



**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2B**

**THE EUROPEAN INSOLVENCY REGULATION**

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

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

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

## INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

1. ***You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.***
2. ***All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters - please do not change the document settings in any way. DO NOT submit your assessment in PDF format as it will be returned to you unmarked.***
3. ***No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).***
4. ***You must save this document using the following format: [studentID.assessment2B]. An example would be something along the following lines: 202223-336.assessment2B. Please also include the filename as a footer to each page of the assessment (this has been pre-populated for you, merely replace the word "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name. Assessments that do not comply with this instruction will be returned to candidates unmarked.***
5. ***Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.***
- 6.1 ***If you selected Module 2B as one of your compulsory modules (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is 23:00 (11 pm) GMT on 1 March 2023. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2023. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.***
- 6.2 ***If you selected Module 2B as one of your elective modules (see the e-mail that was sent to you when your place on the course was confirmed), you have a choice as to when you may submit this assessment. You may either submit the assessment by 23:00 (11 pm) GMT on 1 March 2023 or by 23:00 (11 pm) BST (GMT +1) on 31 July 2023. If you elect to submit by 1 March 2023, you may not***

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

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

**ANSWER ALL THE QUESTIONS**

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

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

Question 1.1

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

**Select the correct answer from the options below:**

- (a) True, before the EIR 2000, the EU has not sought to harmonise the insolvency laws of EU Member States.**
- (b) False, there was another EU Regulation regulating insolvency law at EU level before the EIR 2000.**
- (c) False, an EU Directive regulating insolvency law at EU level existed before the EIR 2000.**
- (d) False, the EU sought to draft Conventions with a view to harmonising the insolvency laws of EU Member States as early as the 1960s, but these initiatives failed.**

Question 1.2

**According to Article 1(1) of the EIR 2015, proceedings fall within the scope of the EIR if:**

- (a) they are based on laws relating to insolvency for the purpose of rescue, adjustment of debt, reorganisation, or liquidation; are public; are collective.**
- (b) they are based on laws relating to insolvency for the purpose of liquidation; are public; are collective.**
- (c) they are based on laws relating to insolvency for the purpose of rescue, adjustment of debt, reorganisation, or liquidation; are public.**

**(d) they are based on laws relating to insolvency for the purpose of rescue, adjustment of debt, reorganisation, or liquidation; are collective.**

Question 1.3

**In 2017, the EIR Recast replaced the EIR 2000. Recasting the EIR 2000 was deemed necessary by various stakeholders. Why?**

- (a) Through its case law, the CJEU had altered the literal meaning of several provisions of the EIR 2000. Newly formulated rules, in line with the CJEU interpretation, were therefore needed.**
- (b) The EIR 2000 was generally regarded as a successful instrument in the area of European insolvency law by the EU institutions, practitioners and academics. However, a number of its shortcomings were identified by an evaluation study and a public consultation.**
- (c) The fundamental choices and underlying policies of the EIR 2000 lacked support from the major stakeholders (businesses, public authorities, insolvency practitioners, etc.). A new Regulation was therefore needed to meet their expectations.**
- (d) The EIR 2000 proved to be inefficient and incapable of promoting co-ordination of cross-border insolvency proceedings in the EU.**

**The correct answer was B.**

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.**

Question 1.10

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

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

**(a) The insolvency practitioner will always succeed in his claim if he can clearly prove that under the *lex concursus*, the contested payments can be avoided (Article 7(2)(m) EIR Recast).**

**(b) The contested transactions cannot be avoided if Canetier SARL can prove that the *lex causae* (including its general provisions and insolvency rules) does not allow any means of challenging the contested transactions, and provided that the parties did not choose that law for abusive or fraudulent ends.**

**(c) The contested payments will not be avoided if Canetier SARL proves that such transactions cannot be challenged on the basis of the insolvency provisions of Italian law (Article 16 EIR Recast).**

**(d) To defend the contested payments Canetier SARL can rely solely, in a purely abstract manner, on the unchallengeable character of the payments at issue on the basis of a provision of the *lex causae*.**

**The correct answer was D.**

**Total marks: 7 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.***

*The particular provision/concept discussed above in Statement 1 is in relation to the safeguards which have been incorporated in the EIR Recast to prevent fraudulent forum shopping, which in turn makes the fundamental presumptions regarding the determination of Centre of Main Interests (COMI), rebuttable. The concept is essentially found in Recital 30 of the EIR Recast, with further explanations in Recital 31-34. It requires the relevant or the competent court to assess, in a comprehensive and a detailed manner, if the COMI of the concerned debtor is actually located within its jurisdiction, as the same is ascertainable to and by third parties. For instance, the presumption of COMI being the place of the registered office of the debtor<sup>1</sup>, can be rebutted if a third party or a creditor is able to establish that the central administration of the debtor company happens in a state different to the state in which it has its registered office. Similar rebuttals are also available for individuals.*

