



**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").**

Question 1.6

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

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

Question 1.7

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

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

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

Question 1.8

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

- (a) The COMI of the debtor is not presumed to be "at the place of the registered office" anymore and the debtor will need to confirm where his COMI is before the beginning of each case.**
- (b) Although the COMI of a debtor is still presumed to be "at the place of the registered office", it is now possible to rebut this presumption, albeit only by the courts.**
- (c) The rule that a company's COMI conforms to its registered office is now an irrefutable presumption.**
- (d) Although the COMI of a debtor is still presumed to be "at the place of the registered office", it should now be possible to rebut this presumption based on Article 3 EIR Recast and Recital 31.**

Question 1.9

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

- (a) Where the decision to open the insolvency proceedings was taken in flagrant breach of the right to be heard, which a person concerned by such proceedings enjoys.**
- (b) The judgment, subject to recognition, was passed with incorrect application of the applicable substantive law.**
- (c) The court, which has opened insolvency proceedings (originating court), most certainly did not have international insolvency jurisdiction to do so under the EIR Recast.**
- (d) The rule applied by the court, which has opened insolvency proceedings (originating court), is unknown or does not have an equivalent in the law of the jurisdiction in which recognition is sought.**

Question 1.10

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

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

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

**The correct answer was C.**

Total marks: 9 out of 10.

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks] **2**

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

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



*This provision/concept is the "Centre of Main Interests" (COMI), and it is discussed in Article 3 of the EIR Recast. This article establishes that the presumption that the registered office, the principal place of business, and the habitual residence are the debtor's COMI can be rebutted. Article 3(1) is the relevant text, which says *inter alia* 'In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary. That presumption shall only apply if the registered office has not been moved to another Member State within the 3-month period prior to the request for the opening of insolvency proceedings.'*

**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.

The EIR Recast expands its scope beyond traditional liquidation-oriented procedures to include proceedings aimed at rescuing financially distressed businesses that are economically viable. This may involve implementing a stay of individual creditors' actions to safeguard the interests of the general body of creditors. The EIR Recast specifically covers restructuring proceedings, even at a stage where insolvency is only likely, and allows for arrangements where the debtor retains partial or full control over its assets and affairs. Recital 10 thus begins:

*The scope of this Regulation should extend to proceedings which promote the rescue of economically viable but distressed businesses and which give a second chance to entrepreneurs. It should, in particular, extend to proceedings which provide for restructuring of a debtor at a stage where there is only a likelihood of insolvency, and to proceedings which leave the debtor fully or partially in control of its assets and affairs...*

This emphasis on restructuring is a notable departure from the previous version of the regulation, EIR 2000, which primarily addressed proceedings leading to the complete or partial divestment of a debtor and the appointment of a liquidator (see Article 1 EIR 2000). By broadening its coverage, the new regulation aligns with the overarching European trend of encouraging effective restructuring mechanisms that benefit creditors, stimulate investments, and create more job opportunities within the single market.

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

The EIR Recast is built upon the concept of modified universalism, as pure universalism has been deemed idealistic and impractical for the time being. Provide three (3) examples of provisions from the EIR Recast which highlight this modified universalism approach.

The default position under Article 3(1) of the EIR Recast is that the courts of the Member State of the debtor's COMI have jurisdiction to main proceedings. These have universal scope, i.e. encompass all the debtor's assets. However:

1. Recital 23 continues the approach of EIR 2000 in allowing secondary proceedings in parallel to the main proceedings. Secondary proceedings can only control assets with their own jurisdiction:

*...To protect the diversity of interests, this Regulation permits secondary insolvency proceedings to be opened to run in parallel with the main insolvency proceedings. Secondary insolvency proceedings may be opened in the Member State where the debtor has an establishment. The effects of secondary insolvency proceedings are limited to the assets located in that State. Mandatory rules of coordination with the main insolvency proceedings satisfy the need for unity in the Union.*

