



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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- 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").*

The correct answer was D.

Question 1.6

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

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

Question 1.7

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

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

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

Question 1.8

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

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

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

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

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

Question 1.9

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

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

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

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

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

The correct answer was A.

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: 8 out of 10.

QUESTION 2 (direct questions) [10 marks]

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

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

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

Statement 2. Proceedings covered by the scope of the EIR 2015 should include proceedings promoting the rescue of economically viable debtors, especially at a stage where there is a mere likelihood of insolvency.

Ans: Statement 1:

Article 3(1) EIR Recast, mentions that the place of the registered office shall be presumed to be the place of COMI in the case of a company or a legal person. However there is a mention of suspect period (3 months) prior to the opening of insolvency proceedings. This is a safeguard towards forum shopping. Thus, if this has happened the court will disregard it. EIR Recast has made COMI more predictable by making the Registered office presumption. This means that the jurisdiction would be the place where the Registered office is located.

This can be rebutted if there is an indication that the administration of the debtor happens in another state, not the state of Registered office. This should be ascertainable by third parties or the creditors.

The aim is of preventing fraud and abuse, causing damage or disadvantage to the

debtor's creditors, Recital 29. The presumptions that the registered office, the principal place of business and the habitual residence are the Centre of main interests should be rebuttable, and the relevant court of a Member State should carefully assess.

This issue was dealt well by the CJEU in Interedil Srl Vs Fallimento, 2011

Ans: Statement 2

The EIR recast applies to proceedings based on laws relating to insolvency in which the purpose is to help adjustment of debt, Rescue, reorganise or liquidation. Article 1 shows that the emphasis is on restructuring. This has been noticed as an innovation as compared from EIR 2000. There is innovation to provide proceedings aiming to rescue the economically viable but financially distressed businesses. This also has to take care that the body of creditors is duly protected. Restructuring should therefore be provided at a stage where there is only likelihood of insolvency.

As an instrument to facilitate rescue financially distressed enterprises is court to court communication. Articles 42, 57 are a result of this and mandate such communication and cooperation. The predecessor Article 41 EIR Recast i.e Article 31 of EIR 2000 did not mention need to communicate. Article 41 (2) (c) of Recast mandates the Insolvency practitioner of secondary proceedings to provide with early proposals to main IP for better restructuring.

The EIR 2000 did not have specific provisions but the need for cooperation between courts was evident in the case of Bank Handlowy (Nov 2012)

In the matter of Lehman Brothers group where 75 separate proceedings were going on with 16 official representatives, the protocol was signed by most of them to ensure proper communication between the IP's appointed in the proceedings.

Question 2.2 [maximum 3 marks] 1

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

ANS:

The need to introduce uniformity of insolvency proceedings at EEC level, was understood as early as 1950's. As there was growth of integrated markets there was no satisfaction in the treatment of foreign insolvencies. Principles of Unity and Universality were offered by EEC Conventions of 1970 and 1980. The Principle of Universality suggested worldwide effect or totality of the debtor's assets. The insolvency proceedings would be dealt with by one court ,applying one set of rules be it procedural , substantive. Istanbul convention 1990 took a stand for several proceedings against the debtor. The EU Convention took a middle approach between Unity and Universality. The compromise received the name of Modified or **Limited Universalism. EIR 2000 also had similar idea. It established that the main proceedings could be initiated at the place of COMI (Article 3(1) EIR 2000.**

You were required to provide three examples but you only mentioned Article 3(1).

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.

ANS: EIR Recast in Article 3(1) states that the courts in the state where the debtor's main interests is situated shall have the jurisdiction of such proceedings. These would be the Main insolvency proceedings. This would encompass all the assets of the debtor thus having Universal scope. EIR Recast (Recital 23) allows opening of secondary proceedings. These (Recital 40 ,EIR Recast) would be territorial in nature and mitigate difficulties that might arise from national Laws.

Article 41 EIR Recast introduced framework for co-operation and communication between Insolvency practitioners.

Article 41(1) Insolvency Practitioner in Main proceeding and in secondary proceeding against the same debtor shall co-operate. This can happen while taking care that it

is compatible with rules applicable to respective proceedings . Such co-operation may include the conclusion of agreements or protocols.

Article 42 provides for cooperation between courts.

Article 43 provides for cooperation between courts and IP's

In the case of group coordination proceedings Articles 56-60 prescribe cooperation and communication duties. A distinct mechanism is set for the group coordination proceeding.

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.

Ans:

Secondary proceedings may hamper the efficient administration of the debtor's estate. EIR Recast gives two situations:

On the request of IP in the main proceeding the court can refuse opening or postpone opening of such proceeding.

