



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2B

THE EUROPEAN INSOLVENCY REGULATION

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

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

(GMT +1) on 31 July 2023. *If you elect to submit by 1 March 2023, you may not submit the assessment again by 31 July 2023 (for example, in order to achieve a higher mark).*

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

ANSWER ALL THE QUESTIONS

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

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

Question 1.1

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

Select the correct answer from the options below:

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

Question 1.2

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

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

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

Question 1.3

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

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

Question 1.4

Why can it be said that the EIR Recast did not overhaul the *status quo*?

- (a) The EIR Recast is a copy of the EIR 2000. Its structure and the wording of all articles are similar.**
- (b) Although the EIR Recast includes relevant and useful innovations, it has stuck with the framework of the EIR 2000 and mostly codified the jurisprudence of the CJEU.**
- (c) The EIR Recast has not added any new concept to the text of the EIR 2000.**

(d) It is incorrect to say that the EIR Recast has not overhauled the *status quo* at all. On the contrary, the EIR Recast has departed from the text of its predecessor and is a completely new instrument which has rejected all existing concepts and rules.

Question 1.5

The EIR Recast is an instrument of a predominantly procedural nature (including private international law issues). Nevertheless, it contains a number of substantive provisions. Which one of the following provisions constitutes a harmonised (stand-alone) rule of substantive law?

- (a) Article 18 EIR Recast ("Effects of insolvency proceedings on pending lawsuits or arbitral proceedings").**
- (b) Article 40 EIR Recast ("Advance payment of costs and expenses").**
- (c) Article 7 EIR Recast ("Applicable law").**
- (d) Article 31 EIR Recast ("Honouring of an obligation to a debtor").**

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.**

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: 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.

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 / Centre of main interests - Article 3(1) and Recital 30

Statement 2: Scope - Article 1 and Recital 10

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

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

Recital 23 - *main insolvency proceedings opened in the Member State where the debtor has its COMI have universal scope and are aimed at including all the debtor's assets. In terms of Recital 23 it is further permitted to open secondary insolvency proceedings to run parallel with the main insolvency proceedings in order to protect the diversity of interests and is applicable and limited to assets situated in that other Member State where the debtor has an establishment. The need for unity in the EU is satisfied by mandatory rules of coordination with the main insolvency proceedings.*

Article 3(1) - *the courts of the Member State in which the debtor's centre of main interests ("COMI") is situated, has jurisdiction to open insolvency proceedings, which will be the main insolvency proceedings in respect of that debtor.*

Article 3(2) - *where the COMI of a debtor is situated in a Member State, the courts of another Member State has jurisdiction to open insolvency proceedings against the debtor if that debtor has an establishment in the territory of that other Member State. The effect of these proceedings will be restricted to the debtor's assets that are situated in the territory of that other Member State. Any proceedings opened in terms of this Article after proceedings were opened in terms of Article 3(1) will be known as secondary insolvency proceedings in terms of Article 3(3). Therefore,*

Recital 26 - *the EIR's rules relating to jurisdiction establishes the international jurisdiction only and they therefore determine the Member State (country) whose courts may open insolvency proceedings. Territorial jurisdiction must be determined by the national law of the particular Member State and therefore the domestic laws of the particular Member State will determine which court in that Member State may open insolvency proceedings.*

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.

Cooperation and communication between insolvency practitioners - Article 41 - *Where main insolvency proceedings and secondary insolvency proceedings have been opened in relation to the same debtor, the insolvency practitioner in the main insolvency proceeding and the insolvency practitioner(s) in the secondary insolvency proceeding(s) must cooperate with each other insofar as the cooperation is not incompatible with the rules that is applicable to the respective proceedings.*

Cooperation and communication between courts - Article 42 - ***A court that is hearing a pending application to open insolvency proceedings or which has opened insolvency proceedings shall cooperate with any other court that is hearing a pending application to open insolvency proceedings, or which has opened insolvency proceedings in order to facilitate coordination of the main, territorial and secondary insolvency proceedings opened in relation to the same debtor. The cooperation is required insofar as the cooperation is not incompatible with the rules that is applicable to the respective proceedings.***

Cooperation and communication between courts - Article 43 - ***in order to facilitate coordination of the main, territorial and secondary insolvency proceedings opened in relation to the same debtor an insolvency practitioner:***

- 1. Appointed in main insolvency proceedings must cooperate with any court that is hearing a pending application to open secondary insolvency proceedings, or which has opened secondary insolvency proceedings;***
- 2. Appointed in territorial or secondary insolvency proceedings must cooperate with any court that is hearing a pending application to open main insolvency proceedings, or which has opened main insolvency proceedings;***
- 3. Appointed in territorial or secondary insolvency proceedings must cooperate with any court that is hearing a pending application to open other territorial or secondary insolvency proceedings, or which has opened other territorial or secondary insolvency proceedings;***

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.

