses of action available for the realisation of those assets;<sup>2</sup> (ii) the undertaking must be in one of the official languages of the Member State where the secondary proceedings could have been opened;<sup>3</sup> (iii) the undertaking must be in writing and comply with any further requirements in relation to form and approval of distributions as set out by the *lex concursus* of the main insolvency proceedings;<sup>4</sup> and (iv) an undertaking must be approved by the "known local creditors" and the form of such approval should follow the majority and voting standards that apply to the adoption of restarting plans in the Member State where the secondary proceedings would have taken place.*

*The second instrument is to stay the opening of secondary insolvency proceedings. Obtaining a stay allows the debtor an opportunity to negotiate with its creditors and potentially agree to a restructuring plan, without the added complications of having to deal with secondary proceedings which may hamper the negotiation of for potential business rescue. In order to stay the opening of secondary insolvency proceedings, the IP or debtor in possession will need to approach the court to request such an action. For the stay to be granted, there must also be suitable measures in place to protect the local creditors for the duration of the stay. These "suitable measures" may include protective measures such as requiring the IP or the debtor in possession not to remove or dispose of any assets which are located in the Member State where the secondary proceedings would be opened, unless this is done in the ordinary course of business. Other protective measures may also be ordered by the court subject to these measures not being incompatible with the national rules on civil procedure of the Member State where the secondary proceedings were to be opened. Where a temporary stay of individual enforcement proceedings has been granted by the court in the main insolvency proceedings, the court may, for a period not exceeding 3 months, stay the opening of secondary proceedings so as to ensure that stay provided in the main insolvency proceedings is not undermined or hindered.<sup>5</sup> When can a stay be lifted? A court must lift a stay where a restructuring plan has been agreed by the debtor and its creditors. A stay may also be lifted where the inverse is true i.e. where*

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<sup>1</sup> B Wessels and I Kokorin (updated by E Ghio), Foundation Certificate in International Insolvency Law Module 2B Guidance Text "The European Insolvency Regulation" dated 2022/2023 (Hereinafter "the Guidance Text") at p 49.

<sup>2</sup> Article 36(1) of the EIR Recast

<sup>3</sup> Article 36(3) of the EIR Recast

<sup>4</sup> Article 36(4) of the EIR Recast

<sup>5</sup> Article 38(3) of the EIR Recast and the Guidance Text at page 50.

*negotiations have soured or been disrupted and it's clear that restructuring plan is unlikely to be agreed to for whatever other reason, the court may lift the stay as it would be injurious to the creditors' rights. Further, the court has the discretion to lift or keep a stay where the IP or debtor in possession has infringed upon the prohibition of disposal of the debtor's assets or on removal of such assets from the territory of the Member State in which the stay was granted. **Good but you did not reference the provision.***

*In contrast to the first instrument where an undertaking is given, the request for a granting of a stay does not put a positive obligation on the court to do so. Whether to grant a stay or not is at the discretion of the court, whereas with a court will be obliged to adhere to an undertaking. Therefore it can be said that the "stronger" of the two instruments in preventing the opening of secondary proceedings where it could hamper the efficient administration of the debtor's estate, is that of the undertaking.*

Total marks: 7 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)?***

*Whilst the EIR 2000 improved the general understanding of conceptual issues in cross-border insolvency law within the EU, certain practical guidance in line with modern insolvency practices was lacking and therefore needed adjusting and clarification. This was achieved through the EIR Recast which expands upon the EIR 2000 to provide more practical guidance in order to take those now cleared-up conceptual issues further and make them useable. The particular changes that have been brought through into the EIR Recast are as follows: (i) it introduced a wider scope of application than the EIR 2000; (ii) it created provisions relating to communication and cooperation between IPs and courts across insolvency proceedings; (iii) it aimed to connect insolvency information across jurisdictions and proceedings (iv) general updates as required by a changing society as well as to align with the EU's political priorities. In order to arrive at these improvements of the EIR 2000 in the EIR Recast, the European Commission identified the following main elements as needing revision:<sup>6</sup>*

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<sup>6</sup> European Commission's "Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings", Strasbourg 12.12.2012, COM (2012) 744 final (English version) at pp. 2-3, accessed at

