



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.***
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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.***
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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

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.

[

Statement 1:

- **Article 3(1) EIR Recast: The place of registered office shall be presumed to be the place of COMI.**
- **Article 2(12) EIR Recast: habitual residence, domicile or registered office of a creditor.**
- **Recital 30 EIR Recast: the guidance provided by the court.**

Statement 2:

- **Article 1 EIR Recast: the EIR Recast applies to public collective proceedings, including interim proceedings, which are based on laws relating to insolvency and in which, for the purpose of rescue, adjustment of debt,etc.**
- **Recital 10 EIR Recast: proceeding which provide for restructuring of a debtor at a stage where there is likelihood of insolvency.**

]

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.

[

When several proceedings in relation to the same debtor are running under different national insolvency laws, it will create a complex system with one main proceeding dominating the course of the debtor's insolvency and one or more secondary proceedings. As a result, compared to the 1970 and 1980 Conventions, which favoured the ideals of unity and universalism, the EIR Recast chooses the middle ground of modified universalism.

Below are three (3) examples of provisions from the EIR Recast which highlight this modified universalism approach:

- 1. Main insolvency proceedings and COMI- Article 3(1) EIR Recast.***
- 2. COMI presumptions- Article 3(1) EIR Recast.***
- 3. Secondary insolvency proceedings and establishment- Article 3(2) EIR Recast.***
- 4. Actions falling under jurisdiction of courts, related actions- Article 6 EIR Recast.***

]

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.

Co-operation and communication within the EIR Recast framework stems from the general idea of mutual trust and sincere co-operation. It certainly makes sense that when there are several proceedings against one debtor, such proceedings should be co-ordinated.

The EIR Recast introduces a comprehensive framework for:

- 1. Co-operation and communication between insolvency practitioners (Article 41 EIR Recast),*
- 2. Co-operation and communication between courts (Article 42 EIR Recast), and*
- 3. Co-operation and communication between insolvency practitioners and courts (Article 43 EIR Recast),*

]

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 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 estates and mitigate difficulties arising from divergent national laws (Recital 40).

For the prevention of secondary proceedings, the EIR Recast contains a number of options to avoid the opening of secondary insolvency proceedings, two examples are listed below:

- 1. The right to give an undertaking ("synthetic" secondary proceedings):
According to Article 38(2) EIR Recast, 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 creditor.*
- 2. The stay of the opening of secondary insolvency proceedings:*

Opening a secondary proceeding may frustrate the process of negotiations and undermine business rescue. To prevent this from happening, the EIR Recast provides for the possibility for the court to temporarily stay the opening of secondary proceedings, when a temporary stay of individual enforcement proceedings has been granted in the main insolvency proceedings. The stay of the opening of secondary proceeding therefore preserves the efficiency of the stay granted in the main insolvency proceedings (Recital 45 EIR Recast). Such stay requires a request from the insolvency practitioner or the debtor in possession (Article 38(3) EIR Recast).

]

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 EIR 2000 (European Insolvency Regulation) was revised in 2015, and during this reform process, the European Commission identified several main elements that needed revision within the framework of the Regulation. These elements included:

- 1. The scope of the Regulation: The Commission identified that the scope of the EIR 2000 needed to be expanded to cover more insolvency-related matters, such as pre-insolvency proceedings, debtor-in-possession regimes, and hybrid proceedings.*
- 2. Coordination between insolvency proceedings: The Commission noted that there were gaps and inconsistencies in the coordination between insolvency proceedings in different Member States, which needed to be addressed. The revised EIR 2015 introduced several new provisions to improve coordination, such as the obligation to appoint a coordinator in multi-state proceedings.*
- 3. Recognition of insolvency proceedings: The Commission identified that the recognition of insolvency proceedings between Member States needed to be improved, particularly in cases where there were conflicting judgments. The revised EIR 2015 introduced new rules to ensure that the courts of the Member*

State where the main insolvency proceedings were taking place would have priority over other courts.