Recital 42; Article 36 read with Article 38(2) - Right to give an undertaking in order to avoid secondary insolvency proceedings - ***In terms of Article 36 the insolvency practitioner in the main insolvency proceedings may, in order to avoid the opening of secondary insolvency proceedings, give an autonomous undertaking with reference to the assets of the debtor situated in the Member State where the secondary insolvency proceedings could be opened, in terms whereof he will distribute the assets located in that Member State in compliance with the distribution and priority rights under the national law that creditors would have if secondary insolvency proceedings were in fact opened in that Member State. In terms of Article 38(2), if the court is satisfied that the said undertaking provides sufficient protection to the local creditors, it should refuse to open the secondary insolvency proceedings.***

Recital 45; Article 38(3) - Temporary stay of opening of secondary insolvency proceedings - ***Where a stay of individual enforcement measures are granted in main insolvency proceedings, the court, on application by the insolvency practitioner or debtor in possession of the assets, should stay the opening of secondary proceedings for a period not exceeding three months if it is satisfied that sufficient measures are in place to protect the local creditors' general interest. in order to preserve the effectiveness of the stay as granted in the main insolvency proceedings***

Total marks: 10 out of 10.

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

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

Question 3.1 [maximum 5 marks] **5**

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

Article 46 of the EIR 2000 the European Commission had to present a report by no later than 1 June 2012 containing a proposal for its amendment, if same was deemed necessary. The European Commission, in preparation of their report in terms of the said Article 46, identified certain provisions which required adjustment, as well as certain developments in the legal fraternity which required totally new rules to be included in the EIR. The EIR 2000 was therefore revised in terms of the following:

- 1. Lack of provisions relating to restructuring – the scope of the EIR was broadened to make provision for and introduce a European business rescue culture in *inter alia* Article 47 of the EIR Recast. References to restructuring are included in various Articles throughout the EIR Recast;***
- 2. Lack of provisions dealing with groups of companies – The scope of the EIR was broadened to include provisions dealing with the insolvencies of companies and for group coordination proceedings with regard to these groups of companies in Chapter V (insolvency proceedings of members of a group of companies) of the EIR Recast;***
- 3. Lack of a definition for centre of main interest (“COMI”) – the main text of the EIR was expanded to include a definition for COMI in Article 3(1) of the EIR Recast.***
- 4. Lack of provisions relating to data protection, processing and storage – The scope of the EIR was expanded and modernised to include provisions relating to data protection, the processing of personal data and for the collection and storage of data in national databases to make data available in an interconnected register in chapter VI of the EIR Recast;***
- 5. Insufficient provision for rules relating to cooperation between insolvency practitioners and courts – Rules relating to cooperation and communication between insolvency practitioners were strengthened in Article 41, and new provisions included with reference to cooperation and communication between courts and between insolvency practitioners and courts in Articles 42 and 43 respectively (with reference to secondary insolvency proceedings). New and similar provisions to those included in the abovementioned Articles relating to cooperation and communication with reference to insolvency proceedings of groups were included in Articles 56, 57 and 58 of the EIR Recast.***

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.

Certain shortcomings of the EIR Recast have been identified in relation to group coordination proceedings. These shortcomings are the following:

- 1. It does not sanction substantive, procedural or jurisdictional consolidation, but offers voluntary group coordination proceedings that can be opened by an insolvency practitioner appointed in insolvency proceedings opened in relation to any member of the group before any court presiding over insolvency proceedings of a group member (Recital 55, Article 61(1) of the EIR Recast). Therefore, creditors do not have the authority to request the opening of group coordination proceedings and a concept of a centre of main interest for the group is not introduced. In terms of Article 66 of the EIR Recast jurisdiction is exclusively assigned to a particular court for group coordination proceedings by agreement of at least two-thirds of all the insolvency practitioners appointed in insolvency proceedings relating to members of the group.*
- 2. It makes provision for the group coordinator to make recommendations for the coordinated conduct of the insolvency proceedings and to propose a group coordination plan that identifies, describes, and recommends the measures to ensure an integrated approach to the resolution of the group members’ insolvencies (Article 72(1) of the EIR Recast). The said recommendations and group coordination plan is however not binding on the insolvency practitioners. In terms of Article 70, they must merely consider the recommendations and if they do not follow same in whole or in part, they must provide reasons for not doing so to the body they have to report to in terms of their national law and the coordinator.*

