INSOL INTERNATIONAL
FOUNDATION CERTIFICATE
IN INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2B

THE EUROPEAN INSOLVENCY REGULATION

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

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

1. ***You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.***
2. ***All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters*** – please do not change the document settings in any way. DO NOT ***submit your assessment in PDF format as it will be returned to you unmarked.***
3. ***No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).***
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6.1 ***If you selected Module 2B as one of your*** compulsory modules ***(see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is*** 23:00 (11 pm) GMT on 1 March 2023***. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2023. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.***

6.2 ***If you selected Module 2B as one of your*** elective modules ***(see the e-mail that was sent to you when your place on the course was confirmed), you have a*** choice ***as to when you may submit this assessment. You may either submit the assessment by*** 23:00 (11 pm) GMT on 1 March 2023 or by 23:00 (11 pm) BST (GMT +1) on 31 July 2023***. If you elect to submit by 1 March 2023, you*** may not

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

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

ANSWER ALL THE QUESTIONS

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

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

Question 1.1

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

Select the correct answer from the options below:

(a) True, before the EIR 2000, the EU has not sought to harmonise the insolvency laws of EU Member States.

(b) False, there was another EU Regulation regulating insolvency law at EU level before the EIR 2000.

(c) False, an EU Directive regulating insolvency law at EU level existed before the EIR 2000.

(d) False, the EU sought to draft Conventions with a view to harmonising the insolvency laws of EU Member States as early as the 1960s, but these initiatives failed.

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.

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 /ex 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 /ex 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 /ex causae.

The correct answer was A.

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.**

This provision refers to the presumption of debtor's "Centre of Main Interest – COMI".

According to EIR Recast, the place where debtor's centre of main interest is located should hold jurisdiction for the filing of a main insolvency proceeding. Such centre of main interest is presumed to be the place of the company's registered office.

This provision can be found at EIR Recast Article 3.

***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.**

This provision refers to the "non-traditional" liquidation-oriented procedures recently encompassed by the scope of the EIR Recast, according to which EIR Recast applies to public collective proceedings, including interim proceedings, which are based in laws relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganisation, or liquidation.

Such provision about the scope of EIR Recast can be found at EIR Recast Article 1 and Recital 10.

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.

Universalism approach provides that there should be only one insolvency proceeding covering all debtor's assets and debt worldwide, what could lead to some major problems like: different treatment among creditors, violation of the sovereignty of other states, difficulties to enforce the decision rendered in such proceeding etc.

Therefore, the modified universalism developed as a milder approach that still holds some of the inceptive universalism though by providing that there should be only one main insolvency proceeding governed by local rules but that the filing of secondary insolvency proceedings is allowed.

Therefore, the possibility for courts of the EIR Recast member States to open secondary insolvency proceedings provided for in EIR Recast Article 19 (a) falls within the modified universalism approach, as it precisely describes the universalism approach.

"Article 19.2. Recognition of the proceedings referred to in Article 3(1) shall not preclude the opening of the proceedings referred to in Article 3(2) by a court in another Member State. The latter proceedings shall be secondary insolvency proceedings within the meaning of Chapter III."

Also, EIR Recast Article 7 (1) and (2) also fall within the scope of modified universalism approach, since it provides that the legislation in effect at the territory in which the insolvency proceedings is filed shall govern such proceeding and the related proceedings (i.e. Pauliana claims), regarded the exceptions provided for in EIR Recast Article 16.

"Article 7. 1. Save as otherwise provided in this Regulation, 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 (the 'State of the opening of proceedings').

2. The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. In particular, it shall determine the following: (...)".

"Article 16. Point (m) of Article 7(2) shall not apply where the person who benefited from an act detrimental to all the creditors provides proof that:

(a) the act is subject to the law of a Member State other than that of the State of the opening of proceedings; and

(b) the law of that Member State does not allow any means of challenging that act in the relevant case."

