



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.

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*.**

Total marks: 9 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.

Registered office presumption – Article 3(1) EIR Recast (and Recital 28).

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.

Promotion of effective restructuring tools – Recital 10 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.

Articles 7 and 8-18 EIR Recast – article 7 applies the lex concursus to the insolvency proceedings, but articles 8-18 recognise certain exceptions to the application of lex concursus.

Article 19(2) EIR Recast re recognition of main proceedings not precluding secondary proceedings being opened in another member state.

Article 32 EIR Recast re recognition and enforceability of foreign judgments, but article 33 provides for an exception on the grounds of public policy.

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.

Article 41(1) – insolvency practitioners in main and secondary proceedings should cooperate.

Article 42(1) – courts should cooperate with other member states courts.

Article 23 – courts and insolvency practitioners should cooperate.

Question 2.4 [maximum 2 marks] **1**

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.

"Synthetic" proceedings pursuant to Article 6. It allows one insolvency practitioner to have central control over the estate by requiring the insolvency practitioner in the main proceedings to give an undertaking that when distributing the assets of the insolvent estate in another member state, he will comply with the laws of that member state. **Article 6 of the Regulation deals with set-off. You may have wanted to talk about article 36?**

A request for a stay by the insolvency practitioner (or debtor in possession) pursuant to Article 38(3). This allows the court to temporarily stay the opening of secondary proceedings where such a stay has been granted in the main proceedings. The stay can be imposed for a period of no more than 3 months as long as local creditors interests are protected.

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)?

Although the EIR 2000 was the first binding instrument addressing cross-border insolvencies in Europe and was widely recognised as a great success, given legal developments and the increase in cross-border trade and insolvencies, many elements were in need of updating by the time that EIR Recast was introduced, including the provisions relating to corporate rescues and restructuring proceedings.

One of the other obvious omissions in EIR 2000 which EIR Recast sought to address, was the absence of any provisions addressing the insolvency of group companies. EIR 2000 made no such provision but, given the inter-connected, global and digital world we know live in, the EIR Recast introduced a new chapter which deals with insolvencies of groups companies (Chapter V – articles 56 – 77). Chapter V directs, *inter alia*, that courts and insolvency practitioners involved in group insolvencies should cooperate and coordinate proceeding relating to the groups wherever possible. It also introduces the idea of a group coordination proceeding.

Other concepts introduced by EIR Recast which were missing from EIR 2000, are the introduction of insolvency registers (article 24 EIR Recast) and notice provisions regarding the opening of insolvency proceedings (article 28(1) EIR Recast).

Under EIR 2000 each member state maintained their own insolvency registration system. Given the importance of such information for creditors and others affected by insolvencies, this system gives much needed certainty and consistency for creditors and members of the public. Similarly, the notification requirements in article 28(1) also gives much needed information to creditors and seeks to ensure that they are on notice and aware of the timings

and process to bring claims where a debtor has entered an insolvency process in another member state. This ensures the integrity of the cross border insolvency process.

In addition to the above, other legal areas which had seen significant advances since EIR 2000 were also modernised and updated in EIR Recast (e.g. data protections laws in Chapter VI of EIR Recast which were not adequately addressed in EIR 2000).

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.

One of the obvious flaws in EIR Recast is the voluntary nature of group co-ordination proceedings prescribed by Recital 55, Article 61, and its applicability in non-member states. Given the prevalence of interconnected groups of corporate entities, EIR Recast had an opportunity to ensure the effective management and co-ordination of cross-border insolvencies involving group companies. However, by making such proceedings voluntary in nature, and allowing an insolvency practitioner appointed in any one member state to object and opt out (without even having to give any reasons for their objection) (article 64), the effectiveness of such group co-ordination proceedings is severely undermined. This means that an insolvency practitioner appointed to a group company in a member state, can frustrate the effectiveness of a group co-ordinator or group co-ordination plan, even if the implementation of the plan across the whole group may be in the best interest of the group as a whole.

A potential solution to this problem could be to make the group co-ordination proceedings, if approved by the court of the applicable member state (who will have determined that the opening of such proceedings would facilitate the effective administration of the group), automatically binding on group companies in other member states. Obviously the court's decision to establish the group co-ordination proceedings would need to be notified (article 28) and the proposed appointment reflected in the member state's insolvency register (article 25). Insolvency practitioners or creditors in other member states could then have a fixed period of time to set out their objections and the basis upon which they disagree with the proposed group co-ordination proceedings before the group co-ordination plan is drawn up.

Another shortcoming in EIR Recast, is that it does not go far enough to ensure adequate levels of communication and cooperation between insolvency practitioners and courts in different jurisdictions. Although Recital 48 correctly points out that close coordination is needed to effectively realise the assets of the insolvent estate. Articles 41 (communication between insolvency practitioners, article 42 (between member state courts) and article 43 (between insolvency practitioners and the court) attempt to address this and to ensure that there will be proper cooperation and sharing of information between all parties involved in concurrent proceedings.

