



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

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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.***
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***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

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***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*.***

Total marks: 10 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.***

2.1. **Statement 1**

The statement relates to the International Jurisdiction

The concept is COMI Presumption. The presumption applies if the registered office and the habitual residence have not been moved to another member state within the 3-month period prior to the request for the opening of Insolvency proceedings.

The relevant article is **ARTICLE 3(1) EIR Recast**.

**Statement 2**

The provision refers to the Scope and specifically Material Scope. The concept is that this provision extends not only to traditional liquidation – oriented procedures but also to proceedings aiming at rescuing economically viable but financially distressed businesses, including those providing for a stay of individual creditors' actions for the sake of protecting the general body of creditors.

The relevant article is **Article 1 EIR and Recital 10**.

*[Type your answer here]*

**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 three (3) examples which highlight the modified universalism are as follows:

- (i) The EIR Recast defines international jurisdiction for insolvency cases within the EU .It designates the Member State the courts of which, may open insolvency proceedings (**Recitals 26**). Territorial jurisdiction within that Member State itself is not a matter for EU law and is established by national (domestic) law of the Member State concerned. For instance, while the EIR Recast may designate the Netherlands (as a country) for the opening of insolvency proceedings, it is Article 2 of the Dutch Bankruptcy Act of 1896 that defines the competent national court, of the courts of first instance in Netherlands to open such proceedings
- (ii) **Article 3(1)** EIR Recast states that the courts of the Member State within the territory of which the Centre of the debtor's main interests is situated, shall have jurisdiction to open insolvency proceedings ("main insolvency proceedings"). Such proceedings have universal scope and aim at encompassing all the debtor's assets. At the same time, the EIR Recast allows for the opening of secondary proceedings, which run in parallel to main insolvency proceedings and produce effects only on assets situated within a state of secondary proceedings (Recital 23). Secondary proceedings, being territorial in nature, protect the diversity of interests, promote effective administration of complex insolvency states, and mitigate difficulties arising from divergent national laws (**Recital 40**)

(iii) While main insolvency proceedings are linked to the COMI of an insolvent debtor, secondary proceedings can be opened in any country in which this debtor has an establishment (**Article 3(2) EIR Recast**). A debtor can have only one COMI and thus only one main insolvency proceeding can be opened. At the same time, there could be as many secondary proceedings as there are establishments of the debtor across Member States (i.e. one main insolvency proceeding and a maximum of 26 secondary insolvency proceedings). Consequently, several proceedings in relation to the same debtor, running under different national insolvency laws, are frequently encountered in practice.

*[Type your answer here]*

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.***

[2.3. Recital 48 stated that the efficient administration of the insolvency estate and the effective realisation of the total assets require proper co-operation between the actors involved in all the concurrent proceedings. Proper cooperation implies the various insolvency practitioners and the courts involved co-operating closely, in particularly exchanging relevant information.

### **1. Co-Operation between Insolvency Practitioners**

According to Article 41 (1) EIR Recast, the insolvency practitioner in main insolvency proceedings and insolvency practitioner(s) in secondary proceedings concerning the same debtor shall cooperate with each other, as long as it is compatible with the rules applicable to the respective proceeding.

Insolvency practitioners must as soon as possible communicate to each other on any information which may be relevant to other proceedings. They should address any progress made. in lodging and verifying claims and all measures aimed at rescuing or restructuring the debtor, or at terminating the proceedings (Article 41 (2)(a) EIR Recast.

Article 41 (2)(c) EIR Recast mandates insolvency practitioners in secondary proceedings to provide the main insolvency practitioner with an early opportunity to submit proposals on the realisation or use of assets in secondary insolvency proceedings.

### **2. Co-Operation between Courts**

The EIR Recast obliged the court before which a request to open insolvency proceedings is pending, or which has opened such proceedings, to co-operate with any other court faced with the issue of opening insolvency proceedings or which has already opened

such proceedings (Article 42(1) EIR Recast). Thus, co-operation extends in time before the insolvency proceedings are opened. This is done to ensure better co-ordination and to preclude abusive forum shopping. The co-operation covers all sorts of proceedings, including territorial (independent) proceedings and is in principles limited only to the extent that such cooperation is incompatible with the rules applicable to each of the proceedings involved.