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

*The aforementioned Statement 2, throws more light on the 'material scope' of the EIR Recast, which is embodied in Article 1(1). It entails that if any collective public proceedings are initiated, where the debtor is totally or partially divested of its assets, where an insolvency practitioner is appointed, where the assets and affairs of the debtor are subject to control, or where in relation to such a debtor there is a stay on individual enforcement action etc., in relation to a debtor in situations where there is only a likelihood of insolvency, such actions/proceedings will then essentially have been instituted to avoid the debtors insolvency and cessation of business. Additionally, Article 1, also specifically mentioned that the above actions can be in relation to 'adjustment of debt' or 'reorganization', hence unequivocally, making restructuring a part of its scope. The same is in alignment of the Directive (EU) 2019/1023 of the European Parliament and of The Council on 'Preventative Restructuring' dated June 20, 2019, which aimed at further ensuring that viable businesses which are in financial difficulties, have access to effective national preventative restructuring frameworks which enable them to continue operating<sup>2</sup>.*

**Question 2.2 [maximum 3 marks] 2**

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<sup>1</sup> Article 3(1) of the EIR Recast

<sup>2</sup> Recital 1- Directive (EU) 2019/1023 Of the European Parliament and of the Council, dated June 20, 2019

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

*The idea of universalism, in its purest sense means one court, one law and at times one proceeding and one estate<sup>3</sup>. However, even if it goes on to acknowledge the 'cross-border' aspect of insolvencies better than the 'territorial' model, the same is said to be impractical as it implies a surrender of sovereignty by judicial member nations and states. On the other hand, 'modified universalism, is when the strict universalism model is applied with some, restrictions or exceptions. Modified universal insolvency retains insolvency sovereignty, but encourages a cooperative approach<sup>4</sup>. The idea of modified universalism arrives as a compromise between universalistic ambitions and the safeguards and sovereignty typical of the territorial approach<sup>5</sup>. The three instances which highlights that modified universalism approach of the EIR Recast is as follows:*

- 1. Main and Secondary Proceedings: As per Article 3(1) of the EIR Recast 2015, main insolvency proceedings can be opened in a European jurisdiction (except Denmark), where the debtor has its centre of main interest (COMI), which shall extend to all member states other than the states which have opened proceedings in accordance with Article 3(2). Further, Article 3(2), allows other member states, where the debtor has an 'establishment<sup>6</sup>' (and not COMI), to open what are called 'secondary proceedings', whose effects are only restricted to that member state. The insolvency practitioner in the main proceedings has the dominant role and has several possibilities open to them for intervening in secondary insolvency proceedings<sup>7</sup>, and hence in that sense is a modified version of universalism.**
- 2. Lex Fori Concursus and Lex Concursus Secundarii: In furtherance to Article 7(1), we understand that the law applicable to insolvency proceedings and everything stemming therefrom will be dealt with the law of that member state, where the proceedings have been opened. Hence. Lex Fori Concursus will be the applicable law (which is the law applicable to main insolvency proceedings) in all the other member states, other than in the ones which have secondary proceedings, where the Lex Concursus Secundarii will be applicable. As mentioned above, this is a departure from pure universalism, but still keeping the Lex Fori Concursus as so to speak, a notch dominant.**

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<sup>3</sup> Prof. Dr. Bob Wessels- Modified Universalism in European Cross-Border Insolvency; <https://bobwessels.nl/blog/2019-01-doc3-modified-universalism-in-european-cross-border-insolvency/>; accessed on June 6, 2023

<sup>4</sup> Page 45- Contact Group on the Legal and Institutional Underpinnings of the International Financial System – *Insolvency Arrangements and Contract Enforceability*.

<sup>5</sup> Irit Mevorach, *The Future of Cross-border Insolvency: Overcoming Biases and Closing Gaps* 27 (OUP 2018)

<sup>6</sup> "Establishment"- as under Article 2(10) of the EIR Recast.

<sup>7</sup> *Idem*, pt. 5, 'The EU Approach'

3. Coordination and Cooperation: *This concept both focuses on a certain conflict-of-laws rule or norm of private international law, and appeals to interrelated main and secondary insolvency proceedings coordinated by courts and insolvency practitioners, in line with their respective duties.*<sup>8</sup> *It is only natural that for a smooth parallel functioning of the various insolvency proceedings in relation to one debtor, must require a high degree of coordination*<sup>9</sup>. *The EIR Recast introduces various provisions (and there also exist soft laws and best practices), that lay down the protocol for coordination between two insolvency practitioners, two courts and between insolvency practitioners and courts.*  
**Good but you do not provide any provision.**

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.**

1. Article 41: *Article 41 mandates the coordination and corporation between insolvency practitioners in main and secondary proceedings, specifically on the point of any update in the lodging and verification of claims, protection of confidential information and sharing of any and all information which is relevant to the insolvency proceedings*<sup>10</sup>. *Under Article 41(2)(b), the insolvency practitioners are also mandated to collectively explore the possibility of a rescue or a restructuring package, if that option is on the table, so as to have a cohesive approach which can lead to maximisation of business enterprise value. Additionally, under Article 41(2)(c), the insolvency practitioner in the secondary proceedings is obligated to give the practitioner in the main proceedings, an early opportunity to submit expression of interests for realisation/use of the debtor's assets in the said secondary proceedings. The cooperation may take any form, and it is limited only by its compatibility with the local laws. It is further recommended that these acts of coordination can take the nature of 'protocols', which can have case specific or theme-related provisions and can touch on topics such as applicable law, independence, administration, priority of proceedings, stays, communication and notice, option of joint hearing, treatment of claims, etc.*<sup>11</sup>.