At last, EIR Recast Article 41 (1) and 42 (1) also highlight the modified universalism approach adopted, by providing that insolvency practitioner of the main and secondary insolvency proceedings involving the same debtor, as well as courts where such insolvency proceedings are pending, shall cooperate with each other.

"Article 41. 1. The insolvency practitioner in the main insolvency proceedings and the insolvency practitioner or practitioners in secondary insolvency proceedings concerning the same debtor shall cooperate with each other to the extent such cooperation is not incompatible with the rules applicable to the respective proceedings. Such cooperation may take any form, including the conclusion of agreements or protocols."

"Article 42. 1. In order to facilitate the coordination of main, territorial and secondary insolvency proceedings concerning the same debtor, a court before which a request to open insolvency proceedings is pending, or which has opened such proceedings, shall cooperate with any other court before which a request to open insolvency proceedings is pending, or which has opened such proceedings, to the extent that

such cooperation is not incompatible with the rules applicable to each of the proceedings. For that purpose, the courts may, where appropriate, appoint an independent person or body acting on its instructions, provided that it is not incompatible with the rules applicable to them."

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.***

Articles 41 (1), 42(1) and 43 (1) deal with the cooperation obligation between insolvency practitioners and courts.

"Article 41. 1. The insolvency practitioner in the main insolvency proceedings and the insolvency practitioner or practitioners in secondary insolvency proceedings concerning the same debtor shall cooperate with each other to the extent such cooperation is not incompatible with the rules applicable to the respective proceedings. Such cooperation may take any form, including the conclusion of agreements or protocols."

"Article 42. 1. In order to facilitate the coordination of main, territorial and secondary insolvency proceedings concerning the same debtor, a court before which a request to open insolvency proceedings is pending, or which has opened such proceedings, shall cooperate with any other court before which a request to open insolvency proceedings is pending, or which has opened such proceedings, to the extent that such cooperation is not incompatible with the rules applicable to each of the proceedings. For that purpose, the courts may, where appropriate, appoint an independent person or body acting on its instructions, provided that it is not incompatible with the rules applicable to them."

"Article 43. 1. In order to facilitate the coordination of main, territorial and secondary insolvency proceedings opened in respect of the same debtor: (…)"

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.***

EIR Recast Article 36 (1) combined with Article 38 (2) provide that to avoid the opening of a secondary insolvency proceeding the insolvency practitioner can do a unilateral undertaking of the assets located within the jurisdiction in which the secondary insolvency proceeding would be opened, distribute the proceeds and pay creditors accordingly to the priority provided in the local governing law (this is the so-called 'synthetic' proceeding). In this case, the court holding jurisdiction over the place where the insolvency practitioner has given an undertaking shall, at the insolvency practitioner's request, not open a secondary insolvency proceeding in case the undertaking adequately protects the general interests of local creditors.

The undertaking shall occur in writing, in the official language of the member state where the secondary proceeding would be opened.

Further, such undertaking shall be approved by known local creditors and only binds the estate if the abovementioned provisions are complied with and after creditors approval.

The insolvency practitioner shall also be held liable for any damage caused to local creditors as a result of the non-compliance with the obligations and requirements provided in EIR Recast Article 36.

"Article 36. 1. In order to avoid the opening of secondary insolvency proceedings, the insolvency practitioner in the main insolvency proceedings may give a unilateral undertaking (the 'undertaking') in respect of the assets located in the Member State in which secondary insolvency proceedings could be opened, that when distributing those assets or the proceeds received as a result of their realisation, it will comply with the distribution and priority rights under national law that creditors would have if secondary insolvency proceedings were opened in that Member State. The undertaking shall specify the factual assumptions on which it is based, in particular in respect of the value of the assets located in the Member State concerned and the options available to realise such assets."