2. Recital 40 explains the rationale, including differences in legal systems - i.e. acknowledging that pure universalism is not [yet] achievable:

*Secondary insolvency proceedings can serve different purposes, besides the protection of local interests. Cases may arise in which the insolvency estate of the debtor is too complex to administer as a unit, or the differences in the legal systems concerned are so great that difficulties may arise from the extension of effects deriving from the law of the State of the opening of proceedings to the other Member States where the assets are located...*

3. Article 3(2), gives force to the above recitals, saying that secondary proceedings can be opened in any country where a debtor has an establishment:

*Where the centre of the debtor's main interests 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. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.*

*These are probably the three most important elements of the EIR Recast which reflect its aspiration of modified universalism.*

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

**Because pure universalism has not been adopted under the EIR 2015, main and secondary insolvency proceedings can be opened at the same time against the same debtor. In light of this, it is seminal that proper co-operation between the actors involved in concurrent proceedings takes place. It is therefore not surprising that co-**

**operation has been introduced as an obligation on several actors in the EIR 2015. List three (3) provisions (recitals and / or articles) of the EIR Recast that deal with the obligation to co-operate.**

**The three main examples are Articles 41-43:**

**Article 41: Cooperation and communication between insolvency practitioners. *The insolvency practitioner in the main insolvency proceedings and the insolvency practitioner or practitioners in secondary insolvency proceedings concerning the same debtor shall cooperate with each other to the extent such cooperation is not incompatible with the rules applicable to the respective proceedings...***

**Article 42: Cooperation and communication between courts. *...to facilitate the coordination of main, territorial and secondary insolvency proceedings concerning the same debtor, a court before which a request to open insolvency proceedings is pending, or which has opened such proceedings, shall cooperate with any other court before which a request to open insolvency proceedings is pending, or which has opened such proceedings...***

**Article 43: Cooperation and communication between insolvency practitioners and courts: *...to facilitate the coordination of main, territorial and secondary insolvency proceedings opened in respect of the same debtor: (a) an insolvency practitioner in main insolvency proceedings shall cooperate and communicate with any court before which a request to open secondary insolvency proceedings is pending or which has opened such proceedings; (b) an insolvency practitioner in territorial or secondary insolvency proceedings shall cooperate and communicate with the court before which a request to open main insolvency proceedings is pending or which has opened such proceedings; and (c) an insolvency practitioner in territorial or secondary insolvency proceedings shall cooperate and communicate with the court before which a request to open other territorial or secondary insolvency proceedings is pending or which has opened such proceedings...***

**Question 2.4 [maximum 2 marks]<sup>2</sup>**

**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.**

**Article 36: Right to give an undertaking in order to avoid secondary insolvency proceedings, enables insolvency practitioners (IPs) to provide an undertaking to a foreign court, which if accepted will allow the latter to refuse to open secondary proceedings in reliance on the IP's undertaking. Along with other provisions, this acts as a floodgates control to prevent a multiplicity of proceedings.**

**Article 38: Decision to open secondary insolvency proceedings, requires a court in receipt of a request to open secondary insolvency proceedings to immediately notify the IP or the debtor in possession in the main proceedings, and give them an opportunity to be heard on the request. This allows the court to consider reasons why opening secondary proceedings would be unnecessary or inappropriate.**

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

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

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

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

**During the reform process of the EIR 2000, what main elements were identified by the European Commission as needing revision within the framework of the Regulation (whether adopted or not)?**

**During the reform process of the European Insolvency Regulation 2000 (EIR 2000), the European Commission identified several main elements that needed revision within the framework of the Regulation. Some of these elements included:**