The EIR Recast provisions are based on best practices and refer to relevant international guidelines (UNCITRAL is specifically referred to in Recital 48). However, in spite of these efforts to codify and prescribe how connected proceedings should operate across different jurisdictions, it ignores practical realities which make a unified set of rules governing cooperation very difficult – particularly cooperation between the courts of different member states. For example, although Recital 50 EIR Recast provides for the appointment of a single insolvency practitioner across several proceedings, EIR Recast's provisions governing the qualification and licensing of insolvency practitioners in different member states make this very

difficult to achieve given they are not universal. Language and differing legal traditions also make such practical cooperation harder to achieve. There are other tools that member state courts could employ, such as joint hearings under the EU Judge Co Guidelines. However, it would seem that in order to really make this provision effective, the EIR Recast could have specifically mandated how such cooperation should take effect. For instance, it could have prescribed that hearings be attended remotely by the member state courts, and that the courts could and should liaise electronically following court hearings to agree on suitable and mutually agreeable courses of actions with regard to the insolvent estate.

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.

As noted, the EIR does not provide for a material harmonization of the national insolvency laws, but instead provides a set of EU wide conflict of laws rules relating to insolvencies. The most obvious is Article 3 which establishes the "COMI" principle. However, the purpose of the EU Restructuring Directive is to reduce differences between member states with regard to the various procedures available to debtors in financial distress to enable them to restructure their business. Prior to the Directive, member states had different rules and laws, with some having no restructuring or preventative restructuring tools, and others having inflexible or ineffective tools. The Directive, unlike the EIR which employs modified universalism in an attempt to find a compromise amongst member states with different laws and legal traditions, aims to harmonise restructuring tools available in member states. It borrows existing and successful elements from the legal systems of member states and attempts to provide a framework which can be used across all member states.

Another notable difference is the remedies available under both the EIR and the Directive. Article 1 of the EIR states that it applies to "*public collective proceedings, including interim proceedings, which are based on laws relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation*", and there is clearly an emphasis on the concept of restructuring in EIR in addition to the more traditional liquidation type scenarios. However, it does not actually prescribe or provide any details of what restructuring tools are available or can be employed under the EIR. Rather, the restructuring tools are to be selected by the insolvency practitioner / debtor in possession in accordance with national laws.

By contrast, the Directive sets out certain harmonised rules enabling insolvency practitioners in a member state to implement a restructuring framework which will be capable of taking effect in other member states. It provides guidance to practitioners and debtors in regarding, *inter alia*, the content and confirmation of restructuring plans, cross class cram down, provisions for new financing, directors duties and discharge of debt / disqualifications. Although the effect of the negotiation process somewhat diluted the effectiveness of the final document, it still affords companies in financial difficulty certainty in respect of the restructuring tools available to them. By contrast, although the EIR does provide for the possibility of group co-ordination proceedings (discussed above), these are voluntary and the EIR does not prescribe what sort of tools can be employed to ensure acceptance across different member states (hence increasing the likelihood of the group co-ordination plan being rejected by one or more appointed insolvency practitioners).

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.

We are informed that, although Bella SARL (the **Company**) is a French registered company and opened its first shop in France, it has warehouses throughout Europe, with its main warehouse in Cork. It also fulfils online purchases, predominantly from Netherlands and Poland.

We first need to determine if the safeguard proceedings which have been applied for in the Strasbourg Court are listed in the annex to EIR 2000. We must also consider if the safeguard proceedings, which seek to implement a preventative restructuring, would fall within the scope of EIR 2000. Article 1(1) of 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*". Accordingly, as EIR 2000 was limited in scope to traditional

'liquidation' type scenarios, it appears as though the Strasbourg 'safeguard' proceeding would not be permitted under EIR 2000 and the Strasbourg Court would not have jurisdiction to open the proceeding under EIR 2000. **Very good.**

Leaving that aside, even if EIR 200 did permit such preventative proceedings, we would need to establish where the Company's COMI is. Had the proceedings been commenced under EIR Recast, it may be more straightforward (see below), however, as they have been commenced under EIR 2000 we would need to examine the legislation and the relevant case law to determine where the company's COMI is. EIR 2000 does not contain a definition of COMI but Recital 13 of EIR 2000 does provide that it will be considered to be where the debtor regularly conducts the administration of its interests and which is ascertainable to third parties. Although this could be considered to be where it is registered, we need to consider which location is ascertainable to third parties and any relevant CJEU case law.

In Eurofood IFSC Ltd (Case C-341/04 of 2006) the CJEU stressed that COMI was not to be determined by reference to national legislation and fell to be determined by the court in a uniform way. The CJEU held that COMI had to be identified on an objective basis and must be ascertainable to third parties. This autonomous interpretation detached from domestic laws facilitates legal certainty across member states.