Court-to-court co-operation can take various forms and may be implemented by any means that the court considers appropriate. For instance, it can result in co-ordination related to the appointment of insolvency practitioners. In that context, courts may appoint a single insolvency practitioner for several insolvency proceedings concerning the same debtor, if this is compatible with the rules applicable to each of the proceedings, with any requirements concerning the qualification and licensing of the insolvency practitioner (Recital 50 EIR Recast.) The courts are empowered to co-ordinate the administration and supervision of the debtor's assets and affairs, synchronise the conduct of hearings and the approval of protocols, where necessary (Article 42(3) EIR Recast).

### **Co-operation between insolvency practitioners and courts**

(Article 43 EIR Recast) describes three situations in which cooperation between insolvency practitioners and courts can occur:

- (a) an insolvency practitioner in main insolvency proceedings must co-operate 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 must cooperate and communicate with the court before which a request to open main insolvency proceedings is pending, or which has opened such proceedings.
- (c) an insolvency practitioner in territorial or secondary insolvency proceedings must 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.

Article 46(1) EIR Recast commits the court in the secondary proceedings to stay the process of assets realization in whole or in part on receipt of the request from the main insolvency practitioner.

The same goes for the goal of business restructuring that becomes more achieve with the power of an insolvency practitioner in the main insolvency proceedings to propose a restructuring plan, a composition, or a comparable measure, in secondary proceedings (Article 47(1) EIR Recast).

*Type your answer here]*

**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.**

[The EIR Recast clearly covers judgments concerning the opening conduct and closure of Insolvency proceedings.

According to Article 6 EIR Recast, the courts of the Member State within the territory of which insolvency proceedings have been opened in accordance with Article 3, shall also have jurisdiction for any action which derives directly from the insolvency proceedings and is closely linked with them, such as avoidance actions.

The examples are as follows: -

- i. Article 3(4) EIR Recast permits the opening of the so-called territorial insolvency proceedings prior to the opening of main insolvency proceedings.
- ii. According to Article 6 EIR Recast, the courts of the Member State within the territory of which insolvency proceedings have been opened in accordance with Article 3 shall also have jurisdiction for any action which derives directly from the insolvency proceedings and is closely linked with them, such as avoidance actions. The Article 6(1) EIR it explicitly names avoidance actions as an example.
- iii. Recital 35 states that the courts of the Member State within the territorial of which Insolvency proceedings have been opened should also have jurisdiction for actions which derive directly from the Insolvency proceedings and are closely linked with them.

Concentrating all the action directly related to the insolvency before the courts of the Member State with jurisdiction to open Insolvency proceedings is consistent with the objective of improving the effectiveness and efficiency of insolvency proceedings having cross-border effects and countering abusive forum shopping.

*Type your answer here]*

**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)?***

The main elements that were identified by the European Commission as needing revision within the framework are as follows:

1. The need to improve the efficiency and effectiveness of insolvency proceedings having cross-border effect

2. The need to ensure equal treatment of creditors (*paritas creditorum* principle).
3. The need to protect legitimate expectations and the "certainty of transactions.
4. The need to make the system of the EIR 2000 universal, as it provided for the possibility of opening secondary (territorial) proceedings in a Member State where the debtor had an establishment, and for coordination between main and secondary proceedings. Unlike main insolvency proceedings, secondary proceedings could cover only assets falling under their limited geographical scope. Importantly, the EIR 2000 prescribed the automatic recognition of judgments opening insolvency proceedings and their effects (*lex concursus* to be applied in the country\_ of recognition) as well as judgments concerning the course and closure of insolvency proceedings (Articles-16, 17 and 25 EIR 2000)
5. Some of its provisions needed adjustment, while other developments required totally new rules.
6. The need of insolvency practice (broadening scope to restructuring proceeding, stronger rules for cooperation between insolvency practitioners and courts,
7. The possibility of proceedings about members of the same group of companies, i
8. The improvement of creditor information (interconnectivity of insolvency registers as well as
9. The general modernisation of the legal rules (data-protection).

|

*Type your answer here]*

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 two shortcomings of the EIR Recast are as follows:

- (i) The EIR Recast has not yet fully achieved harmonization of insolvency laws at EU.
- (ii) The issue of Rescue and Restructuring not properly stated.