- (a) *The scope of the EIR 2000 failed to acknowledge or provide guidance where national procedures of Members provided for proceedings where existing management remain in place or where restructuring of the company takes place at a pre-insolvency stage. In other words, there was a disconnect with how restructuring proceedings or business rescue proceedings were to be acknowledged across the various Member States when it came to rescuing/restructuring an economically viable debtor. It would be the national laws of each Member State that would need to be consulted for how to deal with pre-insolvency matters, where said national law is silent, there were no solutions be found in the EIR 2000. The EIR 2000 failed to include pre-insolvency proceedings in its scope, thereby not acknowledging potential business rescue before insolvency. This has been somewhat resolved with such proceedings being introduced by Member States,<sup>7</sup> and with the publication of the European Restructuring Directive (the "Directive")<sup>8</sup> requiring Member States to put in place "restructuring frameworks" in their insolvency and restructuring laws. These restructuring frameworks provide debtors with the tools to overcome financial distress as soon as possible and outside of formal insolvency proceedings.<sup>9</sup> Article 41(2)(a) of the EIR Recast further widens the scope of the EIR 2000. It provides not only for cooperation and communication between the IPs and courts but also specifies that such communication should also be done with the aim of rescuing or restructuring the debtor.<sup>10</sup>*
- (b) *There remained uncertainty around jurisdiction as to which Member State had competency to open insolvency proceedings. The Debtor's COMI was agreed by Member States to be the best method of determination and it is supported as a concept, however the EIR 2000 failed to provide sufficient guidance on how it should apply in practice, leading to forum shopping. Article 3 of the EIR Recast has increased the scope and practical application of what is considered as the Debtor's COMI by providing 3 rebuttable presumptions, namely: (i) in the respect of a company or legal entity, it is presumed that its COMI will be at the place of the registered office of that company or legal entity, but only if the registered office has not been moved to another Member State within a 3*

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[https://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/com/com\\_com\(2012\)0744\\_/com\\_com\(2012\)0744\\_en.pdf](https://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com(2012)0744_/com_com(2012)0744_en.pdf) on 14 May 2023 (hereinafter the "EC 2012 Proposal"). B Wessels "The European Union Regulation on Insolvency Proceedings (Recast): The First Commentaries" (2016) 13 European Company Law Issue 4 pp. 129-135 accessed through

<https://kluwerlawonline.com/journalarticle/European+Company+Law/13.4/EUCL2016019> on 21 May 2023.

<sup>7</sup> European Commission's "Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee entitled *A new European approach to business failure and insolvency*", Strasbourg 12.12.2012, COM (2012) 742 final (English version) at page s 3-5, accessed at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0742:FIN:En:PDF> on 14 May 2023 (hereinafter the "EC 2012 Communication on Business Failure").

<sup>8</sup> Directive (EU) 2019/1023 of 20 June 2019.

<sup>9</sup> <https://www.simmons-simmons.com/en/publications/cky2qoe0o150m0a90i5zb334u/amendment-of-the-recast-european-insolvency-regulation>

<sup>10</sup> Guidance text at page 45.

*month period before opening insolvency proceedings; (ii) in respect of an individual exercising an independent business or professional activity, the COMI will be presumed to be that individual's principal place of business (in the absence of proof to the contrary and also subject to the 3 month period mentioned above); and (iii) in respect of any other individual, their COMI is presumed to be the place of the individual's habitual residence (in the absence of proof to the contrary and also subject to 6 month period).*

- (c) There were some issues with secondary proceedings interfering with the proper and efficient administration of the main insolvency proceedings with no guidance on how this could be addressed. The main issue with this being that the IP in the main insolvency proceedings will not have control over the assets which are subject to the secondary proceedings and this makes it difficult for said IP to sell the debtor's business as a going concern. Secondary proceedings also hamper the possibility of restructuring an economically viable debtor as the nature of secondary proceedings are intended to wind-up the debtor and not to allow it to continue trading. The EIR Recast introduced a number of legal mechanisms to avoid or otherwise control the opening, conduct and closure of secondary proceedings (namely, and the provision of an undertaking, also known as synthetic proceedings or the request for granting a stay to secondary proceedings) in order to address this deficiency in the EIR 2000.*
- (d) There were some issues with creditors of a debtor finding publicly available information as to whether any insolvency proceedings had been opened. The EIR 2000 did not provide for the publication/ notice of the opening of insolvency proceedings. Without being aware that insolvency proceedings have been opened against a particular debtor, creditors will be unable to bring their claims. A further issue in this regard, is that the EIR 2000 also remained silent on the publication of insolvency proceedings decisions in Member States or for the publication of a European Insolvency Register. A court also needs to be aware if proceedings have already been opened in another Member State to be able to preside over the proceedings before them in an effective manner.*
- (e) The EIR 2000 fails to address how group companies spanning across Member States are to be dealt with in insolvency proceedings. The EIR Recast now specifically provides for guidance and rules on how group companies are to be treated in cross-border insolvency matters as set out at Articles 61-77 of the EIR Recast. One of the key additions that the EIR Recast makes is that it provides rules and guidance on coordination of insolvency proceedings between companies in a group.*