"Article 38.2. Where the insolvency practitioner in the main insolvency proceedings has given an undertaking in accordance with Article 36, the court referred to in paragraph 1 of this Article shall, at the request of the insolvency practitioner, not open secondary insolvency proceedings if it is satisfied that the undertaking adequately protects the general interests of local creditors."
Further, EIR Recast Article 38 (3) provides that where the temporary stay of enforcement proceedings against debtor has been granted to allow negotiations, the competent court may, at the insolvency practitioners' request or the debtor in possession, stay the opening of a secondary insolvency proceeding for a period no longer than 3 months.

"Article 38.3. Where a temporary stay of individual enforcement proceedings has been granted in order to allow for negotiations between the debtor and its creditors, the court, at the request of the insolvency practitioner or the debtor in possession, may

stay the opening of secondary insolvency proceedings for a period not exceeding 3 months, provided that suitable measures are in place to protect the interests of local creditors."

Total marks: 10 out of 10.

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

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

Question 3.1 [maximum 5 marks] 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)?

Previous to the EIR 2000, attempts of harmonisation of cross-border insolvency laws within European countries occurred through several conventions that, for various reasons, ended up not being successful. After 30 (thirty) years of harmonisation attempts, EIR 2000 finally materialized unified binding rules concerning cross-border insolvency for EU.

EIR 2000 adopted the modified universalism approach and provides for a clear framework about, among others, international jurisdiction, applicable law, recognition, and enforcement of foreign insolvency proceedings, which were all governed by a single set of procedural and (some sparse) substantive rules.

As per EIR 2000 Article 46, the European Commission had to present a report by June 1, 2012, regarding the application and possible suggestion of adjustments on EIR 2000. According to the results of such report, despite the success of EIR 2000, a few adjustments and amendments to the rules provided therein were deemed necessary, which led to the draft of the EIR 2015 ('EIR Recast').

Among such adjustments and amendments, one can mention the need to broaden the scope of application to restructuring proceedings, making stronger rules concerning the cooperation of insolvency practitioners and courts, addressing the issue of insolvency of companies belonging to the same economic group, interconnectivity of insolvency registers and data protection.

After the adjustments and insertions, EIR Recast now contains 89 Recitals and 92 Articles divided among 7 chapters and four Annexes, in comparison to the 33 Recitals, 47 Articles divided in 5 Chapters and 3 Annexes of the EIR 2000.

Regarded the need to broaden the application scope of the EIR to other types of insolvency proceedings, EIR Recast established that rescue and stay proceedings for debt restructuring would also be subject to such rules, even when the debtor is not yet insolvent but there is a likelihood of insolvency (EIR Recast Article 1 and Recital 10).

Further, EIR Recast also added one to the three previous Annexes to facilitate the understanding and application of the rules provided therein which contains a list of the proceedings rendered as "insolvency proceedings" for purposes of application of EIR Recast. According to EIR Recast Recital 9 the proceeding provided for in EIR Recast shall be automatically applicable to the insolvency proceedings listed in Annex A.

On its turn, clear provisions about cooperation between insolvency practitioners and courts of various jurisdiction also can be found in EIR Recast Articles 41, 42 and 43. Further Recitals 48, 49 and 50 of the EIR Recast provides that efficient administration of insolvency estate and effective realisation of assets demand proper cooperation among parties involved in all concurrent proceedings, regarded the best practice and guidelines of the United Nations Commission on International Trade Law, what implies on the exchanging of sufficient information, allowing the insolvency practitioner to intervene in secondary insolvency proceedings like the proposition of a restructuring plan, composition or applying for the stay of the realisation of assets.

With regards to the need to address the issue of insolvency of companies belonging to the same economic group, EIR Recast is clear when providing that such set of rules shall be applicable to and ensure the efficient administration of insolvency proceedings relating to different companies that appear as parties to the same economic group (EIR Recast Article 56 and Recital 51). Also, the application of EIR Recast to companies of the same economic group as the debtor are also highlighted in Recitals 6, 49-63.

