



**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.***
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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").*

**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.*

**The correct answer was C.**

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.***

***The correct answer was D.***

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 C.**

**Total marks : 6 out of 10.**

QUESTION 2 (direct questions) [10 marks]

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



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

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

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

*[Statement 1 - International Jurisdiction - Article 3(1) of the EIR Recast*

*Statement 2 - Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings - Article 1 of the EIR Recast]*

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.**

*[I am convinced that the following Articles highlights the modified universalism approach:*

*“Article 3(1) of EIR 2000 - The courts of the Member State within the territory of which the centre of a debtor’s main interests is situated shall have jurisdiction to open the insolvency proceedings”. (International Jurisdiction)*

*“Article 4 of EIR 2000 - (1) The law applicable to insolvency proceedings and their effects shall be that of the Member State, referred to as the ‘State of the opening of proceedings’. (2) The law of the state opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and closure.” (Applicable Law)*

*“Article 16 of EIR 2000 - (1) Any judgement opening Insolvency Proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognized in all the other Member States from the time that it becomes affective in the State of the opening of proceedings. This rule shall also apply where, on account of his capacity, insolvency proceedings cannot be brought against the debtor in other Member States. (2) Recognized 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.” (Principle)*

*“Article 17 of EIR 2000 - (1) The judgement opening the proceedings referred to in Article 3(1) shall, with no further formalities, produce the same effects in any other MS as under this law of the State of the opening of proceedings, unless this Regulation provides otherwise and as long as no proceedings referred to in Article 3(2) are opened in that other MS. (2) The effects of the proceedings referred to in Article may not be challenged in other Member States. Any restriction of the creditors’ rights, in particular a stay or discharge, shall produce effects vis-à-vis assets situated within the territory of another Member State only the case of those creditors who have given their consent.” (Effects of recognition)*

*“Article 25 of EIR 2000 - (1) Judgments handed down by a court whose judgment concerning the opening of proceedings is recognised in accordance with Article 16 and which concern the course and closure of insolvency proceedings, and compositions approved by that court shall also be recognised with no further formalities. Such judgments shall be enforced in accordance with Articles 31 to 51, with the exception of Article 34(2), of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Conventions of Accession to this Convention. The first subparagraph shall also apply to judgments deriving directly from the insolvency proceedings and which are closely linked with them, even if they were handed down by another court. The first subparagraph shall also apply to judgments relating to preservation measures taken after the request for the opening of insolvency proceedings.” (Recognition and enforceability of other judgements)]*

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(1) of the EIR Recast states:*

*“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.”*

**2. Article 43(1) of the EIR Recast states:**

**“1. In order to facilitate the coordination of main, territorial and secondary insolvency proceedings opened in respect of the same debtor:**

**(a) an insolvency practitioner in main insolvency proceedings shall cooperate and communicate with any court before which a request to open secondary insolvency proceedings is pending or which has opened such proceedings;**

**(b) an insolvency practitioner in territorial or secondary insolvency proceedings shall cooperate and communicate with the court before which a request to open main insolvency proceedings is pending or which has opened such proceedings; and**

**(c) an insolvency practitioner in territorial or secondary insolvency proceedings shall cooperate and communicate with the court before which a request to open other territorial or secondary insolvency proceedings is pending or which has opened such proceedings;**

**to the extent that such cooperation and communication are not incompatible with the rules applicable to each of the proceedings and do not entail any 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. Article 3(2) of the EIR recast deals with secondary proceedings. In order to control the opening, conduct and closure of the secondary proceeding, it limits the scope of secondary proceedings to creditors who possess an establishment within the territory of the other member state. Furthermore the proceeding will only be restricted to winding up the assets of the debtor situated in the territory of the secondary member state.**

2. Article 3(4) also controls the opening, conduct and closure of the secondary proceeding by allowing only one instance wherein secondary proceedings may be open prior to the opening of main proceedings. This is due to the conditions laid down by the law of the member state within which the debtors COMI is situated causing a prevention of the opening of the main proceeding.]

