



**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2B**

**THE EUROPEAN INSOLVENCY REGULATION**

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

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

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

## INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

1. ***You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.***
2. ***All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters - please do not change the document settings in any way. DO NOT submit your assessment in PDF format as it will be returned to you unmarked.***
3. ***No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).***
4. ***You must save this document using the following format: [studentID.assessment2B]. An example would be something along the following lines: 202223-336.assessment2B. Please also include the filename as a footer to each page of the assessment (this has been pre-populated for you, merely replace the word "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name. Assessments that do not comply with this instruction will be returned to candidates unmarked.***
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- 6.1 ***If you selected Module 2B as one of your compulsory modules (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is 23:00 (11 pm) GMT on 1 March 2023. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2023. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.***
- 6.2 ***If you selected Module 2B as one of your elective modules (see the e-mail that was sent to you when your place on the course was confirmed), you have a choice as to when you may submit this assessment. You may either submit the assessment by 23:00 (11 pm) GMT on 1 March 2023 or by 23:00 (11 pm) BST (GMT +1) on 31 July 2023. If you elect to submit by 1 March 2023, you may not***

***submit the assessment again by 31 July 2023 (for example, in order to achieve a higher mark).***

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

**ANSWER ALL THE QUESTIONS**

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

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

Question 1.1

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

**Select the correct answer from the options below:**

- (a) True, before the EIR 2000, the EU has not sought to harmonise the insolvency laws of EU Member States.**
- (b) False, there was another EU Regulation regulating insolvency law at EU level before the EIR 2000.**
- (c) False, an EU Directive regulating insolvency law at EU level existed before the EIR 2000.**
- (d) False, the EU sought to draft Conventions with a view to harmonising the insolvency laws of EU Member States as early as the 1960s, but these initiatives failed.**

**The correct answer was D.**

Question 1.2

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

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

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

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

Question 1.3

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

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

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

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

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

Question 1.4

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

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

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

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

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

Question 1.5

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

- (a) Article 18 EIR Recast ("Effects of insolvency proceedings on pending lawsuits or arbitral proceedings").**
- (b) Article 40 EIR Recast ("Advance payment of costs and expenses").**
- (c) Article 7 EIR Recast ("Applicable law").**
- (d) Article 31 EIR Recast ("Honouring of an obligation to a debtor").**

Question 1.6

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

- (a) The ECJ has provided a definition of "insolvency" in recent case law.**
- (b) The European Commission has provided a definition of "insolvency" in its Recommendation on a "New Approach to Business Failure" published in 2014.**
- (c) Each Member State will define "insolvency" in national legislation.**
- (d) Deciding whether a debtor is "insolvent" or not is a matter for the ECJ to determine.**

Question 1.7

**The EIR Recast introduced the concept of "synthetic proceedings". What are they?**

- (a) "Synthetic proceedings" means that when an insolvency practitioner in the main insolvency proceedings has given an undertaking in accordance with Article 36, the court asked to open secondary proceedings should not, at the request of the insolvency practitioner, open them if they are satisfied that the undertaking adequately protects the general interests of local creditors.**
- (b) "Synthetic proceedings" means that for the case at hand, several main proceedings can be opened, in addition to several secondary proceedings.**
- (c) "Synthetic proceedings" means that when secondary proceedings are opened, these are automatically rescue proceedings, as opposed to liquidation proceedings.**

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

Question 1.8

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

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

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

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

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

**The correct answer was D.**

Question 1.9

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

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

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

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

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

Question 1.10

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

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

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

**The correct answer was C.**

Total marks: 7 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: According to article 3(1) of the EIR 2015, there is a presumption that the COMI of a debtor is in the place of its registered office or habitual residence. This presumption, however, as indicated in the guide text, (i) shall only apply if the registered office has not been moved to another Member State within 3 (three) months period prior to the request for opening of insolvency proceeding; and (ii) might be rebutted in court.*

*Statement 2: Article 1 of the EIR 2015 extends not only to “traditional” liquidation-oriented procedures, but also to proceedings seeking to promote the rescue of economically viable but financially distressed business.*

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.***

*As indicated in the guide text, article 3(1) of the EIR Recast provides that the courts of the Member State within the territory of which the debtor’s COMI is situated shall have the jurisdiction to open insolvency proceedings. This will be the main insolvency proceeding, which will result in the extra-territorial application of the law of the member State where such proceeding has been opened (lex concursus). The EIR Recast also provides the opening of secondary proceedings, which will produce effects only on assets situated within a state of secondary proceedings (Recital 23). There might be only one main insolvency proceeding (which will be in the debtor’s COMI), but as many secondary proceedings as there are establishments of the debtors across Member States (article 3(2) of the EIR Recast). The opening of secondary proceedings leads to the creation of a separate insolvency estate and the application of a separate lex concursus, namely the law of the Member State where the establishment is located (lex concursus secundarii).*