Provisions about the interconnectivity of insolvency register were also added to the EIR Recast, especially about where and how the information shall be disclosed, and what piece of information shall be disclosed (EIR Recast Article 24 and the respective following Articles). In addition to that, Recital 76 of the EIR Recast renders that all relevant information in cross-border insolvency cases shall be published in an electronic accessible register.

In sum, the EIR Recast maintained most of the procedural provisions of the EIR 2000 but was adapted to reflect market's needs, cross-border insolvency demands and CJEU case-law, the adjustments and amendments to the EIR 2000 comprised by EIR Recast not only facilitate the application and understanding of such rules but now also provide clear guidelines for topics of main relevance that were disregarded in the inceptive instrument.

Question 3.2 [maximum 5 marks] 0

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.***

Notwithstanding the fact that EIR Recast was welcomed by most stakeholders, some criticised the set of rules regarding the provisions set forth for economic groups and lack of provisions to prevent insolvency proceedings.

This is too slim an answer. You did not discuss flaws sufficiently and did not provide considerations as to how to correct them.

Points you could have discussed included, e.g.:

- ***Groups of companies. It can be argued that the newly introduced provisions on group insolvencies are too weak (or toothless). The EIR Recast does not advocate for either procedural (no group/enterprise COMI) or substantive consolidation (see Article 72(3) EIR Recast). The voluntary nature of group coordination proceedings (see Article 65 EIR Recast re opt-out), supplemented by non-binding actions (recommendations) of a group coordinator, cannot guarantee efficiency, as group members may freely decide to take a hold out (non-cooperative) position. Potential improvements can provide for the adoption of a group restructuring or insolvency plan that is binding for all participating members (with or without cross-jurisdictional (cross-entity) cram-down) and the option for substantive consolidation of the estates of jointly administered members of the group in certain narrowly defined circumstances. See also Recommendations 9.01-9.12 in Bob Wessels and Stephan Madaus, Instrument of the European Law Institute - Rescue of Business in Insolvency Law, 2017.***

- ***'Synthetic' secondary proceedings. Article 36 EIR Recast ('Right to give an undertaking in order to avoid secondary insolvency proceedings') contains 11 paragraphs and evidences a long struggle between representatives of the Member States. It is one of the most complicated provisions of the EIR Recast, touching upon such elements as the language, form of an undertaking, its approval, execution, challenge, etc. This level of detail is meant to guarantee legal certainty and ensure its harmonised application across the Member States. However, the novelty of the concept of 'synthetic' proceedings and the number of provisions used in the EIR Recast inevitably give rise to myriad of questions. For example, under paragraph 1 of Article 36, an undertaking shall specify the "factual assumptions on which it is based, in particular in respect of the value of the assets located in the Member State concerned and the options available to realise such assets." The question arises, how such assets can (and should) be identified and how their value is to be determined. Another problem relates to the establishment of the 'known' foreign creditors. In the absence of the opened secondary proceedings, it is not always possible (without incurring disproportionate costs) to determine such creditors. Ironically, the desired predictability and harmonisation in approaches and rules related to 'synthetic' proceedings has not been fully achieved in practice. A recent report by the Conference on European Restructuring and Insolvency Law (CERIL), CERIL Report 2018-1 of 4 June 2018, has revealed substantial divergence in the way different Member State legislate on 'synthetic'***

proceedings. While some of them (e.g. Finland, the Netherlands) decided not to introduce specific legislation on how to proceed with them, others (e.g. France, Germany) specified the process of accepting an undertaking under national law. The fact that the procedure established in Article 36 EIR Recast has not gained ground since its introduction in summer 2017 may indicate that its improvement or simplification may be necessary. The value of the undertaking is in its flexibility, but overregulation may stifle such flexibility. Giving more freedom to the parties involved and to the Member States in devising the most appropriate solutions on a case-by-case basis can prove to be more desirable and functional.