**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] **0.5**

**During the reform process of the EIR 2000, what main elements were identified by the European Commission as needing revision within the framework of the Regulation (whether adopted or not)?**

[ The recommendation listed the following four (4) policy options:

1. Preserve the status quo
2. Draft a recommendation on minimum standards relating to preventive restructuring procedures
3. Draft a directive on the same topic as the recommendation
4. Set up a fully harmonised procedure, common to all Member States of the EU

*The objective of the Commissioners Recommendation was to “ensure that viable enterprises in financial difficulties have access to national insolvency frameworks, which enable them to restructure at an early stage with a view to preventing their insolvency.”]*

This is not the answer expected. These were elements you could have considered:

- **COMI. Despite the fact that the essence of the concept of COMI has not changed in the EIR Recast (compared to the EIR 2000), some important additions were made. First of all, the definition of COMI has been codified in Article 3 EIR Recast (in the EIR 2000 a similarly worded indication of COMI appeared in Recital 13). Secondly, a ‘suspect period’ was added in Article 3(1) EIR Recast, supplementing the rule on the registered office presumption in a fight against abusive forum shopping. These changes should improve predictability of the international insolvency jurisdiction, ensure maximization of estate value and material efficiency.**

- ***Groups of companies.*** The EIR 2000 did not contain any rules dealing with insolvencies of enterprise groups. The basic premise of the EIR 2000 was that separate proceedings must be opened for each individual member of the group and that these proceedings are entirely independent of each other (entity-by-entity approach). The EIR Recast introduced two specific sets of provisions to promote the efficient administration of insolvency proceedings relating to different companies forming part of a group of companies. These are: 1) cooperation and communication in a group setting (Articles 56-60) and 2) group coordination proceeding (Articles 61-77). These novelties should streamline group insolvencies and make them more coordinated.
- ***Information and publication.*** Access to information is indispensable for effective exercise of creditors' rights. Under the EIR 2000, there were no mandatory EU-level publication requirements concerning decisions opening insolvency proceedings. There was also no European insolvency register which would permit searches in several national registers at the same time. The EIR Recast provides both for the compulsory establishment of national insolvency registers (Article 24) and creation of the interconnection of insolvency registers via the e-Justice Portal (Article 25). The resulting improved access to information should enhance the degree of creditor participation and lower the monitoring costs, thus making the European insolvency regime more cost-efficient.
- You could also have focused on a) new rules on 'as if' (or otherwise called 'synthetic') proceedings (Article 36 EIR Recast), b) the extended scope of the EIR Recast to include, for example, pre-insolvency proceedings and hybrid proceedings, so that they could benefit from the system of automatic recognition of judgments (which has been maintained, see Article 32 EIR Recast), c) extended duties of communication and cooperation. In addition to the existing duties between 'liquidators' (insolvency practitioners), these duties are introduced in relations between courts and between insolvency practitioners and courts, etc.

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.**

*[In my opinion one of the major flaws in the EIR recast is the fact that although Article 1 serves to broaden the scope of the Regulation it applies to *inter alia* public collective proceedings (which includes insolvency or pre insolvency proceedings). Although this allows creditors to become aware of these proceedings, member states can still maintain confidentiality in their own national proceedings and in terms of their state laws. In essence this can make it very difficult for creditors from different jurisdictions to know about the insolvency proceedings which could be occurring in the different state. The EIR could correct this in the future by stipulating that national laws must be*

*in line with the EIR recasts and national law proceedings which have foreign creditors must be made public. If that is too drastic of a step then a compromise could be, to maintain confidentiality, the new Recast could also stipulate that the proceedings be made "public" only to those foreign creditors.*

*There is also no section to determine any recourse following the writing off of a natural person's debts in their member state. Therefore, if a debtor's debts are written off in one member state without any provision made to benefit or pay out made to creditors, then there is no recourse for foreign creditors in terms of the EIR Recast. A provision should be made to protect foreign creditors by allowing them to consent or reject the writing off a natural person's debt.]*