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<sup>8</sup> *Ibid*

<sup>9</sup> Recital 48, EIR Recast 2015.

<sup>10</sup> Article 41(2)(a), EIR Recast 2015

<sup>11</sup> Casasola, O [orcid.org/0000-0002-9652-0582](https://orcid.org/0000-0002-9652-0582) and Madaus, S (2022) Cross-border Insolvency Protocols: Cooperation, Coordination, and Communication Duties under the European Insolvency Regulation Recast. *European Business Law Review*, 33 (6). pp. 839- 880. ISSN 0959-6941, <https://kluwerlawonline.com/journalarticle/European+Business+Law+Review/33.6/EULR2022036> ;

2. Article 42: *The said article of the EIR Recast, mandates co-operation between the courts involved in either the main, territorial or secondary insolvency proceedings concerning one common debtor, to the extent such a cooperation is not contrary to the law applicable to that insolvency proceeding. The said coordination may include topics such as appointment of practitioners, communication of information, supervision of the debtor's assets, conduct of the hearings, approval protocols etc.*<sup>12</sup>. *The court in the European Union, influenced by the soft law*<sup>13</sup>, *courts have started adopting 'protocol' like procedural guidelines, for example the proclamation of the District Court Midden-Nederland of Utrecht.*
  
3. Article 43: *As per Article 43 of the EIR Recast, the insolvency practitioner of both the main and secondary insolvency proceedings must coordinate with the courts in which either the main or the secondary insolvency proceedings are being adjudicated and vice versa, to the extent that such a cooperation is not contrary to law applicable to the insolvency proceeding and also provided that there is no conflict of interest.*

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.***

1. Undertaking under Article 36: *The insolvency practitioner has the right to provide a unilateral undertaking, in respect of the assets of a debtor located in another member state, that as and when the said estate/assets of the debtor will be distributed*<sup>14</sup>, *the same shall be done as per the waterfall or the priority rights of creditors*<sup>15</sup> *under the laws of that member state. This is one of the more commercially effective tools to avoid the opening of secondary proceedings, to essentially, pretend about the existence of one and then operate according to it to safeguard the rights and legitimate expectation of the local creditors. The said undertaking has to be made in the official language of the concerned member state*<sup>16</sup>, *has to be in writing and in the form as may be required under the law of the member state in relation to any distributions etc.*<sup>17</sup>, *should be approved by the local creditors in accordance to the rules of voting and majority*

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<sup>12</sup> Article 41(3)(a)- 41(3)(e), EIR Recast, 2015

<sup>13</sup> Cooperation Guidelines for Cross-Border Insolvencies, 2007- CoCo Guidelines &, EU Cross-Border Insolvency Court-to-Court Communication Principles and Guidelines, 2014 (EU JudgeCo)

<sup>14</sup> The cut off date for determination of the asset pool/estate, shall be the date of the undertaking- Article 36(2), EIR Recast

<sup>15</sup> Article 36(2), EIR Recast

<sup>16</sup> Article 36(3), EIR Recast

<sup>17</sup> *Ibid*, Article 36(4)

*applicable<sup>18</sup>. The undertaking is also subject to challenge by the local creditors before the court of the main insolvency proceedings<sup>19</sup> and the local creditors are also entitled to protective/interim measures in the local court. There is also a penal measure attached the non-compliance of the undertaking by the insolvency practitioner<sup>20</sup>. Most importantly, as per Article 38 (2), the local member court may not open secondary proceedings, at the request of the insolvency practitioner, who has given an undertaking, if the court is satisfied that the interests of the local creditors are protected.*

- 2. Stay of Secondary Proceedings: In accordance with Article 38(3) of the EIR Recast, when there is stay on individual enforcement actions in the main proceedings, the local court at the concerned member state is also empowered to, at the request of the main insolvency practitioner or the debtor, to stay the opening of a secondary proceedings in that state. The scope of the instrumentality of stays is much narrower compare to that of an undertaking, as the same can be for maximum period of 3 months provided the safeguards to protect the interests of the local creditors is in place. Also, the local creditors can ask for interim reliefs and the court can impose embargoes on the main practitioner from removing assets from the member state<sup>21</sup>. The said stay can be lifted if the member court *suo moto*, or through an application by a local creditor is satisfied that the stay is prejudicing the rights and the national law, or if the negotiations work out in terms of a restructuring package.*

**Total marks: 9 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)?***

- 1. Center of Main Interest: The Regulation (EC) No 1346/2000 of 29 May 2000 (EIR 2000), under Article 3, a main insolvency proceeding could be opened in the member state where the debtor has its center of main interest (COMI), while territorial or secondary proceedings could be opened in states where the debtor had an 'establishment'. Furthermore, the COMI was simply assumed to***

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<sup>18</sup> *Ibid*, Article 36(5)

<sup>19</sup> *Ibid*, Article 36(7), Article 36(8)

<sup>20</sup> *Ibid*, Article 36(10)

<sup>21</sup> Which are not in the ordinary course of business.