- 4. Group insolvency: The Commission recognized that the EIR 2000 did not adequately address the issue of group insolvency, where several companies within a group are experiencing financial difficulties. The revised EIR 2015 introduced new provisions to address group insolvency, such as the possibility for a group coordinator to be appointed.*

Overall, the main aim of the EIR 2015 reform process was to improve the efficiency and effectiveness of cross-border insolvency proceedings within the European Union, and to create a more harmonized framework for dealing with insolvency-related issues.]

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.

[Although the EIR Recast was generally well-received by stakeholders, some critics argued that it fell short in certain areas. Here are two potential flaws or shortcomings of the EIR Recast and some suggestions on how they could be corrected:

- 1. Lack of harmonization: One criticism of the EIR Recast is that it does not go far enough in harmonizing insolvency laws across EU Member States. While the Recast introduced some new provisions to improve coordination and cooperation between different Member States, it did not create a fully harmonized framework for dealing with insolvency. One potential way to address this shortcoming would be to create a more comprehensive EU-wide insolvency law that provides a unified set of rules for cross-border insolvency.*
- 2. Inadequate protection for creditors: Another criticism of the EIR Recast is that it does not provide enough protection for creditors, particularly in cases where a debtor is attempting to use insolvency proceedings to avoid paying their debts. Some critics argue that the Recast does not go far enough in ensuring that creditors have adequate information and are able to participate fully in insolvency proceedings. One potential way to address this shortcoming would be to create new rules that give creditors greater access to information and more opportunities to participate in insolvency proceedings, such as by creating a creditors' committee or providing for more robust reporting requirements for insolvency practitioners.*
- 3. The co-ordination of insolvency proceedings of members of a group of companies: the EIR Recast introduces procedural rules on the co-ordination of the insolvency proceedings of members of an enterprise group. Such rules*

strive to ensure the efficiency of the co-ordination, whilst at the same time respecting each group member's separate legal personality (Recital 54 EIR Recast). This latter requirement, has led to a rather modest result.

The EIR Recast does not sanction substantive, procedural or even jurisdictional consolidation. Instead, it offers a co-ordination mechanism called the "group co-ordination proceeding". Therefore, nothing structural for groups themselves. It is important to note that group co-ordination proceedings are voluntary in nature (for the member of the group to be included in group co-ordinating proceedings). In addition, these proceedings lead to non-binding actions (recommendations) of a group coordinator. For these reasons, the new set of rules on group insolvency have had a mixed reception in legal literature, with the majority of authors expressing doubts as to their effectiveness and practical value, as well as to the high costs the group co-ordinating proceedings may bring with them and their complex character.

4. *Members located in non-Member States: the EIR Recast will not bind courts and insolvency practitioners in such non-Member State proceedings and that the latter cannot form part of the group co-ordination proceedings. This, however, should not prevent the possibility of entering into cross-border agreements or protocols.*

The opening of a group co-ordination proceeding can be requested by an IP appointed in insolvency proceedings opened in relation to any group member, and before any court presiding over insolvency proceedings of a group member (Recital 55, Article 61 EIR Recast).

Two conclusions can be drawn. First, only insolvency practitioners appointed in proceedings against a group member can request the opening of group proceedings. Creditors, including public authorities, are not empowered to do so. Second, group co-ordination proceedings can be initiated in any court presiding over insolvency proceedings (whether main or secondary) against any group member. The EIR Recast does not introduce a concept of a group (or enterprise) COMI and does not otherwise indicate the main court, which is decisive in performing the tasks of co-ordination].