It is my submission that the abovementioned shortcomings can be corrected by the issuing of further Directive in terms whereof provisions in relation to group coordination proceedings are expanded to:

- 1. Creditors to request such proceedings, as they have a direct interest in the administration of the insolvencies of the group of companies;*
- 2. Provide for jurisdictional consolidation by way of defining the centre of main interests of the group of companies to be the place where the parent company has its registered head office and therefore establishing jurisdiction in favour of the court situated in the jurisdiction of the registered head office of the parent company. This will eliminate any uncertainty and the need for insolvency practitioners to agree on the said jurisdiction;*
- 3. Create provisions with reference to the adoption of the recommendations and group coordination plan by the majority of the creditors of the insolvent group members at a meeting of creditors and which makes the plan binding upon adoption thereof. This will allow creditors to peruse the group coordination plan and provide feedback on the plan, as the implementation or not of the plan will*

have a direct bearing on their claim against the respective insolvent members of the group.

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.

- 1. In terms of Recital 10, read with Article 1 of the EIR Recast proceedings based on the laws relating to insolvency for the purpose of rescue, adjustment of debt, reorganisation or liquidation may be commenced with in situations where there is only a likelihood of insolvency. The purpose of these proceedings will then be to avoid the debtor's insolvency or termination of the debtor's business activities. Similarly, the 2019 Directive deals with preventative restructuring, but establishes minimum standards for preventative restructuring procedures which enables debtors that are financially distressed to restructure their debts at an early stage to avoid insolvency.*

The 2019 Directive extends the preventative restructuring procedures to include early warning systems and access to information in Article 3 of the 2019 Directive, which is not provided for in the EIR Recast. In terms of Article 3(1) Member States shall ensure that debtors have access to early warning tools that can detect circumstances that could lead to a likelihood of insolvency and enable them to take necessary measures to prevent insolvency.

The EIR Recast therefore provides for rescue or reorganisation in situations where there is only a likelihood of insolvency, but the 2019 Directive takes it a step further by ensuring that debtors can identify the circumstances that can lead to insolvency in order to prevent insolvency.

- 2. The EIR Recast now makes provision for restructuring and the adoption of restructuring plans, however it does not contain provisions relating to the content of restructuring plans, the basis upon which restructuring plans can be adopted by way of a voting structure and for the confirmation of restructuring plans by a judicial or administrative authority in Articles 8, 9 and 10 of the 2019 Directive respectively. Article 11 of the 2019 Directive further includes a cross-class cram-down provision, in terms whereof a restructuring plan that is not approved by affected parties may become binding upon dissenting voting classes if the restructuring plan fulfils certain requirements.*

The EIR Recast therefore now makes provision for business restructuring in order to avoid insolvency, but the 2019 Directive provides guidance and regulations for the implementation of a business rescue plan and the confirmation of the plan in certain circumstances where it was not approved by affected parties.

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] **5**

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.

In order to ascertain whether the EIR 2000 will be applicable the question that must be answered is whether the proceeding is an insolvency proceeding as defined in the EIR 2000.

In terms of Article 1(1) the EIR 2000 applies to “collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator.”

In terms of Article 2(a) of the EIR 2000 insolvency proceedings “shall mean the collective proceedings referred to in Article 1(1). These proceedings are listed in Annex A”.

The decisive role of Annex A was confirmed by the CJEU in Case C-116/11, Bank Handlowy w Warszawie SA v Christianapol sp. Z o.o., ECLI:EU:C:2012:739 (Nov. 22, 2012). The court held that the proceedings listed in Annex A must be regarding as coming within the scope of the regulation and the inclusion thereof has a binding effect which attaches to the provisions of a regulation.

Although safeguarding is one of the possible paths that can be followed in France if a company is financially distressed, it is part of the rescue procedures available in France. EIR 2000 is only applicable to the insolvency proceedings listed in Annex A and not to rescue and restructuring proceedings.

In terms of Annex A insolvency proceedings referred to in Article 2(a) in France includes:

- 1. Liquidation;*
- 2. Judicial reorganisation with appointment of an administrator.*

Safeguarding is therefore not an insolvency proceeding in terms of the EIR 2000 and the Strasbourg High Court will not have jurisdiction under the EIR 2000, as:

- 1. It is a rescue proceeding and not an insolvency proceeding;*
- 2. It is not included in the insolvency proceedings as referred to in Annex A to the EIR 2000.*

Very good.

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.