The IP in the main proceeding (Article 38(2)) can give an undertaking (in respect of assets located in the member state in which secondary proceedings were to be opened), to local creditors. This undertaking is given to them assuring them that they will be treated as if secondary proceedings had been initiated. (Rec. 40)

The court (Article 38(3)) can, i.e it has discretion to temporarily stay the opening of secondary proceedings. The stay cannot be for more than three months.

The procedure for getting stay is simpler.

Total marks: 8 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)?

ANS:

The EU Commission had regarded the regulation EIR 2000 as a generally successful instrument. However, there were some ambiguities with regard to: scope of application to hybrid proceedings, COMI application, role of main proceedings when several proceedings are opened against the same debtor, in different member states, insolvency of group companies.

EIR Recast has these amended for better scope of insolvency proceedings:

Article 1 of the Recast takes care of the collective public proceedings based on law relating to insolvency. The purpose is to rescue, reorganization and adjustment of debts. An insolvency practitioner is appointed. Assets are under the control or supervision of the court. A temporary stay of individual proceedings is granted by court to allow negotiations between the debtor and the creditors.

It applies to pre-insolvency proceedings which are laid down by the law of member states which would include financial creditors. There are safeguards so that creditors do not suffer any adjustment of their claims. The non-participating creditors should not suffer. The number of creditors must make a significant part of the debtors outstanding debts. The EIR Recast includes maintaining insolvency registers to facilitate publicity for the benefit of cross border recognition.

Interim insolvency proceedings fall within the scope of EIR Recast.

The text of "insolvency proceedings" is used in a wider sense. It simply requires that the proceedings should be based on 'laws relating to insolvency'. It includes those proceedings where there is likelihood of insolvency. The consideration is thus to promote the rescue of distressed companies.

Article 1(b) of the Recast provides for restructuring of debtor where there is likelihood of insolvency and the debtor is left in control of his assets and affairs.

Proceedings which involve debt adjustment or debt discharge for natural persons is also involved.

Article 3 governs pre-insolvency or the hybrid proceedings. Temporary moratorium not to affect the rights in rem of the creditors over the assets located in other member states (Art 8). The stay on opening secondary proceedings may be only temporarily, maximum for a period of three months.

The Annexure mechanism has been continued. Those proceedings included in Annexure can benefit from the Regulation.

The resolution, restructuring of investment firms is now governed by the EIR Recast.

Regarding the jurisdiction of opening the main insolvency proceedings, there has been consideration to reduce forum shopping and improve procedural framework. The definition of COMI has been clarified. The location of the centre of administration must be ascertainable by third parties, the creditors.

Three rebuttable presumptions are laid down. Two are the new presumptions that are rebuttable according to the EIR Recast.

The place of registered office of the company, in case of individual professional the COMI shall be place of business, and in the case of individual, the COMI shall be that of his habitual residence. All these should be in the absence of proof to the contrary.

The court may specify the grounds for opening the insolvency proceedings. The Insolvency practitioner can also be given the task to examine the jurisdiction. There are certain Recitals provided in the EIR Recast which give guidance to the courts to decide the COMI.

There is provision of Suspect period of three months in the case of companies and professionals and a period of six months in the case of individuals prior to the request for opening of insolvency proceedings. The interested party would in that case would have to prove the genuine move without having benefited by doing so.

Article 6(1) is a new provision defining the scope of the jurisdiction of the court of main proceedings. It provides what actions qualify as insolvency actions.

Question 3.2 [maximum 5 marks] **2.5**

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.

ANS: To improve coordination of insolvency proceedings of group of companies, there are certain procedural rules. These rules ensure efficiency of the co-ordination, though no substantive sanction is provided for procedural or jurisdictional consolidation. It provides for ‘group coordination proceeding.’

The EIR Recast does not provide any definite explanation of Right in rem. This can be explained differently by member states.

The EIR Recast does not address insolvency forum shopping as such but only the abusive forms which can be of disadvantage to the debtors’ creditors. Insolvency Venue change for the purpose of successful restructuring is not prohibited. A stricter definition of COMI was not introduced. It offered presumptions indicating its location, mainly being registered office presumption.

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”. This has led only to modest results.

Therefore, many authors have expressed doubts over its effectiveness. The concept of a group COMI is not introduced. The indication for a main court for performing co-ordination is also not provided. According to Article 61(3), a coordinator is appointed who will make request to the court which will then consider the feasibility of coordination proceedings. He should be independent and able to propose a group coordinated plan. Also, he must identify recommendations for coordinated conduct of insolvency proceedings.

In the EIR Recast group co-ordination regime there is a right of every insolvency practitioner concerned to object against the inclusion within group co-ordination proceedings of the insolvency proceedings in respect of which he or she has been appointed according to (Article 64(1) EIR Recast). He can do so without giving any reasons. Group coordination proceeds are voluntary in nature and also Article 64 EIR Recast, provides for easy opt out. The IP’s are not obliged to follow the coordinators recommendations. Creditors of the group members are not consulted about opening of proceedings nor are they given opportunity to be heard.