Question 3.3 [maximum 5 marks] 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 EIR Recast is a binding international private law instrument that aims to harmonise the rules governing cross-border insolvency proceedings, especially concerning the international jurisdiction, applicable law, recognition, and enforcement of foreign insolvency proceedings. On the other hand, the Directive on Preventive Restructuring Frameworks 2019 aims to set of minimum standards to achieve coherent frameworks concerning insolvency proceedings in EU.

Therefore, one can notice two main differences between the EIR Recast and the Directive: objectives and enforceability of the respective instruments.

The objectives differ since EIR Recast is aimed at harmonising the rules governing cross-border insolvency proceedings in EU, whilst the Directive is aimed at establishing minimum standards to achieve coherent framework for insolvency proceedings across EU.

Another difference is that the provisions of the EIR Recast shall be adopted without further changes by EU Member States, while the provisions of the Directive serve as a mere guide for EU Member States that have some space to address the matters provided therein as it convenes.

Total marks: 10 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.

Initially it is worth to highlight that France was a member State to the EU by the time the 'sauveguard' was requested, and, thus, subject to the EIR 2000.

Secondly, 'sauveguard' was an insolvency proceeding already encompassed by ERI 2000, as per CJEU understanding in the case of Bank Handlowy, Case C-116/11, Bank Handlowy w Warswawie SA v Christianapol sp. z.o.o, ECLI:EU:C:2012:739 (Nov. 22, 2012). Despite this not being the matter in discussion in the proceeding the fact the 'sauveguard' was considered an insolvency proceeding for purposes of the ERI 2000 are supported by such ruling.

Al last, in accordance with CJEU in *Eurofoods IFSC Ltd*, case C-341/04, ECLI:EU:C:2006:281 (May 2, 2006), COMI shall be identified by objective and ascertainable by third parties. Also, in *Interedil Srl v Falimento Interedil Srl*, Case C-369:ECLI:EU:C:2011:671 (October 20, 2011) CJEU rendered that, when bodies responsible for the management of debtor are located in the same place as its

registered office, and management decisions are taken in the same place, as recognized by third parties, the presumption that the registered office is the debtor's COMI is irrefutable. Considering that Bella SARL has its registered office in France and that this is where the administration is centred and acknowledged by third parties (what is not clear from the information provided for in the question above), one could consider that the insolvency proceeding was dully filed before the competent court and that Strasbourg High Court would hold jurisdiction over such insolvency proceeding.

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

- ***The Strasbourg High Court does not have international insolvency jurisdiction to open insolvency proceedings.***

- ***Students are expected to mention that under the EIR 2000 (Article 3), the determination of international jurisdiction to open main insolvency proceedings is linked to the debtor's centre of main interest (COMI). According to Article 3 EIR Recast, COMI shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties (see also Recital 28). The place of the registered office shall be presumed to be the COMI in the absence of proof to the contrary.***

- ***Relevant case law: *Eurofood IFSC Ltd*, Case C-341/04, ECLI:EU:C:2006:281 (May 2, 2006) and *Interedil Srl, in liquidation v Fallimento Interedil Srl*, Case C-396/09, ECLI:EU:C:2011:671 (Oct. 20, 2011).***

- ***However, Article 1 of the EIR 2000 states that 'this Regulation shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator.***

- ***Article 2 EIR 2000 states that '"insolvency proceedings" shall mean the collective proceedings referred to in Article 1(1). These proceedings are listed in Annex A.***

- ***Annex A of the EIR 2000 only listed two French insolvency proceedings which came under the scope of the EIR 2000: (i) liquidation; (ii) redressement judiciaire (rehabilitation).***

- ***Therefore, the EIR 2000 would not apply to safeguard proceedings.***

Question 4.2 [maximum 5 marks] 5

Assume that the timeline is as explained in the <u>original scenario above</u> 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 analysis on whether the EIR Recast applies to a case relies on the cumulative compliance with the following legal requirements: territorial, material, personal and temporal. In the abovementioned case, ERI Recast is applicable since all legal requirements are fully complied with, as explained below:

Territorial Scope. ***The EIR Recast applies to all States that are members to the EU, with exception of Denmark, as per Recital 88 of the ERI Recast. It is also worth to highlight that EIR Recast Article 3(1) provides that insolvency proceedings shall be filed where debtor's COMI is located, and that it is presumed to be located where debtor holds its registered office.***

In Bella SARL's case, the company has its registered office in France, which is a member State to the EU.