- **Scope and Ambit. The European Commission recognized the need to broaden the scope of the EIR to cover various types of insolvency proceedings, including those aimed at rescuing financially distressed businesses. This expansion sought to provide a more comprehensive framework for dealing with cross-border insolvencies and facilitate the restructuring of viable but financially troubled companies.**
- **Recognition and Enforcement. The recognition and enforcement of insolvency proceedings across EU member states were considered essential for promoting efficient cross-border insolvency proceedings. The European Commission sought to improve and simplify the process of recognition and enforcement, making it more effective and harmonized within the EU.**
- **Cooperation and Coordination. The Commission emphasized the importance of enhancing cooperation and coordination between courts in different member states handling cross-border insolvency cases. Improved communication and information sharing were seen as crucial elements to avoid conflicts and ensure a coherent approach to the administration of the debtor's assets.**
- **Avoidance Actions. The reform aimed to address issues related to avoidance actions in cross-border insolvency cases. This involved determining the applicable**

**law for such actions and streamlining the rules to ensure consistency and predictability in handling voidable transactions.**

- **Rescue Culture. The European Commission sought to promote a "rescue culture" within the EU, encouraging the rescue and restructuring of viable businesses in financial distress. This involved providing effective tools and mechanisms for restructuring, with a focus on preserving businesses and maximizing value for creditors.**

**Not all proposed changes were adopted in the final version of the European Insolvency Regulation Recast. Nonetheless, the reform process sought to address these main elements and improve the framework for cross-border insolvency proceedings within the European Union.**

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

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

**Two flaws or shortcomings of the EIR Recast that have been criticised are:**

- **Lack of Harmonization on Secondary Proceedings. One of the criticisms was the failure to achieve full harmonisation concerning the opening of secondary proceedings. The EIR Recast still allows for the possibility of opening secondary proceedings in other EU member states, even when the debtor's COMI is in the jurisdiction of the main proceedings. This could lead to potential duplication of proceedings and inefficiencies in the administration of the debtor's assets.**

**Potential corrections. The EIR Recast could be amended to adopt a stricter approach towards secondary proceedings. It could introduce a presumption against the opening of secondary proceedings when the debtor's COMI has already been determined in the main proceedings. Considering the potential adverse effects on efficiency and coordination, the threshold of evidence required from the party seeking to open secondary proceedings to demonstrate why such proceedings are warranted could be increased.**

- **Potential over-emphasis on rescue and restructuring. Another criticism has been that the EIR Recast has too much focus on rescue and restructuring. The core of this argument is most businesses that entering restructuring eventually fail anyway, and therefore the shift to a so-called 'rescue culture' has gone too far. One scholar describes this issue thus:**

***The recast Regulation, or at least the rhetoric surrounding it, puts the emphasis very much on business restructuring rather than on liquidation. The assumption appears to be that business restructuring is value enhancing***

*whereas liquidation is value destructive. While plausible in many scenarios, the assumption cannot be accepted as a universal truth. Often assets may be put to their most productive use through the liquidation process rather than left to linger in 'zombie' businesses that have little hope of long-term economic health but serve to suck resources away from more productive sectors. Be that as it may, the recast is not unduly prescriptive. McCormack, Gerard. "Something old, something new: recasting the European Insolvency Regulation." (2016): 121-146.*

*In fairness to the drafters, this move to 'rescue' was very much the zeitgeist at the time. Whether there is a subsequent growth in 'zombie' businesses etc. is probably a reflection of the wider culture rather than the EIR Recast. Governments' unwillingness to allow businesses to fail was most recently obvious during the covid crisis in 2020 and 2021, the consequences of which have not fully played out.*

*Potential corrections. To rectify this shortcoming, the EIR Recast could be amended to explicitly recognise the need for creative destruction, an economic concept popularized by the Austrian economist Joseph Schumpeter. It refers to the continuous process of innovation and technological advancement leading to the decline or elimination of less efficient and outdated businesses or industries. As these unsuccessful businesses fail, their resources, such as labour, capital, and technology, are released and redirected towards more productive and successful ventures. This process is seen as a driving force behind economic progress and growth, as it paves the way for new and more dynamic enterprises to emerge and thrive.*