*be the place where the debtor has its registered office, in the absence of any proof to the contrary<sup>22</sup>. Moreover, the EIR 2000 did not provide a definition of COMI and only provided a non-binding guidance in the recitals. Further, there came about increasing examples of businesses, that had their registered office in one member state, while their center of main interest was in another member state, mainly because there was no restriction of establishment within the EU. What also became clear was abuse of this freedom. For instances, a company opened an establishment in the United Kingdom, to evade the Dutch Law, which was said to be more severe. However, the Amsterdam Court in the matter, of Inspire Art<sup>23</sup>, opined that "if a company does not conduct any business in the member state in which it has its registered office and pursues its activities only or principally in the member state where its branch is established is not sufficient to prove the existence of abuse or fraudulent conduct which would entitle the latter member state to deny that company the benefit of the provisions of community law relating to the right of establishment."<sup>24</sup>. In the said matter the right of establishment was not hampered but the court did qualify the said right by ruling "save where the existence of an abuse is established on a case-by-case basis"<sup>25</sup>. This aspect of the on-going economic integration was addressed in the EIR Recast, firstly by defining COMI, and then making the presumption of COMI comparatively more rebuttable and to be ascertainable from the eyes of a third party (mainly creditors), which the court has to assess in a comprehensive manner. The same is in Recital 30 of the EIR Recast, with further explanations in Recital 31-34. The EIR Recast has further added a 'suspect period' to further rebut the presumption<sup>26</sup>.*

- 2. Group Insolvencies: EIR 2000, applied only to single companies and the absence of provisions on group enterprises caused severe problems. In particular, this is the case if the assets of a corporate enterprise are spread over several legal entities or if the businesses of separate legal entities are somehow interlinked<sup>27</sup>. The European Commission had also debated the various rights the main insolvency practitioner ought to have in relation to the assets and affairs of the group in different member states, such as, right to stay, right to propose a plan etc., which were deemed desirable. Falling from the approach taken in the EIR 2000, the Court of Justice of the European Union (CJEU) was also heavily criticized due to its entity-wise approach in dealing with bigger group insolvency<sup>28</sup>, which did not lead to a maximization of the value of the business enterprise for all the stakeholders and also blatantly ignored the**

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<sup>22</sup> Executive Summary (Background) -European Parliament- Directorate-General for Internal Policies – Legal & Parliamentary Affairs- Note on Harmonisation of Insolvency Law at the EU Level, 2010

<sup>23</sup> ECJ Case C 167/01

<sup>24</sup> *Idem*, Para 139

<sup>25</sup> *Idem*, Para 143

<sup>26</sup> Recital 31, EIR Recast.

<sup>27</sup> European Parliament- Directorate-General for Internal Policies – Legal & Parliamentary Affairs- Note on Harmonisation of Insolvency Law at the EU Level, 2010

<sup>28</sup> Most prominently in the matter of *Eurofoods Ltd.*- Case C-341/04, ECLI: EU:C:2006:281, dated May 2,2006

*intricacies, nuances and complexity of that kind of a truly cross-border/global enterprise. In contrast, the EIR Recast has incorporate an entire chapter<sup>29</sup> and to being with a very broad definitions of 'group of companies', 'control'. Under Recital 53, there has been plugged an enabler which can possibly determine the COMI of the whole group. Further, detailed rules for coordination have been introduced<sup>30</sup>, the powers which were debated by the commission have been introduced under Article 60, procedural aspects have been taken in account in relation to coordinated court proceedings<sup>31</sup>, including the concept of a group coordinator<sup>32</sup>. Further concepts of data privacy and protection have also been given statutory relevance.*

3. Digitized Insolvency Registers: ***The EIR 2000, broadly speaking did not have the instrumentality of mandating an EU wide insolvency register and mostly the member states had their own version of it, whose workings were not streamlined, were mostly in their own state language, etc. and there was an inherent lack of a central database, which inadvertently, lead to the almost no free flow of timely information between the stakeholder across the member states, especially the creditors. The drawback of the aforementioned weakness, being instances of the creditors missing out on filing the claim forms, which would result in either completely missing out or having a lesser priority in the waterfall or facing penalties. This was also discussed in the backdrop of the introduction of the European e-Justice Portal, and it was discussed that national insolvency judgments and relevant orders could be made available on the E-Justice portal to widespread advantage within the EU<sup>33</sup>. Accordingly, the EIR Recast has been a huge leap forward as it states "In order to improve the provision of information to relevant creditors and courts and to prevent the opening of parallel insolvency proceedings, Member States should be required to publish relevant information in cross-border insolvency cases in a publicly accessible electronic register"*<sup>34</sup> and further entails procedural and substantive law on the workings, significance and coordination of Insolvency Registers under Article 24-29.**
  
4. Harmonization of the eligibility for opening insolvency proceedings: ***The commission identified that the due to the increased mobility and interdependency between the main and the secondary insolvency proceedings, it will be desirable that the requirements relating to the opening of insolvency proceedings and the eligibility of the debtor may be harmonized<sup>35</sup>. In this context it was recommended the tests for admission be standardized and/or the***

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<sup>29</sup> Chapter V, EIR Recast

<sup>30</sup> Article 56-59, EIR Recast

<sup>31</sup> Article 61-70, EIR Recast

<sup>32</sup> Article 71-77, EIR Recast

<sup>33</sup> European Parliament- Directorate-General for Internal Policies – Legal & Parliamentary Affairs- Note on Harmonisation of Insolvency Law at the EU Level, 2010

<sup>34</sup> Recital 76, EIR Recast.