My suggestions on how this could be corrected are as follows:

Harmonisation:

- Having common definition of insolvency proceeding
- Establishing condition for opening insolvency proceeding universally
- Explicitly state ranking of claim
- Avoidance and the identification and tracing of assets that belong to the insolvency estate.

In the absence of a definition of an Insolvency Proceeding it makes it lose its importance  
Rescue & Restructuring

- Look into the issue of preventive restructuring proceeding across member state to enable debtors in financial difficulty to restructure at an early state to avoid insolvency
- Introducing debtors in possession procedures.

The possibility to cross-class cram-down dissecting creditors *Type your answer here]* **This was done by the Directive. The Regulation also did not aim to substantively harmonise insolvency law. Rather, it is a choice-of-law, choice-of-forum instrument.**

Question 3.3 [maximum 5 marks] **2**

***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 ways in which the Regulation and the Directive differ are as follows.

1. The directive adopted stated that Debtors will have access to early warning tools that enable them to detect the deterioration of the business leading turn, to engaging in restructuring processes at an early stage. The overarching objective is to promote development of a new culture of preventive restructuring with viable companies experiencing financial difficulties being offered early access to restructuring procedures, irrespective of their location in the European Union. **Compare to the Regulation.**

This entails the following:

- (i) easy access to preventive restructuring procedures allowing debtors to restructure their debts at an early stage.
- (ii) the possibility for debtors accessing the preventive restructuring procedure to remain in control of their assets and day-to-day operation of the business through a debtor-in-possession model.
- (iii) a stay on creditor actions to encourage good faith debtors to apply for restructuring at an early stage.
- (iv) the possibility to cross-class cram-down dissenting creditors.
- (v) the "best interests of creditors" test and the absolute priority rule, which aim at protecting creditors; and
- (vi) the protection of new and interim financing, which is a key attribute to any successful restructuring plan

2. The Directive is aimed at creating harmonised restructuring frameworks throughout the Member States, including key commonalities with the processes from these jurisdictions. It did so by introducing a number of concepts and provisions associated with robust and successful existing restructuring frameworks, such as Chapter 11 of the US Bankruptcy Code, the Irish Examinership, the UK Scheme of Arrangement and the French sauvegarde process. It is the first instrument that substantively harmonises insolvency law across the EU, albeit only a narrow aspect of it, that is, preventive restructuring, and as a result it represents a milestone in the development of European insolvency law. **Compare to the Regulation.**

***Type your answer here]***

**Total marks: 9 out of 15.**

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

## Scenario

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

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

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

Question 4.1 [maximum 5 marks] **2**

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

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

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

(Article 3(1) EIR 2000). established that (main) insolvency proceedings could be initiated at the place of the debtor's Centre of main interest, or COMI Such proceedings had universal scope and encompassed all debtor's assets throughout the EU. The EIR 2000 also prescribed that the law of the state of the opening of insolvency proceedings, the *lex concursus*, determines the effects of such proceedings (Article 4 EIR 2000).

The Centre of Main Interest of Bella SARL is in France where the Main Insolvency proceedings were opened. Bella SARL has its office registered in France. It has warehouses in the following European Countries: Germany, Ireland, Italy, Spain and Portugal.

The CJEU confirmed this approach in *Christopher Seagon v. Deko Marty Belgium NV*, It noted that concentrating all the actions directly related to the insolvency before the courts

of the Member State with jurisdiction to open insolvency proceedings is consistent with the objective of improving the effectiveness and efficiency of insolvency proceedings having cross-border effects and of countering abusive forum shopping.