Group coordination proceedings create complexity. In addition, there is increase in costs as well as it becomes more time consuming.

Another issue can arise if the corporate group has members located in non-member states and the EIR Recast will not bind courts.

For efficient administration of insolvency proceedings, the approach should be to extend the scope of application of regulation unilaterally. **I am not sure I understand this sentence. What do you mean by “unilaterally”?**

You did not sufficiently explain how things could be improved.

Question 3.3 [maximum 5 marks] **1.5**

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.

Ans

In June 2019, the EU adopted the Directive. It aimed at promoting preventive restructuring culture. Early restructuring to viable companies with financial difficulties. This was irrespective of their location.

The objective is to promote the 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. It recommends a new approach of preventive restructuring procedure, encourage to apply at an early stage by providing stay on creditor actions, protecting the creditors keeping in view the priority rule.

However, the Directive does not harmonize core aspects of substantive insolvency law, like common definition of insolvency. There is also criticism that ranking of claims is not taken care of and no harmonization in identifying the assets of the insolvency estate. There is huge diversity in the legal systems of the member states.

The Directive gives Member States the flexibility to achieve the objectives by applying the principles and rules in a way that is suitable in their national contexts. There is significant variation as to how the creditors are treated in terms of priority of their claims and also the governance of restructuring proceedings.

Thus, the harmonizing effect of the Directive will be limited. There would be only minor adjustments to the procedures already present in a legal system, rather than the introduction of something entirely new.

Regulation is directly applicable in Member states, Directive is not directly applicable. It has to be accomplished into national law before it is applicable in each member state. National authorities have the choice of form and method. Regulation are effective towards the goal of enabling the debtors in financial difficulties at an early stage to reorganize their debts and pursue their business.

Under EIR Recast, Insolvency proceedings have a main objective which is the maximization of value of the enterprise or business. Regulations are for improving the representation of creditors' interests in the proceedings.

While the points discussed are sound, you did not actively compare both instruments. Points which you could have discussed include:

- The difference between a Regulation and a Directive, as an instrument of EU law;
- The EIR 2015 is a choice-of-forum instrument which harmonised the procedural aspects of cross-border insolvency law / the Directive aimed to harmonise substantive aspects of insolvency law across the EU;
- The EIR 2015 is a conflict of law instrument focusing on most aspects of cross-border insolvency law / the Directive, while substantively harmonising insolvency law across the EU, has focused on a narrow aspect of insolvency, i.e. preventive restructuring;
- Due to the nature of the Regulation, all Member States must comply with its provisions / the Directive is a minimum standard instrument, which means that it merely establishes a threshold under which the Member States cannot legislate. However, this minimum harmonisation approach also leaves the Member States with substantive leeway in how they want to adopt the provisions of the Directive.

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] **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.

Ans.

The main insolvency proceedings could be initiated at Strasbourg i.e the place which was the COMI-Centre of main interest {Article 3(1) EIR 2000}. It is also prescribed that the law of the state of opening insolvency proceedings determines the effects of these proceedings, which would be known to be Lex concursus. It would be this law that would govern powers of the debtor, ranking for claims of the creditors, rights of the creditor. {Article 4 EIR 2000}. It provided for opening of secondary proceedings where the debtor had an establishment. Secondary proceedings had a limited scope geographically and could cover assets falling within that territory.

In the matter of Eurofoods the crucial question to be decided was to determine the competent court to open the proceedings.

CJEU stressed that mere control of a subsidiary company by its parent company was not sufficient to rebut the presumption (EIR 2000) that the place of registered office is presumed to be the COMI. COMI must be ascertainable by third parties.

The need for cooperation though not provided specifically in EIR 2000, was indicated by CJEU in the case of Bank Handlowy case. Sincere cooperation between the courts opening up the secondary proceedings have regard to the objectives of the main proceedings.

In the case of Burgo Group SpA , the view taken by CJEU was that if the Main proceedings have been opened in a member state other than that of its registered office, secondary proceedings could be opened in that state i.e where the debtor has some economic activity happening involving human means, or has assets in that state. As in the facts of the present case the main warehouse is located in Cork, Ireland, employees are located in Germany, Ireland and Italy as also the customers 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 the mentioned countries.

The issue of COMI presumptions was also dealt with in the case of Interdil Srl, where the company had its original Registration in Italy but later moved to London. It had assets, Agreements and Contracts in Italy. Here it was held by CJEU that when the bodies responsible for management are in the same place as its registered office and management decisions are taken in the same place and the third parties can ascertain it then the presumption is irrefutable.