*From the above, although it is clear that the EIR Recast did improve certain issues prevalent under the EIR 2000, there is still room for improvement in particular when it comes to rescuing the business of a potentially economically viable debtor before opening insolvency proceedings.*

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.**

*The EIR Recast remained silent/failed to provide guidance in respect of pre-insolvency restructuring scenarios particularly where a company had the opportunity for economic recovery - it largely did not address the potential of business rescue on cross-border basis before proceeding with standard insolvency proceedings. This was a missed opportunity, as it was largely left to national legislature within each Member State to attempt to provide guidance on how business rescue or pre-insolvency proceedings are to take place. This obviously still creates a void in the cross-border space with each Member State creating their own rules around business rescue which may or not conflict or contradict each other. There needed to be unification of how cross-border business rescue was to be implemented between Member States where a debtor's assets and business may be spread. This lacuna in the EIR Recast has led to the EU Commission to revisit these points which have now largely been addressed in the Directive. The Directive requires Member States to put in place "restructuring frameworks" in their insolvency and restructuring laws. These restructuring frameworks provide debtors with the tools to overcome financial distress as soon as possible and outside of formal insolvency proceedings. Some of the novel provisions of the Directive included providing for (i) access to preventative restructuring procedures which allows for early stage restructuring of debts; (ii) a stay on creditor actions so as to allow good-faith debtors to take early stage restructuring steps; and (iii) opportunity for debtors to remain in control of the assets and operation of their business whilst making use of the preventative restructuring procedures etc. The Directive provisions in my opinion are to some extent a solution to the problem, as it creates a minimum set of standardised rules for preventative restructuring which are to be applied across Member States upon the implementation of the Directive in their national legislation. This does not mean that further work is not required, but at least there is some standard and starting point when it comes to pre-insolvency, preventative restructuring and to avoidance of lengthy, costly insolvency proceedings.*

**Good but you were required to consider how things can be corrected. How can things be improved further?**

*A further issue with the EIR Recast's lack of guidance on matters of pre-insolvency or business rescue is that this has led to "forum shopping" whereby debtors attempt to shift their COMI to a different Member State so as to benefit from the application of a more favourable insolvency regime.<sup>11</sup> The most common form of "Forum shopping" in this context is to shift their COMI to the UK so that the English law concept of a scheme of arrangement may be applied. Because of the lack of pre-insolvency mechanisms provided under the EIR Recast, debtors will attempt to move their COMI to another Member State which does have a pre-insolvency or restructuring mechanism so as to attempt to preserve their business and not be forced into insolvency proceedings*

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<sup>11</sup> [https://commission.europa.eu/system/files/2023-02/Final%20Report%20-%20Abusive%20Forum%20Shopping\\_Febr%202022.pdf](https://commission.europa.eu/system/files/2023-02/Final%20Report%20-%20Abusive%20Forum%20Shopping_Febr%202022.pdf) European Commission "Study on the issue of abusive forum shopping in insolvency proceedings" dated February 2022, accessed 20 May 2023.

where they may be economically viable under the laws of a different Member State.  
**Same comment as above.**

Question 3.3 [maximum 5 marks] **5**

**The European Insolvency Regulation is a choice-of-forum instrument, which although aiming at procedural harmonisation, did not harmonise the substantive insolvency laws of the Member States. Because of lingering disparities among the national insolvency regimes across the EU, the European institutions introduced the Directive on Preventive Restructuring Frameworks in 2019, which is meant to dovetail the European Insolvency Regulation. List two (2) ways in which the Regulation and the Directive differ.**