<sup>35</sup> European Parliament- Directorate-General for Internal Policies – Legal & Parliamentary Affairs- Note on Harmonisation of Insolvency Law at the EU Level, 2010

rules mandating bankruptcy be harmonized. Now in terms of the eligibility, under Article 1, it is provided that the EIR Recast will be applicable to public collective proceedings (including interim proceedings), for the purpose of rescue, adjustment of debt, reorganisation or liquidation, where the debtor is either partially or totally divested of its assets, an insolvency practitioner is involved, the assets of the debtor are subject to a control or supervision by the court and where there is a stay on individual enforcement action. However, though the eligibility seems exhaustive, the same is heavily in spirit, limited as all the proceedings which are deemed to be covered under Article 1, are listed in Annex A of the EIR Recast. While the Annex A provides clarity, it also renders the eligibility criteria inoperable. Further, instead of providing the list of debtors to whom the same will be applicable, it provides the kinds of debtors to which the same is not applicable being insurance companies, financial or credit institutions, investment firms, and collective investment undertakings<sup>36</sup>.

5. Restructuring Proceedings: *The EIR 2000 had excluded restructuring, or pre insolvency or rescue proceedings, however the same has been made abundantly inclusive in the EIR Recast and the same goes on to also mention in Article 1 "Where the proceedings referred to in this paragraph may be commenced in situations where there is only a likelihood of insolvency, their purpose shall be to avoid the debtor's insolvency or the cessation of the debtor's business activities."*

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.**

1. Group Insolvencies: *The introduction of the laws and procedure on group insolvencies has been considered one of the most significant improvements of the EIR Recast over its predecessor. One has to acknowledge the manner in which the EIR Recast deals with group insolvencies, it does not recommend a substantive consolidation<sup>37</sup>, nor does it reflect a parent-subsidiary model as the subsidiaries in essence cannot be equated with 'establishments'<sup>38</sup>. It has been opined by many that the procedure that has been suggested by the EIR Recast is the path of least resistance, to essentially avoid reconciliation of the laws and complexities that the Commission would have been faced with in the event they would have attempted substantial consolidation. Firstly, the need for such an enhanced corporation and communication, which will in turn lead to increased*

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<sup>36</sup> Article 1, EIR Recast

<sup>37</sup> 'Commission Staff Working Document: Impact Assessment Accompanying the Document Revision of Regulation (EC) No 1346/2000 on Insolvency Proceedings' SWD (2012) 416 final, 31

<sup>38</sup> External Evaluation of Regulation No. 1346/2000/EC on Insolvency Proceedings' JUST/2011/JCIV/PR/0049/A4 (Heidelberg-Luxembourg-Vienna Report)



costs, time and complexities could deter many. Also, in accordance with Article 64 of the EIR Recast, any insolvency practitioner in respect of any group member object to its inclusion within the group. This opt-out mechanism has attracted criticism from some scholars and its generally believed that the effectiveness of group coordination proceedings will therefore be negatively affected<sup>39</sup>. The inclusion of the aforesaid, though included in a bonafide manner, to essentially not coercively drag any group entity in an insolvency proceeding, threatens its effectiveness as it primarily gives an option to the group entities and its practitioners to not coordinate. The EIR Recast, negates and looks away from the inevitable reality that different creditors and even the different classes of creditors may have different objectives which may differ from the objective that the group coordinator may be trying to achieve. These inconsistent strategies may not only cut off the relationships of group members companies in the group insolvencies, but also create uncertainty to stakeholders.<sup>40</sup> It is recommended that to achieve a cohesive group reorganisation, the opt-out mechanism should have extensive checks and balances and should not be granted without scrutiny.

2. Suspension Period to Prevent Forum Shopping: *Forum shopping describes the situation where a debtor engages in regulatory arbitrage by modifying certain criteria that allow them to benefit from a different, more favorable insolvency law or jurisdiction*<sup>41</sup>. During the period when the European Commission was taking due cognizance of the drawbacks and the gaps of the EIR 2000, more than half of the respondents indicated evidence of abusive forum shopping from the relocation of Centre of Main Interest (“COMI”)<sup>42</sup>. Hence taking from the *inter-alia* the aforementioned feedback, the EIR Recast introduced a few, but significant changes to combat forum shopping. Firstly, it introduced a distinction between forum shopping which the creditors agree to and the ones which may be deemed as abusive and offensive by qualifying it with these given words “to the detriment of the general body of creditors”<sup>43</sup>. It also under Recitals 29-34, introduce measures such as that the COMI presumption should be rebuttable, that the COMI presumption does not apply during the ‘suspension period’, being the period of three months (in the case of companies) and six months (in the case of individuals) (“Suspension Period”) before filing of an application for initiation of insolvency proceedings. The critique has crucially come qua the Suspension Period, as this rule has been considered a weak adaption of the initial recommendations that the commission was faced with<sup>44</sup>. The way the Suspension Period concept is

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<sup>39</sup> Christoph Thole, and Manuel Dueñas, 'Some Observations on the New Group Coordination Procedure of the Reformed European Insolvency Regulation' Int. Insolv. Rev., Vol. 24 (2015) p224;

<sup>40</sup> Zhang, D. (2018) A recommendation to improve the opt-out mechanism in EU regulation on insolvency proceedings recast. International Company and Commercial Law Review, 28 (5). pp. 167-175. ISSN 0958-5214.