Entity by Entity approach developed by CJEU in Eurofood is being followed in European insolvency Law and has not changed.

You do not sufficiently answer the question. Here were the steps:

- **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.

ANS:

Scope of EIR Recast:

The EIR Recast is a binding piece of Legislation and thus applicable in all the member states except Denmark.

Provisions of EIR Recast shall apply only to insolvency proceedings opened as indicated in Article 84(1) EIR Recast. Here the date of opening the proceedings as mentioned is after 26th June 2017 thus showing that the proceedings would be considered under EIR Recast. Bella SARL is a French Registered company i.e in one of the member states. It is not an excluded category. It has to be mentioned in the Annex A. The date of confirming the opening of the proceedings by the court shall be considered and this would be after 30th June 2017 when the French High Court opens proceedings. This has been provided in Article 2(7) EIR Recast. It could also be the date when an insolvency practitioner is appointed by the court under the same provision.

The CJEU had extended the scope even to actions against a person whose place of residence was in a third country.

Provision in Article 1 EIR Recast, which applies to public collective proceedings. These proceedings have to be based on laws relating to insolvency. The purpose has to be to rescue, adjust the debt, reorganize or liquidate.

In case any judgements issued in proceedings governed by law applicable to insolvency matters, those are also recognised under EIR Recast. However, the National insolvency procedures not listed in Annex A are not covered. Though this system of Annex A may appear rigid but gives respect to sovereignty of member states.

It coexists with the Directive on preventive restructuring. Enabling the efficient restructuring, facilitate continuation of debtors' business. In a way safeguarding the interest of creditors and at the same time reduce the costs.

EIR Recast has broadened the scope of restructuring, improved communication and cooperation. To ensure equal treatment of local and foreign creditors, the EIR Recast has some rules which override the national legislation. Article 55(1) and 45(1) facilitate this. The facts of the given case against the background of EIR Recast, it can be concluded that the EIR Recast is applicable to the insolvency proceedings.

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.

Answer:

The given company had warehouse in Italy. All of its employees are located in countries like Germany, Ireland, Italy, Spain, Portugal.

The EIR Recast follows the multi layered system. Several insolvency proceedings against the same debtor in different states can be opened. However, this may complicate the efficient administration of insolvency estate. The EIR Recast follows the concept of 'Establishment' shown by economic activity or even the presence of human resources in the member state.

The nature of main and secondary proceedings may differ. One may be rehabilitative while the other may aim at liquidation of the company. Rules for cooperation and communication should be such that they act as tools to mitigate such risks.

Opening of secondary proceedings by the bank in Italy would safeguard the expectation as to the applicable insolvency law. This would bring them into their position in creditor ranking.

The rights in rem are insulated from effects of opening of insolvency proceedings.

An innovative provision is for providing an undertaking by the Insolvency Practitioner. This covers the assets located in the member state where secondary proceedings may be requested. The treatment given under this as if secondary proceedings have been opened.

The EIR Recast sets uniform rules for resolving conflict of laws which replace national rules of private international law. The jurisprudence of CJEU ensures the law is interpreted and applied in the same way by member states.

CJEU has confirmed in the case of ENEFI, the prevalence of the main proceedings and their Lex concursus.

In the case of Christopher Seagon v Deko, it was observed by CJEU that concentrating all actions related to insolvency proceedings before the courts which have the jurisdiction to open such proceedings would be beneficial for effectiveness and also counter abusive forum shopping. The principle of cooperation was established and emphasised by CJEU in Bank Handlowy case.

You were supposed to discuss other steps:

- **According to Article 3(2) EIR Recast, where the debtor's COMI is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if it possesses an establishment within the territory of that other Member State.**
- **Under Article 2(10) EIR Recast, 'establishment' means any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets.**
- **Relevant case law: *Interedil Srl, in liquidation v Fallimento Interedil Srl*, Case C-396/09, ECLI:EU:C:2011:671 (Oct. 20, 2011), *Burgo Group SpA v Illochroma SA*, Case C-327/13, ECLI:EU:C:2014:2158 (Sep. 4, 2014).**
- **The facts of the case do not support the finding of an establishment of Bella SARL in Italy. The presence alone of assets (leased-out warehouse) in isolation, contractual relations with a local bank (including maintenance of a bank account) and occasional negotiations (whether individual or collective) with local distributors do not qualify as 'non-transitory economic activity with human means and assets'. The requisite minimum level of organisation and a degree of stability (see para. 64 in *Interedil*) is evidently missing.**
- **Therefore, under the EIR Recast, secondary insolvency proceedings cannot be opened in Italy, nor Spain.**

Total marks: 7 out of 15

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

Total marks: 32 / 50