Applying that to present case, we need to look at the facts independently and determine what COMI would be reasonably ascertainable by third party. There is no registered office presumption under EIR 2000, so we would likely need more information regarding how the business operates and what takes place in each jurisdiction. However, based on the description of the cross-border enterprise and how it operates, it is possible that one could say that the existence of a Spanish bank account or the main warehouse in Ireland could be a basis for a third party to assume the Company conducts the administration of its business somewhere other than France. However, this is academic as, in any event, the Strasbourg Court would likely not have jurisdiction to open preventative restructuring proceedings under EIR 2000.

Question 4.2 [maximum 5 marks] 2

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.

Article 1 of the EIR states that it applies to "*public collective proceedings, including interim proceedings, which are based on laws relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation*". This is marked difference to EIR 2000 which instead focussed in traditional insolvencies involving "*the partial or total divestment of a debtor and the appointment of a liquidator*". As there is a focus on preventative restructuring in EIR Recast, we would need to ascertain if the Strasbourg safeguard proceedings satisfy the conditions set out in Article 1 and, crucially, if they are listed in Annex A of the EIR Recast. If so, then it is possible that EIR Recast could apply to the proceedings. If the safeguard proceedings are not listed in Annex A, then EIR Recast cannot apply.

Next, in order to determine if EIR Recast will apply to these proceedings (assuming the proceedings are listed in Annex A), we need to determine where the Company's COMI is. Article 3(1) EIR Recast does contain a registered office presumption, meaning the fact that

the Company's registered office is in France would lead to presumption that this is also its COMI. This presumption will not apply in certain circumstances, such as where the registered office has moved in the preceding 3 months, or there are objective matters which indicate that the debtor's interests are administered in a different country.

In *Interdil Srl -v- Fallimento Interdil Srl* (Case C-396/09 of 2011) the CJEU ruled that where the body responsible for the management of the debtor is in the same jurisdiction as its registered office, and management decisions are also taken there such that this would be clear and ascertainable to third parties, then the registered office presumption cannot be refuted. The CJEU's guidance is now reflected in Recital 30 of the EIR Recast.

Given the Company was originally registered in France, set up its first store in France, and continues to have a presence and employees there, it does not appear that there is cause to rebut this presumption.

You forgot the following two elements:

- **Article 1(2) EIR Recast. Bella SARL is not a credit institution, insurance undertaking or any other 'excluded' entity. YES**
- **Article 2(7), 84(1), 92 EIR Recast. The proceedings in question were opened on 30 June 2017, i.e. after the EIR Recast has entered into force. The filing date (20 June 2017) is not determinative for the temporal scope. YES**

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.

In order to determine if secondary insolvency proceedings can be opened in Italy, we need to establish if the Company can be considered to have an 'establishment' in Italy. Article 3(2) EIR Recast states "*where the centre of the 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 it 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.*"

Clearly the effects of any secondary proceedings brought in Italy would be limited to the assets situated in Italy. However, we need to establish if the company has an 'establishment' in Italy. Article 2(10) EIR Recast defines this 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*".

Similar to the examination of COMI for primary proceedings, the CJEU have employed an autonomous interpretation regarding a debtor's 'establishment'. In *Interdil* (referred to above)

the CJEU found that an economic activity coupled with the presence of employees showed a certain minimum level to establish an 'establishment'. The presence of goods or bank accounts will not, on their own, suffice to meet the test. Rather, there must be some non-transitory economic activity with both human means and assets and the presence of an establishment should, like COMI, be capable of being objectively ascertained by third parties.

Applying that to the present case, we are told that the Company has warehouses and employees in Italy and appears to have had operations there for many years preceding the EIR Recast proceedings. Based on the test applied by the CJEU and the definition in EIR Recast it appears that the Company's 'operations' would bring it within the definition of article 2(10) and permit the Italian bank to apply to open secondary proceedings.

However, if an insolvency practitioner has been appointed in the French proceedings and the opening of secondary proceedings are likely to frustrate his efforts to collect and realise the assets of the estate, or to present a cohesive restructuring plan, he could seek to give an undertaking pursuant to article 36 in respect of the Italian assets and avoid the secondary proceeding by instead creating a 'synthetic' secondary proceeding. This was a judicial innovation brought about by the CJEU in *Collins & Aikman, Europe SA* [2006] EWHC 1343 (Ch). This would allow any insolvency practitioner appointed in the French proceedings to have central control over the insolvency estate and to develop a cohesive restructuring plan. Another option open to the French insolvency practitioner would be to seek to stay the opening of the secondary insolvency proceedings in Italy pursuant to article 38(3). However, any stay would only apply for a period not exceeding three months.

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 *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.

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

Total marks: 42 / 50.