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.**

*According to the Guide text, the articles are: Articles 41, which provides rules on cooperation and communication between insolvency practitioners; Article 42, which provides rules on cooperation and communication between courts; and article 43, which provides rules on cooperation and communication between insolvency practitioners and courts.*

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.**

*As described in the guide text, the EIR Recast provides for the possibility for the court to temporarily stay the opening of secondary insolvency proceedings when a temporary stay of individual enforcement proceedings has been granted in the main insolvency proceedings (recital 45 EIR Recast).*

*Article 38(2) provides that where the 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 it is satisfied that the undertaking adequately protects the general interests of local creditors.*

**Total marks: 10 out of 10.**

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

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

Question 3.1 [maximum 5 marks] **1.5**

**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)?**

*In general, the main elements identified were related to cross-border matters, for example, establishment of unified rules on international jurisdiction, recognition/enforcement of foreign insolvency decisions, efficiency/effectiveness of cross-border proceedings, equal treatment of creditors, protection of legitimate*

*expectations and transactions, communication between insolvency courts and insolvency practitioners. These issues were mainly adopted by the EIR Recast, which brought new / modern rules seeking to improve these issues of the EIR 2000.*

***This is a slim answer. There were many more points you should have covered:***

- ***COMI. Despite the fact that the essence of the concept of COMI has not changed in the EIR Recast (compared to the EIR 2000), some important additions were made. First of all, the definition of COMI has been codified in Article 3 EIR Recast (in the EIR 2000 a similarly worded indication of COMI appeared in Recital 13). Secondly, a 'suspect period' was added in Article 3(1) EIR Recast, supplementing the rule on the registered office presumption in a fight against abusive forum shopping. These changes should improve predictability of the international insolvency jurisdiction, ensure maximization of estate value and material efficiency.***
- ***Groups of companies. The EIR 2000 did not contain any rules dealing with insolvencies of enterprise groups. The basic premise of the EIR 2000 was that separate proceedings must be opened for each individual member of the group and that these proceedings are entirely independent of each other (entity-by-entity approach). The EIR Recast introduced two specific sets of provisions to promote the efficient administration of insolvency proceedings relating to different companies forming part of a group of companies. These are: 1) cooperation and communication in a group setting (Articles 56-60) and 2) group coordination proceeding (Articles 61-77). These novelties should streamline group insolvencies and make them more coordinated.***
- ***Information and publication. Access to information is indispensable for effective exercise of creditors' rights. Under the EIR 2000, there were no mandatory EU-level publication requirements concerning decisions opening insolvency proceedings. There was also no European insolvency register which would permit searches in several national registers at the same time. The EIR Recast provides both for the compulsory establishment of national insolvency registers (Article 24) and creation of the interconnection of insolvency registers via the e-Justice Portal (Article 25). The resulting improved access to information should enhance the degree of creditor participation and lower the monitoring costs, thus making the European insolvency regime more cost-efficient.***
- ***Students can also focus on a) new rules on 'as if' (or otherwise called 'synthetic') proceedings (Article 36 EIR Recast), b) the extended scope of the EIR Recast to include, for example, pre-insolvency proceedings and hybrid proceedings, so that they could benefit from the system of automatic recognition of judgments (which has been maintained, see Article 32 EIR Recast), c) extended duties of communication and cooperation. In addition to the existing duties between 'liquidators' (insolvency practitioners), these duties are introduced in relations between courts and between insolvency practitioners and courts, etc.***

Question 3.2 [maximum 5 marks] 0.5

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

*In short, some stakeholders state that the EIR Recast failed to promote some important insolvency issues. For example, reducing the formalities and improving flexibility in national preventive restructuring procedures; and to protect the interests of dissenting creditors. Although, in my opinion the EIR Recast tried to improve and regulate these issues, I believe that indeed some stronger and clear rule on these matters were necessary. That would improve the legal safety of parties involved, and, therefore reduce the number of litigations concerning the lack of an unified interpretation of the insolvency law.*

**Similarly, this is quite slim. Your attempt at resolving the issue is also quite weak. Just stating that “clearer rules” are needed is not precise enough.**

- ***Groups of companies. It can be argued that the newly introduced provisions on group insolvencies are too weak (or toothless). The EIR Recast does not advocate for either procedural (no group/enterprise COMI) or substantive consolidation (see Article 72(3) EIR Recast). The voluntary nature of group coordination proceedings (see Article 65 EIR Recast re opt-out), supplemented by non-binding actions (recommendations) of a group coordinator, cannot guarantee efficiency, as group members may freely decide to take a hold out (non-cooperative) position. Potential improvements can provide for the adoption of a group restructuring or insolvency plan that is binding for all participating members (with or without cross-jurisdictional (cross-entity) cram-down) and the option for substantive consolidation of the estates of jointly administered members of the group in certain narrowly defined circumstances. See also Recommendations 9.01-9.12 in Bob Wessels and Stephan Madaus, Instrument of the European Law Institute - Rescue of Business in Insolvency Law, 2017.***
- ***‘Synthetic’ secondary proceedings. Article 36 EIR Recast (‘Right to give an undertaking in order to avoid secondary insolvency proceedings’) contains 11 paragraphs and evidences a long struggle between representatives of the Member States. It is one of the most complicated provisions of the EIR Recast, touching upon such elements as the language, form of an undertaking, its approval, execution, challenge, etc. This level of detail is meant to guarantee legal certainty and ensure its harmonised application across the Member States. However, the novelty of the concept of ‘synthetic’ proceedings and the number of provisions used in the EIR Recast inevitably give rise to myriad of questions. For example, under paragraph 1 of Article 36, an undertaking shall specify the “factual assumptions on which it is based, in particular in respect of the value of the assets located in the Member State concerned and the options available to realise such***