*The European Insolvency Regulation is largely an instrument for the determination of jurisdiction in the case where multiple insolvency proceedings can be opened in relation to a particular debtor's assets spanning across the EU. The European Insolvency Regulation focuses on harmonizing the question of jurisdiction across Member States in insolvency proceedings by providing a set of "choice of law" provisions to be used by Member States to determine which is the most appropriate jurisdiction to open insolvency proceedings as well as to differentiate how main and secondary insolvency proceedings are to interact across the various Member States. The Directive dovetails the Regulation in that it takes the Regulation a step further and provides for the harmonization of insolvency and restructuring procedures across Member States with the particular aim of business rescue. The European Insolvency Regulation was silent as to potential business rescue and did not provide for any pre-insolvency considerations or solutions. The main goal of the Directive is to harmonize varying approaches to insolvency prevention and pre-insolvency restructuring prevalent in Member States to have at least a minimum set of cohesive rules/ common understanding as to pre-insolvency restructuring procedures. The result of will ensure that less time and money is spent on arduous and long court processes to liquidate a debtor. The Directive attempts to allow for more negotiations between creditors and the debtor outside of a court setting by shifting the whereas the European Insolvency Regulation centres around the interaction of courts and IPs in insolvency proceedings.<sup>12</sup> Whilst the European Insolvency Regulation focuses on and provides for the determination of the main insolvency proceedings as well as breaking down how secondary and main insolvency proceedings are to work together to ensure that a debtor's creditors across the EU are treated fairly and allowed the best possible return. The European Insolvency Regulation failed to take a step further a look towards the options available to prevent insolvency in the first place, to provide options for economically viable debtors to restructure their debts at an early stage and to attempt to create a more harmonized approach across the EU when it comes to business rescue and the procedures for same (which are widely varied across Member States). Due to*

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<sup>12</sup> <https://blogs.law.ox.ac.uk/business-law-blog/blog/2021/07/restructuring-and-insolvency-europe-policy-options-implementation-eu> J Garrido, C DeLong, A Rsekh and A Rosha "Restructuring and Insolvency in Europe: Policy Options in the Implementation of the EU Directive" dated 30 July 2021, accessed 20 May 2023.



*the lack of pre-insolvency procedures and silence on early stage financial restructuring or business rescue in the European Insolvency Regulation, the Directive was also intended to prevent forum shopping where certain debtors in other Member States would find ways of using the English law Scheme of Arrangement in order to restructure their debt.*

*The Directive changes the focus from insolvency and the liquidation of debtor's assets, to pre-insolvency restructuring, whereby the debtor's assets are preserved and rearranged for the benefit of all parties concerned (both the debtor and its creditors, with the primary focus still on the creditors). Furthermore, the Directive allows for early stage intervention to attempt to resolve the matter through restructuring procedures as opposed to proceeding immediately with insolvency.*

*Unfortunately, due to the extent of the compromise needed to have the Directive accepted by the various Member States, the Directive does not go as far as it should to achieve its ultimate goal of harmonizing the substantive insolvency laws of the Member States, and in this regard the EIR Recast too fails. They both remain silent on a common definition of insolvency, ranking of claims and identification and tracing of the insolvent estate's assets, amongst other things.<sup>13</sup>*

**Good.**

Total marks: 12 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***

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<sup>13</sup> Guidance Text p65.

**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.**

*For purposes of establishing jurisdiction under the EIR 2000, it is necessary to establish the debtor's centre of main interest ("COMI") as this will be where the main insolvency proceedings can be initiated. The main insolvency proceedings will be in respect of all the debtor's assets throughout the EU., and it will be the law of the state in which such main proceedings are opened that will determine the effect of the insolvency proceedings (e.g. ranking of creditors, liquidators powers, how a debtor's assets are realised and distributed etc). COMI under the EIR 2000 is not expressly defined but based on the guidance at Recital 13, it is understood that a debtor's COMI is the place where the debtor administers their interests on a regular basis and which is ascertainable by third parties. The CJEU in the *Eurofood IFSC Ltd* case<sup>14</sup> confirmed this understanding and further confirmed that is a standalone concept that must be understood uniformly despite how COMI may be defined or understood pursuant to a Member State's national legislation. The CJEU emphasised that in determining a debtor's COMI, the criteria used in such determination objective and ascertainable by third parties (for example, by looking to whether the debtor conducts its administration in a particular Member State on a regular and lasting basis). In the *Interdil Srl v Fallimento Interdil Srl* case<sup>15</sup> where the question before the court was whether the Italian courts had jurisdiction to hear bankruptcy proceedings in respect of a company that was originally registered in Italy relocated to the UK being registered as a foreign company on the UK register of companies. When the Italian bankruptcy proceedings were instituted the company had already been liquidated in the UK. It was argued that only the English courts had jurisdiction, whilst the Italian court found that the Italian courts had jurisdiction, on the basis that the presumption of COMI being established by the registered office of the company could be rebutted. The CJEU cleared up how this presumption works and how it could be rebutted. It found that the registered office presumption cannot be disputed where (i) the bodies responsible for the management and supervision of the debtor are in the same place*

<sup>14</sup> Case C-341/04, ECLI:EU:C:2006:281 (May 2, 2006) (hereinafter the "*Eurofood IFSC Ltd* case").