Question 3.3 [maximum 5 marks] 0

***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.***

*[Type your answer here]*

***No answer provided. Elements you could have considered included, e.g.:***

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

***Total marks : 5.5 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.***

***[Yes, the Strasbourg Court does have international jurisdiction to open the requested proceeding. Recital 13 of the EIR 2000 states the following "The 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties'. In this scenario the company was registered in France and we shall assume has conducted the administration of its affairs in France. This assumption is based on the fact that despite it having a warehouse in Spain, the income derived from that warehouse was in the form of rental income and not as a result of selling toys.***

***Furthermore Article 3(1) of the EIR 2000 states "1. The courts 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. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary."***

This article was reaffirmed in the case of *Eurofood IFSC Ltd*<sup>1</sup> where the presiding officer stated in paragraph 105

*"I accordingly conclude in answer to the third question referred that, where insolvency proceedings are first opened by a court in the Member State in which a company's registered office is situated and in which the company conducts the administration of its interests on a regular basis in a manner ascertainable by third parties, the courts of other Member States do not have jurisdiction to open main insolvency proceedings"*

It is therefore clear from the articles in the case law mentioned above that the Strasbourg Court does have international jurisdiction to open the requested 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] 2.5

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<sup>1</sup> Case C-341/04, ECLI:EU:C:2006:281 (May 2, 2006)



**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.**

*[In order to determine whether the recast applies it must follow the following steps in order to determine when does it apply in time (temporal), to whom does it apply (personal scope), which proceedings are covered by it (material scope) and what is the geographical limitations (scope) thereof.*

- 1. The first step involves the question does the debtor have COMI in a member state of the EU? - Yes it does as the company is registered in France, which is a member state of the EU.*
- 2. The second step involves asking whether the debtor is not a bank, insurance company or other excluded undertakings? - Yes, the debtor is neither a bank nor any other excluded entity.*
- 3. Thirdly one must ask whether the proceeding opened against the debtor is listed in Annex A to the EIR recast - no, the procédure de sauvegarde is not listed in Annex A therefore it does not fall within the material scope. **It does under the EIR 2017.***
- 4. finally, the last question that must be asked is whether the proceeding is opened after 26 June 2017? The answer is yes as the respective proceeding was opened on 29th June 2017*

*Therefore, since the proceeding is a restructuring proceeding and not an insolvency proceeding which does not form part of Annex A to the EIR Recast, it therefore does not fall within the scope and the EIR Recast would not apply.]*

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.**

*[Yes, such a proceeding can be opened in Italy under the EIR Recast. According to Article 3(2) of the EIR Recast which states:*

*“Where the centre of a debtor’s main interests 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 he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.”*

In the case of *Interedil Srl v Fallimento Interedil Srl*<sup>2</sup> the Court stated in paragraphs 62 and 63 that:

*“62. The fact that that definition links the pursuit of an economic activity to the presence of human resources shows that a minimum level of organisation and a degree of stability are required. It follows that, conversely, the presence alone of goods in isolation or bank accounts does not, in principle, satisfy the requirements for classification as an ‘establishment’.*

*63. Since, in accordance with Article 3(2) of the Regulation, the presence of an establishment in the territory of a Member State confers jurisdiction on the courts of that State to open secondary insolvency proceedings against the debtor, it must be concluded that, in order to ensure legal certainty and foreseeability concerning the determination of the courts with jurisdiction, the existence of an establishment must be determined, in the same way as the location of the centre of main interests, on the basis of objective factors which are ascertainable by third parties.”*

It is clear from the above that PAJ possesses more than goods in isolation or a bank account and conducts business in Spain in the form of rental of its warehouse, therefore such proceedings can be opened in Spain in terms of the EIR recast an above-mentioned case law.]

This is incorrect. The reasoning was as follows:

- **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).**

<sup>2</sup> Case C-396/09, ECLI:EU:C:2011:671 (Oct. 20, 2011).

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

**Total marks : 6 out of 15**

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

**Total marks : 27.5 / 50**