*By rectifying the above, the EIR Recast could be improved to provide a more effective and harmonized framework for EU cross-border insolvency proceedings, further promoting the principles of modified universalism and facilitating the rescue and restructuring of viable (emphasis deliberate) businesses facing financial distress. These are however as much political questions as they are legal ones.*

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.**

**Two ways in which the European Insolvency Regulation (EIR) and the Directive on Preventive Restructuring Frameworks differ are as follows:**

Scope and Objective. **The EIR is primarily a choice-of-forum instrument that deals with cross-border insolvency proceedings. Its main objective is to determine the jurisdiction for opening and conducting insolvency proceedings involving debtors with assets or creditors in multiple EU member states. The EIR aims to provide a framework for the efficient administration of cross-border insolvencies, but it does not harmonize the substantive insolvency laws of the member states. On the other hand, the Directive on Preventive Restructuring Frameworks, adopted in 2019, has a different scope and objective. This directive focuses on harmonizing preventive restructuring frameworks within the EU member states. It seeks to facilitate the early restructuring of financially distressed businesses to prevent insolvency and promote the rescue of viable companies. Unlike the EIR, the directive addresses substantive aspects of insolvency law by promoting the use of preventive measures and providing tools for financial restructuring, aimed at avoiding insolvency.**

Applicability and Binding Nature. **The EIR is directly applicable in all EU member states, meaning it has immediate legal effect without the need for national implementing legislation. It is also binding in its entirety and directly applicable to the parties involved in cross-border insolvency proceedings. In contrast, the Directive on Preventive Restructuring Frameworks does not have the same direct applicability. It requires EU member states to transpose its provisions into their national laws within a specified timeframe. This means that the directive sets a common framework and objectives for preventive restructuring, but the specific measures and mechanisms for achieving these objectives may vary from one member state to another, depending on how they choose to implement the directive into their national legal systems.**

**In summary, while both the EIR and the Directive on Preventive Restructuring Frameworks aim to address aspects of insolvency law in the EU, they differ in their scope, objectives, applicability, and binding nature. The EIR primarily deals with choice of forum in cross-border insolvency cases, while the directive aims to harmonize preventive restructuring frameworks at the national level to facilitate early restructuring and rescue of financially distressed businesses.**

**Total marks: 15 out of 15.**

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

Scenario

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

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

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

Question 4.1 [maximum 5 marks] **1**

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

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

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

***Yes, Article 3(1) EIR 2000 established that main proceedings could be initiated at the debtor's COMI. Bella SARL is a French-registered company and opened its first store in Strasbourg in 2010. These proceedings have universal scope, i.e. all debtor assets in the EU.***

***Further, Article 4 of the EIR 2000 prescribed that the *lex concursus*, i.e. law of the state of the opening of insolvency proceedings. This will therefore govern, e.g. debtor and liquidator powers, ranking of claims, the effects on current contracts of the proceedings, and creditors' rights. These would also therefore be governed by French law.***

***Finally, Articles 16, 17 and 25 prescribed the automatic recognition of judgments opening insolvency proceedings and their effects as well as judgments concerning the course and closure of insolvency proceedings.***

***This is incorrect.***

- The Strasbourg High Court does not have international insolvency jurisdiction to open insolvency proceedings.***
- Students are expected to mention that under the EIR 2000 (Article 3), the determination of international jurisdiction to open main insolvency proceedings is linked to the debtor's centre of main interest (COMI). According to Article 3 EIR Recast, COMI shall be the place where the debtor conducts the administration of***



**its interests on a regular basis and which is ascertainable by third parties (see also Recital 28). The place of the registered office shall be presumed to be the COMI in the absence of proof to the contrary.**

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

Question 4.2 [maximum 5 marks] 5

**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.**

Temporal scope. **Article 92 of the EIR Recast: *Entry into force*, provides:**

***This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union. It shall apply from 26 June 2017, with the exception of: (a) Article 86, which shall apply from 26 June 2016; (b) Article 24(1), which shall apply from 26 June 2018; and (c) Article 25, which shall apply from 26 June 2019.***