<sup>15</sup> Case C-396/09, ECLI:EU:C:2011:671 (Oct 20, 2011)(hereinafter the "*Interdil* case".

as its registered office; and (ii) the management decisions of the company are taken at the registered office in a manner that is ascertainable by third parties. Bella's registered office is in Strasbourg, France, Bella, operates across various Member States with its warehouses and customers in these Member States. Applying the above to the facts of the Bella matter, the registered office of Bella is in France and accordingly it can be presumed that Bella's COMI is in Strasbourg, France and that the Strasbourg court does have jurisdiction to hear the main insolvency proceedings. However, Bella operates warehouses across the EU with its main warehouse in Ireland, and over the course of 2011, Bella undertook certain of its administration activities in Spain (obtaining loan agreements in Spain, opening bank account in Spain and negotiating and agreeing supply terms (even if unbinding) in Spain. It can therefore be argued that perhaps by undertaking these activities in Spain, Bella administers its interests in Spain within the guidance of Recital 13 for determining COMI. It is not clear from the set of facts whether the second part of the guidance of Recital 13 can be said to be met i.e. that these activities in Spain are conducted on a regular basis and are ascertainable by third parties. Looking to the Interdil case for guidance, it is also unclear from the set of facts in Bella's case where the bodies responsible management and supervision of Bella sit and again whether it is ascertainable by third parties that the management decisions of the company are taken at the registered office. If it can be shown using the objective test that the management and supervision of Bella takes place at its France registered office, there will be a strong case that it is indeed the Strasbourg court that has jurisdiction to hear the main insolvency proceedings. In other words the registered office presumption will then prevail and it will meet the tests set out in the Interdil case. If however, it can be shown that the activities mentioned above carried out in Spain constitute the management and supervision of Bella in Spain and that this is ascertainable by third parties, then it will be possible to rebut the registered office presumption as set out in the Interdil case. The court in the Interdil case did however point out that the mere presence of some assets including bank accounts would not be sufficient to rebut the registered office presumption.<sup>16</sup> Based on the above and the information in Bella's matter, I am of the view that the registered office presumption would apply as the factors for its rebuttal are weak, and the French court would have jurisdiction under the EIR 2000.

**While your reasoning is sound, the 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] 5

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<sup>16</sup> Supra note 15, *Interdil* case at para 53.

**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.**

*There are four essential questions to ask oneself in determining whether the EIR Recast will apply to particular proceedings - these are discussed below in the context of the facts of Bella's case.*

*Firstly, we need to determine whether Bella (as the debtor entity) has its COMI in a Member State. Under the EIR Recast, Article 3 provides that the courts of the Member State within which the centre of the debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. The Article goes further and sets out that the 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. For a company, the EIR Recast provides for a rebuttable presumption that the COMI will be the place of its registered office in the absence of proof to the contrary so long 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. In Bella's case, its registered office is in France and we can therefore apply the presumption (in the absence of proof to the contrary) that France is where its COMI is situated. France is a Member State and its COMI is accordingly in a Member State. This fulfils the geographical requirement.*

*Secondly, we need to determine whether the matter involves an excluded entity under the scope of the EIR Recast (ie the personal scope). Article 1(2) of the EIR Recast provides that the EIR Recast does not apply to insolvency proceedings that concern (i) insurance undertakings; (ii) credit institutions; (iii) investment firms and other firms, institutions and undertakings to the extent that they are covered by Directive 2001/24/EC; and (iv) collective investment undertakings. None of these are applicable to Bella. Bella is a French-registered company selling cosmetic products and therefore not excluded on the basis of personal scope.*

*Thirdly, it needs to be ascertained whether the type of proceedings being opened falls within the ambit of the EIR Recast (ie the material scope). According to Article 1, the EIR Recast applies 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).*

*These proceedings are set out in Annex A of the EIR Recast and Article 2(4) specifically defines "insolvency proceedings" as the proceedings listed in Annex A of the EIR Recast. This is useful as it sets out which national law procedures of the various Member States are considered insolvency proceedings within the scope of EIR Recast.*