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

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

[The European Insolvency Regulation (EIR) and the Directive on Preventive Restructuring Frameworks (DPRF) are two distinct legal instruments that aim to

address different aspects of insolvency law in the European Union. Here are two ways in which the EIR and the DPRF differ:

1. **Scope:** The EIR is primarily concerned with cross-border insolvency proceedings within the EU, while the DPRF is focused on preventive restructuring frameworks for companies that are facing financial difficulties but have not yet entered insolvency. While the EIR deals with the coordination and recognition of insolvency proceedings between Member States, the DPRF aims to provide a common framework for early restructuring of companies to prevent insolvency.
2. **Substantive law:** As a choice-of-forum instrument, the EIR does not harmonize the substantive insolvency laws of the Member States, but rather provides rules on jurisdiction, applicable law, and the recognition and coordination of insolvency proceedings. In contrast, the DPRF is a substantive law instrument that sets out common principles and procedures for preventive restructuring frameworks across the EU, with the aim of providing companies with a more efficient and effective means of restructuring before they become insolvent. The DPRF establishes minimum standards for preventive restructuring frameworks, such as the involvement of creditors and the need for a court or other independent body to oversee the process.

Overall, while the EIR and the DPRF both seek to promote greater efficiency and coordination in insolvency matters across the EU, they address different aspects of the insolvency process and operate at different levels of legal harmonization.]

Total marks: 15 out of 15.

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

Scenario

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

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

Unfortunately for Bella SARL, the timing of this initiative coincided with the Great Economic and Financial crisis which hit Europe in the late 2000s. By 2014 the company was in financial difficulty, yet managed to keep afloat for another few years. On 20

June 2017, it filed a petition to open safeguard proceedings in the Strasbourg High Court in France.

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

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

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

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

[Under the European Insolvency Regulation 2000 (EIR 2000), the determining factor for jurisdiction is the location of the debtor's "center of main interests" (COMI). According to Article 3(1) of the EIR 2000, the courts of the Member State in which the debtor's COMI is situated have jurisdiction to open insolvency proceedings. The concept of COMI is further clarified in Recital 13, which indicates that COMI should correspond to the place where the debtor conducts the administration of its interests on a regular basis and is therefore ascertainable by third parties.

In the case of Bella SARL, the company is registered in France and opened its first store in Strasbourg. Its main warehouse is located in Cork, Ireland, and it has warehouses across Europe, including Germany, Ireland, Italy, Spain, and Portugal. Considering that the company's primary operations, management, and decision-making processes are in France, it can be argued that its COMI is in France.

The CJEU's judgment in the case of Interedil Srl (C-396/09) provides guidance on determining the COMI. The Court held that the COMI should be identified by considering factors that are both objective and ascertainable by third parties. Factors include the location of the company's headquarters, central administration, and the place where it carries out its main business activities. In the case of Bella SARL, these factors point to France as its COMI.

Therefore, in accordance with Article 3(1) of the EIR 2000 and considering the CJEU jurisprudence, the Strasbourg High Court has jurisdiction to open the requested safeguard proceedings.]

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

- 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] 2

Assume that the timeline is as explained in the original scenario above and that the French High Court opens safeguard proceedings on 30 June 2017.

Will the EIR Recast be applicable to the proceedings?

Your answer should address the EIR Recast's scope and contain all steps taken to answer the question.

[The European Insolvency Regulation Recast (EIR Recast) entered into force on 26 June 2017, and according to Article 92(1), it applies to insolvency proceedings opened after that date. Since the French High Court opens safeguard proceedings on 30 June 2017, the EIR Recast is applicable to the proceedings.

Regarding the scope of the EIR Recast, Article 1 states that it applies to collective insolvency proceedings based on the debtor's insolvency, which involve the partial or total divestment of the debtor's assets and the appointment of a liquidator or another insolvency practitioner. Safeguard proceedings in France are collective insolvency proceedings aimed at protecting a debtor experiencing financial difficulties and preserving its business. They involve the appointment of a judicial administrator and the implementation of a safeguard plan, which includes measures such as debt rescheduling, asset divestment, and operational restructuring. As such, they fall within the scope of the EIR Recast.