Therefore, considering the requirements for compliance with the territorial scope and that the insolvency proceeding was filed in debtor's COMI, before a Member State of the EU, under this requirement, EIR Recast would apply to the matter.

Material Scope. ***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, reorganisation or liquidation, as per EIR Recast Article 1. Also, in accordance with EIR Recast Recital 9, only the proceedings listed in Annex A to the EIR Recast can be considered as 'insolvency proceedings' for purposes of EIR Recast application.***

In Bella SARL's case, the company filed for a safeguard ('sauveguard'), which is an insolvency proceeding listed under Annex A of the EIR Recast.

Therefore, considering the requirements for compliance with the material scope and that 'sauveguard' is listed as an insolvency proceeding under Annex A to the ERI Recast, under this requirement, EIR Recast would apply to the matter.

Personal Scope. ***The EIR Recast does not apply to insolvency proceedings that concern insurance undertakings; credit institutions; investment firms and other firms, institutions, and undertakings to the extent that they are covered by Directive 2001/24/EC; or collective investment undertakings, as per Article 1 (2), EIR Recast.***

In Bella SARL's case, the company sells cosmetics, activity that is not encompassed by the abovementioned personal legal exceptions to ERI's application.

Therefore, considering the requirements for compliance with the personal scope and that Bella SARL's activities are not encompassed by legal personal exceptions

provided for in Article 1 (2), under this requirement, EIR Recast would apply to the matter.

Temporal Scope*. The EIR Recast is in effect since June 26, 2017, as per EIR Recast Article 92.*

In Bella SARL's case, the company filed a petition to open 'sauveguard' proceeding before the Strasbourg High Court in France on June 20, 2017 but French Supreme court only opened such proceeding on June 30, 2017.

Therefore, considering the requirements for compliance with the temporal scope and the proceeding opening date, under this requirement, EIR Recast would apply to the matter.

Question 4.3 [maximum 5 marks] 1.5

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

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

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

According to EIR Recast Article 3(1), main insolvency proceedings shall be filed where debtor's COMI is located, and there is a legal presumption that COMI is located where debtor holds its registered office, unless factually proven that administration is held elsewhere. This is also the understanding of CJEU in Eurofoods IFSC Ltd, case C-341/04, ECLI:EU:C:2006:281 (May 2, 2006).

In the Italian bank case, the COMI is presumed to be in Italy, since this is the country where debtor's registered office is located and there is no information that would allow the rebuttal of such presumption. Therefore, the entity should be seeking for the filing of a main proceeding rather than secondary proceedings in Italy.

Additionally, the EIR Recast does not apply to insolvency proceedings that concern insurance undertakings; credit institutions; investment firms and other firms, institutions, and undertakings to the extent that they are covered by Directive 2001/24/EC; or collective investment undertakings, as per Article 1 (2), EIR Recast. Therefore, the fact that the filing entity is a bank falls in the legal personal exceptions for ERI application.

Also, in accordance with EIR Recast Recital 9, only the proceedings listed in Annex A to the EIR Recast can be considered as 'insolvency proceedings' for purposes of EIR Recast application and a 'distribution ranking' is not listed under ERI Annex A. Hence,

the distribution ranking cannot be considered an insolvency proceeding for purposes of EIR Recast Article 1.

All things considered, such secondary proceedings cannot be opened in Italy under ERI Recast.

Some of your reasoning is sound but you did not provide the required answer.

- ***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: 8.5 out of 15.

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

Total marks: 36.5 / 50