In order to determine the scope of the EIR Recast, regard must be had to the following considerations:

- 1. Material scope –
In terms of Article 1 of the EIR Recast, the EIR Recast will apply to “public collective proceedings, including interim proceedings, which are based on laws relating to*

insolvency and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation:

- (a) a debtor is totally or partially divested of its assets and an insolvency practitioner is appointed;*
- (b) the assets and affairs of a debtor are subject to control or supervision by a court; or*
- (c) a temporary stay of individual enforcement proceedings is granted by a court or by operation of law, in order to allow for negotiations between the debtor and its creditors, provided that the proceedings in which the stay is granted provide for suitable measures to protect the general body of creditors, and, where no agreement is reached, are preliminary to one of the proceedings referred to in point (a) or (b)."*

Article 1 further confirms that the proceedings referred to above are listed in Annex A.

Safeguard proceedings in France are collective proceedings aimed at rescuing a debtor in financial distress and therefore will fall within the ambit of Article 1 of the EIR Recast. Safeguard proceedings are further listed in the proceedings referred to in Annex A under France. The proceedings will therefore fall under the material scope of the EIR Recast.

2. Temporal scope -

In terms of Article 84(1) of the EIR Recast it applies from 26 June 2017. The safeguard proceedings are opened on 30 June 2017 and therefore the proceedings falls under the temporal scope of the EIR Recast.

3. Personal scope -

In terms of Recital 9 of the EIR Recast the Regulation should apply to insolvency proceedings that meet the conditions set out in the Regulation, irrespective of whether the debtor is a natural person, a legal person, a trader or an individual.

In terms of Article 1(2) the regulation shall not apply to proceedings that concern:

- (a) Insurance undertakings;**
- (b) Credit institutions;**
- (c) Investments firms, other firms, institutions and undertakings covered by Directive 2001/24/EC;**
- (d) Collective investment undertakings.**

Bella SARL is a French-registered company selling cosmetic products. It is therefore a legal person and is not excluded in terms of Article 1(2) of the EIR Recast. It therefore falls under the personal scope of the EIR Recast.

4. Territorial scope -

In terms of Recital 25 of the EIR Recast the Regulation only applies to proceedings where the debtor's centre of main interests ("COMI") is located in the European Union ("EU").

In terms of Article 3(1) of the EIR Recast, the COMI of a company or legal person is presumed to be the place of the registered head office of the company, if it has not been moved in the three months prior to the opening of the insolvency proceedings.

Bella SARL was registered in France, being a member of the EU, in 2010. The proceedings were opened in 2017, more than three months after the registration of the company. Bella SARL's COMI is therefore situated in the EU and the proceedings will fall under the territorial scope of the EIR Recast.

As all four determinations as discussed above is complied with, the EIR Recast should be applicable to the opened safeguard proceedings.

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.

Recital 23 of the EIR Recast allows secondary insolvency proceedings to be opened where the debtor has an establishment. The secondary proceedings run parallel with the main insolvency proceedings opened where the debtor has its COMI and are limited to the assets located in the Member State where it has an establishment.

In terms of Article 3(2) of the EIR Recast, if the debtor possesses an establishment within the territory of a Member State, that Member State will have jurisdiction to open insolvency proceedings, which proceedings will be restricted to the assets of the debtor situated in the territory of that Member State.

In terms of Article 37(1)(b) of the EIR Recast the opening of secondary insolvency proceedings may be requested by any person or authority empowered to request same under the law of the Member State within which the opening of the secondary proceedings is requested.

In terms of Article 2(10) of the EIR Recast an 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”.

In Interdil Srl v Fallimento Interdil Srl Case C-396/09, ECLI:EU:C:2011:671 (Oct. 20, 2011) the CJEU examined the concept of establishment. The court found that, as the definition connects an economic activity to human means and assets, a minimum level of organisation and a degree of stability are required. The presence of goods of bank accounts alone does not satisfy the requirements for classification as an “establishment”.

In terms of paragraph 71 of the Virgós-Schmit Report the decisive factor in considering the non-transitory character of economic activities, is how the activity appears externally in the perception of third parties. There must be a degree of continuity and stability and a purely occasional place of operations cannot be classified as an establishment.

Bella SARL has a warehouse in Italy and it also has employees and customers in Italy. The warehouse can be considered to be a place of operations for the debtor, as economic activities are run from the warehouse, for example the distribution of cosmetics and as employees of the debtor is based in Italy the economic activity is undertaken by human means.

Therefore, Bella SARL has an establishment in Italy and secondary insolvency proceedings can be opened under the EIR Recast in Italy.

While your reasoning is sound, the answer is incorrect.

- 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 *Interdil*) is evidently missing.***
- Therefore, under the EIR Recast, secondary insolvency proceedings cannot be opened in Italy, nor Spain.***

Total marks: 12 out of 15.

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

Total marks: 44 / 50