Furthermore, the EIR Recast introduces improvements and new provisions compared to the EIR 2000, such as the introduction of rules on the coordination of main and secondary insolvency proceedings (Articles 36-38), the establishment of interconnected insolvency registers (Article 24), and the recognition and enforcement of insolvency-related judgments (Article 19). The applicability of the EIR Recast to the proceedings would thus provide a more comprehensive framework for the cross-border resolution of Bella SARL's insolvency.

In conclusion, the EIR Recast is applicable to the proceedings opened by the French High Court on 30 June 2017, as they fall within its scope and temporal application.]

You have missed some steps:

- **Article 3(1) EIR Recast. COMI of Bella SARL is in the EU (and not in Denmark), i.e. in Ireland (as stated in the answer to Question 4.1.). YES**
- **Article 1(2) EIR Recast. Bella SARL is not a credit institution, insurance undertaking or any other 'excluded' entity. YES**
- **Article 2(4), Recital 9, Annex A EIR Recast. The opened proceeding 'Safeguard' is listed in Annex A to the EIR Recast. YES**
- **Article 2(7), 84(1), 92 EIR Recast. The proceedings in question were opened on 30 June 2017, i.e. after the EIR Recast has entered into force. The filing date (20 June 2017) is not determinative for the temporal scope. YES**

Question 4.3 [maximum 5 marks] **2**

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

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

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

[Under the EIR Recast, secondary insolvency proceedings may be opened in another Member State where the debtor has an establishment, as per Article 3(2). An establishment is defined in Article 2(10) as "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods." The secondary proceedings are intended to protect the interests of local creditors and to facilitate the administration of complex cross-border insolvencies.

In the scenario presented, Bella SARL has warehouses across Europe, including Italy, which indicates the presence of an establishment in Italy. The existence of an establishment in Italy, where the company carries out non-transitory economic activities, supports the argument that secondary insolvency proceedings may be opened in Italy under the EIR Recast.

However, the mere existence of an establishment is not sufficient for opening secondary insolvency proceedings. The CJEU's judgment in the case of Bank Handlowy and Adamiak (C-116/11) clarified that secondary proceedings can be opened in a Member State only if the debtor possesses assets in that state. In this case, Bella SARL has a warehouse in Italy, which can be considered an asset.

Furthermore, under the EIR Recast, the opening of secondary insolvency proceedings is subject to certain conditions and restrictions. For instance, Article 36(1) allows the insolvency practitioner in the main proceedings to give an undertaking (a so-called "synthetic secondary proceeding") to treat local creditors in the secondary proceedings jurisdiction as if secondary proceedings had been opened. If such an undertaking is accepted by the local creditors, secondary proceedings cannot be opened.

Given the facts of the case, the applicable law, and the relevant CJEU jurisprudence, it can be concluded that secondary insolvency proceedings can be opened in Italy under the EIR Recast, as Bella SARL has both an establishment and assets in Italy. However, the opening of secondary proceedings is subject to certain conditions and restrictions, such as the possible giving of an undertaking by the insolvency practitioner in the main proceedings.]

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

- **Relevant case law: *Interedil Srl, in liquidation v Fallimento Interedil Srl*, Case C-396/09, ECLI:EU:C:2011:671 (Oct. 20, 2011), *Burgo Group SpA v Illochroma SA*, Case C-327/13, ECLI:EU:C:2014:2158 (Sep. 4, 2014).**

- ***The facts of the case do not support the finding of an establishment of Bella SARL in Italy. The presence alone of assets (leased-out warehouse) in isolation, contractual relations with a local bank (including maintenance of a bank account) and occasional negotiations (whether individual or collective) with local distributors do not qualify as 'non-transitory economic activity with human means and assets'. The requisite minimum level of organisation and a degree of stability (see para. 64 in *Interedil*) is evidently missing.***
- ***Therefore, under the EIR Recast, secondary insolvency proceedings cannot be opened in Italy, nor Spain.***

Total marks: 6 out of 15.

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

Total marks: 41 / 50