<sup>41</sup> Wolf-Georg Ringe – “Insolvency Forum Shopping- Revisited”; Hamburg Law Review, 2017 page 38-59.

<sup>42</sup> Commission Proposal COM(2012) 744, p 4; Commission Impact Assessment accompanying the EIR revision, SWD(2012) 416, section 3.4.1

<sup>43</sup> Recital 5, EIR Recast.

<sup>44</sup> For instance, INSOL Europe suggested a strong suspension period of 1 year in its draft EIR Reform document.

*designed to work is that the court that is seized of the insolvency application has to establish the real COMI as per the broad rules laid under the EIR Recast and cannot rely on the presumption simply (registered office). This is a weak approach as it only disapplies the COMI presumption, rather than treating any potential COMI shift as entirely ineffective for the purposes of the jurisdictional rules of the of the EIR Recast<sup>45</sup>. Another drawback of this design is that it almost completely excludes shifts of the head office and is only restricted to the 'registered office' whilst the shifting of the head office or the main/central administration of the company is common modus of abusive from shopping<sup>46</sup>. It can also prove to be detrimental to cases where everyone has agreed to the shift keeping in mind the best interests of the various stakeholders and maximisation of the value of the assets and preservation of the business enterprise of the corporate debtor as a going concern. Further, it could also harm new creditors who have taken an interest in the debtor's new location, without knowing the intent of the shift. An alternative remedy to address the forum shopping could have been that, which was suggested by Netherlands, Germany and Spain during the legislative negotiations at the time of drafting of the EIR Recat, being that any transfer of the COMI would have to be disregarded whenever its 'exclusive or main object or effect was to harm the interests of creditors or employees'.*

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 fundamental differences between the EU Restructuring Directive of June 20 2019 (EU 2019/1023) ("Directive") and the EIR Recast has been highlighted below:*

- 1. Approach: Harmonisation v Standardisation- the EIR Recast deals with jurisdiction, recognition, enforcement, applicable law, corporation and coordination of the courts and the insolvency practitioners. However, the EIR Recast does not tackle the disparities between the interstate laws that deal with those procedures<sup>47</sup>. Essentially, it does not try and implement the same set of rules and regulations across the states to deal with the insolvency and liquidation procedures of corporates and the individuals, but it rather deals with it by recommending a structure with contours within which the member states and their participating stakeholders and their pillars (such as the courts***

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<sup>45</sup> *Idem*, 41

<sup>46</sup> *Ibid*

<sup>47</sup> Article 12 of the EU Restructuring Directive of June 20 2019 (EU 2019/1023)

*and the insolvency professionals) have to fit in and behave by enhanced coordination, all while the laws being respective to their member state. The EIR does not provide for any material harmonization of the national insolvency laws, but rather provides a set of conflict of laws rules for the field of insolvencies<sup>48</sup>. The most important concepts that the EIR Recast introduces are that of "COMI", more from the perspective of preventing forum hopping and the EIR also ensures that the opening of insolvency proceedings in one Member State is recognized in all other Member States<sup>49</sup>. One the other hand the Directive can be termed as the first big step by the Commission towards material harmonisation of the restructuring laws in the EU. The need for the same was felt because there were differences between the Member States as regards the range of the procedures available to the debtor in financial difficulties in order to restructure their businesses as some member states were found to have have a limited range of procedures that allow the restructuring of businesses only at a relatively late stage, in the context of insolvency procedures. In other Member States, restructuring was possible at an earlier stage but the procedures available were not as effective as they could be, or they are very formal, in particular because they limit the use of out-of-court arrangements<sup>50</sup>. In this backdrop all the 27 member states were obligated to implement the Directive at least by July 17, 2021 (though most of them have asked for extended timelines for implementation. Germany and Netherlands were the first to adopt the Directive timely). This was done in part to address the menace of forum shopping, and also keeping in mind the increasing trend of restructuring in insolvency laws given its obvious benefits such as safeguarding of the economies, preventing build up of non-performing loans, preventing of job-losses and know-how skills. For these reasons the Directive made it mandatory for Member States to offer a "preventive restructuring framework" for companies in a financially distressed situation when there is a likelihood of insolvency, with a view to preventing the insolvency and ensuring the viability of the debtor. Distressed debtors should be given the possibility to (financially) restructure their debt under the protection of individual enforcement actions on the basis of the majority of the creditors' decisions<sup>51</sup>. However, given its nature the Directive gave a free hand to the member states for implementing the same in the manner they deemed the best.*

2. Insolvency v Restructuring: *In furtherance to the approach discussed above, the other main difference between the Directive and the EIR Recast is the kind of procedure that they address. In accordance with Article 2 of the Directive, restructuring should enable debtors in financial difficulties to continue business, in whole or in part, by changing the composition, conditions or*

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<sup>48</sup> Baker & Mckenzie on "Global Restructuring and Insolvency Guide- European Union", << <https://resourcehub.bakermckenzie.com/en/resources/global-restructuring-and-insolvency-guide/subpages/european-union>>>, accessed on July 4, 2023.