**Article 86, which applies from 26 June 2016 is re. *Information on national and Union insolvency law*, and is not relevant to this question. EIR Recast therefore does not apply, because these proceedings were filed on 26 June 2017, four days before its entry into force, and it applies to insolvency proceedings opened after that date. The EIR Recast does not have retroactive application, which means it does not affect or apply to insolvency proceedings that were opened before its effective date (i.e., before 26 June 2017). Insolvency proceedings opened prior to this date continue to**

**be governed by the previous version of the European Insolvency Regulation 2000 (EIR 2000).**

**For completeness, however:**

**Material scope. Article 1 notes that 'This Regulation shall apply to public collective proceedings, including interim proceedings, which are based on laws relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation'. Annex A specifically lists safeguard ('Sauvegarde') proceedings. This is therefore within EIR Recast's material scope.**

**Personal scope. Recital 9 says 'This Regulation should apply to insolvency proceedings which meet the conditions set out in it, irrespective of whether the debtor is a natural person or a legal person, a trader or an individual...'. Recital 10 includes rescue proceedings: 'The scope of this Regulation should extend to proceedings which promote the rescue of economically viable but distressed businesses and which give a second chance to entrepreneurs...'. Article 1(2) excludes '(a) insurance undertakings; (b) credit institutions; (c) investment firms and other firms, institutions and undertakings to the extent that they are covered by Directive 2001/24/EC; and (d) collective investment undertakings.' This is because per Recital 19, 'they are excluded from the scope of this Regulation, as they are all subject to special arrangements and the national supervisory authorities have wide-ranging powers of intervention.' The case in the question would therefore be within the personal scope of EIR Recast.**

**Territorial scope. As binding EU legislation, EIR Recast applies directly in all Member States except Denmark, but does not offer clear rules for geographical application. Recital 25 says, 'This Regulation applies only to proceedings in respect of a debtor whose [COMI] is located in the Union'. Recital 27 then says, 'Before opening insolvency proceedings, the competent court should examine of its own motion whether the centre of the debtor's main interests or the debtor's establishment is actually located within its jurisdiction'. Were Bella SARL's COMI outside of the EU, or in Denmark, EIR Recast therefore would not apply. On the facts however, that is not the case.**

**In *Christopher Seagon v Deko Marty Belgium NV*, Case C-339/07, ECLI:EU:C:2009:83 (Feb. 12, 2009), the ECJ ruled that courts of a Member State within the territory of which insolvency proceedings were opened have jurisdiction in actions to set transactions aside (*actio pauliana*), if brought against an entity whose registered office is in another Member State. In both *Ralph Schmid v Lilly Hertel*, Case C-328/12, ECLI:EU:C:2014:6 (Jan. 16, 2014) and *H, acting as liquidator in the insolvency of G.T. GmbH, v H.K.* Case C-295/13, H v HK (Dec. 14, 2014), the CJEU confirmed that the EIR (and thus EIR Recast) can have extraterritorial application.**

**The rationale behind this is that while the Brussels I Regulation, i.e. the overall Regulation on civil and commercial jurisdiction, is focused in favour of defendants: i.e.**

*actor sequitur forum rei, or the plaintiff follows the forum of the property in suit, or the forum of the defendant's residence, in insolvency proceedings the focus is to avoiding forum shopping to detrimental to creditors. Therefore, determine COMI (which in turns determines jurisdiction) should use verifiable and predictable criteria. The possibility of non-EU domiciled defendants being enmeshed in EU proceedings due to there being an EU COMI is not generally seen as problematic within that context. In any event, this isn't an issue here, and no non-EU states are mentioned in the question.*