The prevalence of main insolvency proceedings and their lex concursus has been confirmed by the CJEU in the case of ENEFI Energiahatekonysagi Nyrt. Based on the above, Strasbourg High Court has jurisdiction to open the requested safeguard proceedings under the EIR 2000.

*Type your answer here]*

**While some of your reasoning is sound, 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.**



Firstly, it is necessary to look for the "Centre of the debtor's main interest" (Article 1 (1) EIR Recast), i.e., the debtor's COMI. The EIR Recast applies only when the debtor's COMI is located within the EU (excluding Denmark). Bella SARL is a French registered company and opened its first warehouse in Strasbourg., which is an EU Member State. Thus, the requirement of the **Geographical scope of the EIR is satisfied**.

Secondly, one needs to check whether the personal scope of the EIR Recast is complied with. As Bella SARL is neither a bank, nor any other excluded" entity, the requirement of the **personal scope of the EIR is satisfied**

Thirdly, in order to fall within the scope of the EIR Recast, an insolvency proceeding has to be listed in Annex A (material scope). The safeguard proceeding opened against Bella SARL is mentioned in Annex A. Therefore, it falls within the **material scope** of the EIR Recast.

Fourthly, **temporal scope** must be checked. This scope requires that the insolvency proceeding is opened after 26 June 2017 (the entry of the EIR Recast into force). The facts of the case indicate that the insolvency proceeding in question was opened on 30 June 2017, that is within the temporal scope of the EIR Recast.

Having studied the facts of the case against the background of the EIR Recast, I can conclude that the EIR Recast is applicable to the insolvency proceeding opened against Bella SARL.

*Type your answer here]*

**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.***

[Article 8 EIR Recast is identical to Article 5 EIR 2000. It provides an exception to the general rule of application of lex concursus. Under this exception, the opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or-intangible, movable or immovable assets, both specific assets and collections of indefinite assets which change from time to time, belonging to the debtor and which are situated within the territory of another Member State at the time of the opening of proceedings.

Recital 68 EIR Recast is clear that the basis, validity and extent of rights in rem should normally be determined according to the lex situs and not be affected by the opening of insolvency proceedings. This means that most often the attributes of a right in rem will follow the law of the location of the property.

Based on the facts of the case, I can conclude that the EIR Recast is applicable and such proceedings can be opened in Italy.

Article 7 EIR Recast lays down the general rule, under which the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened. This law (*lex concursus*) determines, *inter alia*, the effects of insolvency proceedings on proceedings brought by individual creditors and the rules governing the distribution of proceeds from the realisation of assets. Since the main insolvency proceedings were opened in France, French law should be considered to be the *lex concursus*.

Article 8 EIR Recast states that the opening of insolvency proceedings shall not affect the rights in rem of creditors in respect of immovable assets, belonging to the debtor and situated within a Member State, other than the state for the opening of insolvency proceedings.

The concept of an "establishment" is essential to the opening of secondary proceedings, as such proceedings can only be opened in a Member State in which the debtor has an establishment.

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

Whereas main insolvency proceedings are dependent on the debtor's COMI, secondary proceedings are inextricably linked to a debtor's establishment. In 2000, the EIR Recast adheres to the autonomous interpretation of the concept of establishment.

Bella SARL has an establishment in Italy based on the above.

In *Interdil* the CJEU examined the concept and concluded that the fact that the definition connects the pursuit of an economic activity to the presence of human resources, shows that a minimum level of organisation and a degree of stability are required.

This is incorrect.

- ***According to Article 3(2) EIR Recast, where the debtor's COMI is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if it possesses an establishment within the territory of that other Member State.***
- ***Under Article 2(10) EIR Recast, 'establishment' means any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets.***
- ***Relevant case law: Interdil Srl, in liquidation v Fallimento Interdil 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.**

Type your answer here]

**Total marks: 9 out of 15.**

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

Total marks: 38 / 50