<sup>49</sup> *Ibid*

<sup>50</sup> Article 4 of the EU Restructuring Directive of June 20 2019 (EU 2019/1023)

<sup>51</sup> *Idem*, point no 48

*structure of their assets and their liabilities or any other part of their capital structure – including by sales of assets or parts of the business or, where so provided under national law, the business as a whole – as well as by carrying out operational changes. The underpinning and the intent of the Directive is to focus on the measures to be taken to reshape and save the business and to essentially save the business as a going concern before insolvency or dissolution becomes imminent and the business and the assets are sold on a piece meal basis. More importantly, the benefits as have been highlighted by the Directive can also be seen to have to more engaging positive macro-economic impact on the union as it discusses the advantages of having harmony in the nature or preventative restructuring as honest insolvent or over-indebted entrepreneurs can benefit from a full discharge of debt after a reasonable period of time, thereby allowing them a second chance<sup>52</sup>, additionally, the frameworks should help to prevent job losses and the loss of know-how and skills, and maximise the total value to creditors<sup>53</sup>, also, the availability of effective preventive restructuring frameworks would ensure that action is taken before enterprises default on their loans, thereby helping to reduce the risk of loans becoming non-performing in cyclical downturns and mitigating the adverse impact on the financial sector<sup>54</sup>. Investor perspective was also seen as a major driving factor when the diverse restructuring laws of the member state were sought to be harmonised vide the Directive and the same was seen as indispensable for a well-functioning internal market in general and for a working capital market union and also for the resilience of the European economies including for preservation and creation of jobs<sup>55</sup>. As per Article 13 of the Directive, the same is without prejudice to the scope and the functioning of the EIR Recast, only by requiring the member states to put in place preventative restructuring procedures that comply with certain minimum principles of effectiveness. On the other hand, the, EIR Recast seeks procedural coordination at the stage of admission of an insolvency or a liquidation application, which as compared to preventative restructuring has a higher involvement of the state, the courts and the other formal participants. Its for this reason that one can suggest why the Recast does not aim to harmonise in the form of a set of guidelines for implementation, because restructuring, being more informal and out of court, can have such directives. While the Recast which deals with formal procedures as listed in the Annex A thereof, deals with a set of rules and regulations in law (which may have been followed in the respective member state since years) and hence at the max can only suggest an enhanced coordination. Concepts like the early warning tools, rescue packages and negotiations under the Directives are only flavours of restructuring which can said to be lacking from the EIR Recast. The end goal of Directives is to have the*

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<sup>52</sup> Article 1 of the EU Restructuring Directive of June 20 2019 (EU 2019/1023)

<sup>53</sup> Article 2 of the EU Restructuring Directive of June 20 2019 (EU 2019/1023)

<sup>54</sup> Article 3 of the EU Restructuring Directive of June 20 2019 (EU 2019/1023)

<sup>55</sup> Article 8 of the EU Restructuring Directive of June 20 2019 (EU 2019/1023)

*same management remain in control at the end, while this may or not be the aim of a proceeding under the EIR Recast.*

**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.***

***As per Article 3(1) of the EIR 2000, the court of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings and in the case of a corporate, the place of the registered office shall be presumed to be the centre of main interest in the absence of proof to the contrary. From the fact set that has been provided above, firstly, it is not clear in which region/city of France is the registered office of Bella SARL ("Corporate Debtor").***

*Strasbourg has been mentioned only qua it being the location of the first store (retail) of the Corporate Debtor. Additionally, the fact set also gives the locations of the various warehouses of the Corporate Debtor, across Europe, which includes many countries but not France. Interestingly, the main warehouse of the Corporate Debtor has been listed as Cork, Ireland. France is also not on the list of countries from where majority of the online orders of the Corporate Debtor are clocked. Concentrating on the fact that the Corporate Debtor will have the most supplier relationships and business stronghold in terms of administrative and operations purposes at the places where its warehouses are located or at the least where its main warehouse is located, being Ireland. There is a lot to argue against the proposition that the Strasbourg High Court has the jurisdiction to open the safeguard proceedings against the Corporate Debtor. Hence as per the aforementioned article, plenty of proof in my mind can be offered against the presumed COMI of France. Also, in the matter of *Eurofood IFSC Ltd*<sup>56</sup>, the CJEU has in Paragraph 37 (Operative Part 1) clearly laid down that the presumption laid down in the second sentence of Article 3(1) of the EIR 2000, whereby the centre of main interest is situated in the member state where its registered office is situated, can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which location at that registered office is deemed to reflect.*

While your reasoning is sound, your 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.***

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<sup>56</sup> CJEU Case C-341/04 [2006] ECR I- 3813 (2nd May 2006)