Question 4.3 [maximum 5 marks] 1

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

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

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

*Based on the facts of the case provided, secondary insolvency proceedings may be opened in Italy under the EIR Recast, depending on how the insolvency practitioners handle the Italian bank's request. It is however unlikely.*

*Article 3(1) of the EIR Recast clarifies that, except for certain exceptions not applicable in this case, the debtor's COMI is presumed to be the place of its registered office. Bella SARL is a French-registered company, and the scenario does not indicate any specific factors that would rebut the presumption that its COMI is in France. Additionally, Article 3(1) states that the law applicable to insolvency proceedings and their effects shall be the law of the member state where such proceedings are opened (i.e., the law of the main proceedings). Therefore, the French law would apply to the insolvency proceedings initiated in France.*

*The EIR Recast includes specific provisions related to the opening of secondary proceedings in addition to the main insolvency proceedings. According to Article 3(2) of the EIR Recast, the debtor's COMI determines the jurisdiction for the opening of main insolvency proceedings. In this scenario, Bella SARL filed a petition to open safeguard proceedings in the Strasbourg High Court in France. Since its COMI is in France, the French court has jurisdiction to open the main insolvency proceedings.*

*In the context of the question, the Italian bank filing for secondary insolvency proceedings in Italy with the purpose of securing an "Italian insolvency distribution ranking" suggests that it aims to obtain a more favourable position in the order of distribution of assets compared to other creditors. By initiating secondary proceedings in Italy, the bank seeks to benefit from the Italian insolvency law's specific provisions regarding creditor ranking, potentially improving its chances of receiving a higher payout from the debtor's assets compared to other creditors involved in the main proceedings in France.*

*However, under Article 36, Right to give an undertaking in order to avoid secondary insolvency proceedings, the IP(s) could give an undertaking to the Italian bank to assure them that they will comply with the distribution and priority rights under Italian law that the bank would have if secondary insolvency proceedings were opened in Italy. Article 36 EIR Recast reflects the codification of *Collins & Aikman Europe SA, Re*<sup>1</sup> in which the English High Court addressed a lacuna in the EIR 2000 by explicitly ruling that it had jurisdiction to grant an order enabling English-appointed joint administrators of companies based in Europe to implement assurances given earlier to creditors in the relevant European jurisdictions and hence to *pro tanto* depart from the application of the ordinary provisions of English law, the law of the main proceedings.*

*Article 38(1), Decision to open secondary insolvency proceedings, says that a court seised of a request to open secondary insolvency proceedings shall immediately give notice to the insolvency practitioner or the debtor in possession in the main insolvency proceedings and give it an opportunity to be heard on the request, and 38(2) says that following such an undertaking the Italian court should not open secondary insolvency proceedings if it is satisfied that the undertaking adequately protects the general interests of local creditor, ie the Italian bank.*

*In this case therefore, the likely outcome would be that any attempt to open secondary proceedings would lead to the IP(s) offering undertakings to the Italian bank, thus rendering the secondary proceedings unnecessary.*

While some of your reasoning is sound, the answer is incorrect.

- **According to Article 3(2) EIR Recast, where the debtor's COMI is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if it possesses an establishment within the territory of that other Member State.**
- **Under Article 2(10) EIR Recast, 'establishment' means any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets.**
- **Relevant case law: *Interedil Srl, in liquidation v Fallimento Interedil Srl*, Case C-396/09, ECLI:EU:C:2011:671 (Oct. 20, 2011), *Burgo Group SpA v Illochroma SA*, Case C-327/13, ECLI:EU:C:2014:2158 (Sep. 4, 2014).**
- **The facts of the case do not support the finding of an establishment of Bella SARM 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**

---

<sup>1</sup> [2006] EWHC 1343 (Ch) [2006] 6 WLUK 160 | [2006] B.C.C. 861 | [2007] 1 B.C.L.C. 182 | [2007] I.L.Pr. 2.

*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: 7 out of 15.**

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

Total marks: 41/50