*Article 1 further stipulates that where any of the aforementioned proceedings (a) to (c) are able to be commenced when there is only a likelihood of insolvency, the purpose of these proceedings will be to avoid the debtor's insolvency or the cessation of the debtor's business activities.*

*Based on the above, the safeguarding proceedings being opened by Bella (Sauvegarde), fall within the scope of Article 1 of the EIR Recast and is specifically listed in Annex A of the EIR Recast. Sauvegarde is a recognised insolvency proceeding and is for the purpose of rescue, adjustment of debt, reorganisation or liquidation. Safeguard proceedings are available to debtors who are in financial difficulty and require the reorganisation of the company to allow for it to continue to operate. This is at the point where the debtor is not yet insolvent but intervention is required or it will be in short order. Even if this was not clear from the nature of the proceedings and there was the need for further application of the facts to determine whether it is in scope of the EIR Recast, Article 9 of the EIR Recast, goes further in recognising the listed proceedings in Annex A and stipulates that no further examination is needed where those proceedings are instituted and that the EIR Recast applies to them.*

*Lastly, it is important to look at the dates of the proceedings (the temporal Scope). The safeguard proceedings have been opened on 30 June 2017 and accordingly the provisions of the EIR Recast become relevant, as opposed to the EIR 2000 which was repealed and replaced with the EIR Recast from 26 June 2017 onwards. Article 84(1) of the EIR Recast specially provides that the provisions of the EIR recast shall apply to insolvency proceedings opened this date. Therefore Bella's proceedings will need to be considered in the context and provisions of the EIR Recast.*

*It is therefore clear Bella's matter falls within the scope of the EIR Recast and should be governed by same.*

**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.***

Further the EIR 2000 also provides that secondary insolvency proceedings can be opened where the debtor has an establishment in relation to the assets of the debtor in that specific territory. In order to determine "establishment" one needs to look to the place of operations where the debtor carries out or has carried out a non-transitory economic activity with human means and assets. These operations must at least be carried out in the three-months prior to request to open main insolvency proceedings. This time specification indicates that there does need to be a sense of stability or continuity of the activities being looked to determine whether there is an "establishment" in that territory. This confirms the "non-transitory" nature of the establishment requirements. It is also important that on an objective test, a third party would be able to recognise "establishment" exists within the territory in question. Further, the CJEU in the *Interedil* case found that the mere presence of goods in isolation or bank accounts does not alone indicate that there is "establishment".<sup>17</sup> The definition of "establishment" specifically refers to a human means and assets, therefore it would not be sufficient for there, merely, to be a debtor's assets within a territory to say there is an establishment - the reference to human means, means there needs some human presence in relation to the debtor or organisation (eg employees working for the debtor in that territory). In *Bella's* case, the business does have warehouses in Italy which indicates that it will have a certain amount of employees to run those warehouses and supply customers, also the fact that it is an Italian bank filing the petition indicates that *Bella* holds assets and liabilities and presumably at least a bank account in Italy, covering off the "human means and assets" point of the definition of "establishment". With that point met, the bank will just need to show the court that the operation of the warehouses is not transitory in nature and that it has been operating within the 3 months prior to the opening of the main insolvency proceedings in France. From the above, it is likely that the Italian bank will be able to show that *Bella* has an "establishment" in Italy in accordance with Article 2(10) of the EIR Recast's definition of "establishment", and that secondary proceedings may therefore be opened in Italy. In respect of secondary proceedings, the law of the particular Member State in which secondary proceedings are opened will apply and not the law of the main insolvency proceedings. However, the effect of the secondary proceedings will be restricted to the assets of the debtor situated within the specific geographical territory of that Member State. Therefore, upon the bank opening the secondary proceedings in Italy, the Italian insolvency distribution ranking will apply but only insofar as it relates to the assets held by the debtor in Italy.

**As before, good reasoning but unfortunately, the answer is incorrect.**

- **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,**

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<sup>17</sup> Supra note 15, *Interedil* case at para 62.

***contractual relations with a local bank (including maintenance of a bank account) and occasional negotiations (whether individual or collective) with local distributors do not qualify as 'non-transitory economic activity with human means and assets'. The requisite minimum level of organisation and a degree of stability (see para. 64 in *Interedii*) is evidently missing.***

- ***Therefore, under the EIR Recast, secondary insolvency proceedings cannot be opened in Italy, nor Spain.***

Total marks: 9 out of 15.

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

**Total marks: 36 / 50.**