- **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.**

*The EIR Recast in Recital 3 states that "The proper functioning of the internal market requires that cross-border insolvency proceedings should operate efficiently and effectively. This Regulation needs to be adopted in order to achieve that objective". The scope of the Recast includes provisions governing jurisdiction for opening insolvency proceedings and actions which are directly derived from insolvency proceedings and are closely linked with them<sup>57</sup>. The Recast also includes bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings and actions related to such proceedings<sup>58</sup>. Additionally, the EIR Recast applies to a natural person and a legal person<sup>59</sup> and all the proceedings which the union had intended to include within the ambit of the EIR Recast has been enlisted in Annex A thereof<sup>60</sup>. The scope in spirit also includes the proceedings which promote the rescue of economically viable but distressed businesses and which give a second chance to entrepreneurs<sup>61</sup> and also covers interim proceedings<sup>62</sup> and must include collective public proceedings which are based in laws of insolvency which can also include rescue, adjustment of debt, reorganisation or liquidation<sup>63</sup>. The scope of the EIR Recast can also be classified in a more technical and broader way. For instance, the temporal scope of the EIR Recast is that the insolvency proceedings in question should have been opened (accepted by the court) after June 26, 2017<sup>64</sup>. Further, Article 1(2) of the EIR Recast also explicitly states that the regulations will not apply to insurance undertakings, credit institutions, investment firms and/or collective investment undertakings (personal scope). The EIR Recast in its recitals and specially under Article 1, does provide a wide scope of the*

<sup>57</sup> CJEU Case C-341/04 [2006] ECR I- 3813 (2nd May 2006)

<sup>57</sup> Recital 6 of the EIR Recast 2015.

<sup>58</sup> Recital 7 of the EIR Recast 2015.

<sup>59</sup> Recital 9 of the EIR Recast 2015

<sup>60</sup> *Ibid*

<sup>61</sup> Recital 10 of the EIR Recast 2015

<sup>62</sup> Recital 11 of the EIR Recast 2015

<sup>63</sup> Article 1(1)- Scope of the EIR Recast 2015

<sup>64</sup> Article 2(7) read with Article 2(8) of the EIR Recast 2015

*nature of proceedings it tried to include in its ambit, but it also more specifically, under Article 2(4) restricts the meaning and interpretation of “insolvency proceedings” to the proceedings that have been included in the list on Annex A, which essentially is its material scope. Lastly, the regulations also have a geographical scope, being that its applicable on (qua the COMI) all member states of the European Union, except Denmark.*

*Applying the knowledge of the scope of the EIR Recast as above mentioned, to the fact set:*

- 1. Geographical Scope: The COMI of the Corporate Debtor is undetermined from the given, however, Denmark is not mentioned as a potential COMI. Hence from a geographical perspective, EIR Recast is applicable on the states as mentioned in the fact set.*
- 2. Material Scope: The safeguard proceedings as mentioned above are covered in Annex A of the EIR Recast (Sauvegarde)*
- 3. Personal Scope: The nature of business of the Corporate Debtor is not which is affected by exceptions covered in Article 1(2). Hence the EIR Recast is applicable to the debtor;*
- 4. Temporal Scope: The safeguard proceedings have been filed on June 20, 2017. And the EIR Recast is only applicable to proceedings which have been opened (qua the decision of the court confirming the admission of such proceedings and the appointment of an insolvency practitioner) after June 27, 2017. We can assume the High Court of Strasbourg could not have confirmed the safeguard proceedings in the matter of a week and hence the same only would have been admitted after June 26, 2017. Thus, making the EIR Recast applicable.*

*Hence as the facts pertaining to the Corporate Debtor confirm to all the aspects of the scope of the EIR Recast, the same is applicable.*

**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.***

*The fact set has listed “Italy” as a location where the Corporate Debtor has a warehouse. The same can be associated with enhanced business activity (including availing facilities from financial institutions) and can be termed as an ‘establishment’ under the EIR Recast. Article 3(10) of the EIR Recast defines ‘establishment’ as “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". The question also says that an Italian Bank has filed for secondary insolvency proceedings to determine an insolvency distribution ranking. The Italian Bank can be deemed as a 'local creditor'. EIR Recast define the term 'local creditor' under Article 3(11) as "a creditor whose claims against a debtor arose from or in connection with the operation of an establishment situated in a Member State other than the Member State in which the centre of the debtor's main interests is located" (being Italy). The CJEU in the matter of Burgo Group v Illochroma<sup>65</sup>, has laid down in relation to who can seek the opening of a secondary proceeding that the same must be determined on the basis of the national law of the Member State within the territory of which the opening of such proceedings is sought. And further that it must also comply with the EU Law and its national law. The secondary proceedings referred to herein appear to be an attempt to general interest of the local creditor under Italian Law. In accordance to the above, the same can opened as 'secondary proceedings' under the EIR Recast.*

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

- **According to Article 3(2) EIR Recast, where the debtor's COMI is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if it possesses an establishment within the territory of that other Member State.**
- **Under Article 2(10) EIR Recast, 'establishment' means any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets.**
- **Relevant case law: *Interedil Srl, in liquidation v Fallimento Interedil Srl*, Case C-396/09, ECLI:EU:C:2011:671 (Oct. 20, 2011), *Burgo Group SpA v Illochroma SA*, Case C-327/13, ECLI:EU:C:2014:2158 (Sep. 4, 2014).**
- **The facts of the case do not support the finding of an establishment of Bella 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: 9 out of 15.**

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<sup>65</sup> Burgo Group SpA v Illochroma SA in liquidation [2014] EU ECJ C327/13

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

Total marks: 40 / 50.