**assets.” The question arises, how such assets can (and should) be identified and how their value is to be determined. Another problem relates to the establishment of the ‘known’ foreign creditors. In the absence of the opened secondary proceedings, it is not always possible (without incurring disproportionate costs) to determine such creditors. Ironically, the desired predictability and harmonisation in approaches and rules related to ‘synthetic’ proceedings has not been fully achieved in practice. A recent report by the Conference on European Restructuring and Insolvency Law (CERIL), CERIL Report 2018-1 of 4 June 2018, has revealed substantial divergence in the way different Member State legislate on ‘synthetic’ proceedings. While some of them (e.g. Finland, the Netherlands) decided not to introduce specific legislation on how to proceed with them, others (e.g. France, Germany) specified the process of accepting an undertaking under national law. The fact that the procedure established in Article 36 EIR Recast has not gained ground since its introduction in summer 2017 may indicate that its improvement or simplification may be necessary. The value of the undertaking is in its flexibility, but overregulation may stifle such flexibility. Giving more freedom to the parties involved and to the Member States in devising the most appropriate solutions on a case-by-case basis can prove to be more desirable and functional.**

Question 3.3 [maximum 5 marks] 0

**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.**

[Type your answer here]

**Total marks: 2 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] **0.5**

**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 EIR did not contain a definition of COMI. Recital 13, however, provided some guidance on this matter, establishing 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. The most important case precedent regarding this matter, involving Eurofood IFSC Ltd, the Court stressed the the concept of COMI has an autonomous meaning and must therefore be interpreted in a uniform way. This understanding was also reinforced by the CJEU.*

*Due to the above, since EIR 2000 did not provide a clear concept of COMI, although Bella SARL was registered in France, parties might argue that is COMI is actually in Ireland. Notwithstanding, if Bella SARL evidences that it conduct its administration from France, then the Strasburg High Court might have jurisdiction to open the requested safeguard.*

**You answer is incorrect.**

- The Strasbourg High Court does not have international insolvency jurisdiction to open insolvency proceedings.**
- Students are expected to mention that under the EIR 2000 (Article 3), the determination of international jurisdiction to open main insolvency proceedings is linked to the debtor's centre of main interest (COMI). According to Article 3 EIR Recast, COMI shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties (see also Recital 28). The place of the registered office shall be presumed to be the COMI in the absence of proof to the contrary.**

- **Relevant case law: *Eurofood IFSC Ltd, Case C-341/04, ECLI:EU:C:2006:281 (May 2, 2006)* and *Interedil Srl, in liquidation v Fallimento Interedil Srl, Case C-396/09, ECLI:EU:C:2011:671 (Oct. 20, 2011)*.**
- **However, Article 1 of the EIR 2000 states that ‘this Regulation shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator.**
- **Article 2 EIR 2000 states that “insolvency proceedings” shall mean the collective proceedings referred to in Article 1(1). These proceedings are listed in Annex A.**
- **Annex A of the EIR 2000 only listed two French insolvency proceedings which came under the scope of the EIR 2000: (i) liquidation; (ii) redressement judiciaire (rehabilitation).**
- **Therefore, the EIR 2000 would not apply to safeguard proceedings.**

Question 4.2 [maximum 5 marks] 0

**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.**

*Provisions of the EIR Recast apply only to insolvency proceedings opened after June 26, 2017 (article 84(1) EIR Recast). Proceedings opened before this date must be governed by the EIR 2000. Due to this above, the EIR Recast will not regulate the proceeding of Bella SARL.*

**You did not discuss the relevant features.**

- **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] 0.5

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

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

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

*Secondary proceedings might be opened in every place where the debtor has an establishment. This secondary proceeding will cover only the assets located in this place. Therefore, as a rule, the Italian Bank might request the opening of this proceeding in Italy, since Bella SARL has an warehouse located in this country. Notwithstanding, the EIR Recast provides some limitations for the opening of this proceedings (e.g., right to give an undertaking and stay of the opening of this proceeding), and so the Italian Bank must verify whether any of this limitations are present in the current case.*

**This is not the correct line of reasoning.**

- **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: 1 out of 15.**

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

Total marks: 20 / 50