INSOL INTERNATIONAL
FOUNDATION CERTIFICATE
IN INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2B

THE EUROPEAN INSOLVENCY REGULATION

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

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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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.

The correct answer was B.

Question 1.4

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

(a) The EIR Recast is a copy of the EIR 2000. Its structure and the wording of all articles are similar.

(b) Although the EIR Recast includes relevant and useful innovations, it has stuck with the framework of the EIR 2000 and mostly codified the jurisprudence of the CJEU.

(c) The EIR Recast has not added any new concept to the text of the EIR 2000.

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

Question 1.5

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

(a) Article 18 EIR Recast ("Effects of insolvency proceedings on pending lawsuits or arbitral proceedings").

(b) Article 40 EIR Recast ("Advance payment of costs and expenses").

(c) Article 7 EIR Recast ("Applicable law").

(d) Article 31 EIR Recast ("Honouring of an obligation to a debtor").

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 /ex concursus, the contested payments can be avoided (Article 7(2)(m) EIR Recast).

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

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

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

Total marks : 8 out of 10.

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks] 2

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

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

<u>Statement 2</u>. 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 refers to the presumption of the debtor's center of main interests ("COMI"), for the purpose of defining the main insolvency proceeding. This rebuttable presumption is provided for in Article 3(1) of the EIR Recast. The EIR Recast brought as an innovation the adoption of a suspect period, that is, the registered office, the principal place of business or the habitual residence of the debtor cannot have been changed to another Member State in the period of 3 months prior to the request to open the insolvency proceedings.[1]

Statement 2 concerns the material scope of the EIR Recast. That is, the statement makes reference to the cases in which the EIR Recast is applicable. In this context, article 1(1) of the EIR Recast provides that "Regulation shall 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". Subsequently, the device adds that "[w]here the proceedings referred to in this paragraph may be commenced in situations where there is only a likelihood of insolvency, their purpose shall be to avoid the debtor's insolvency or the cessation of the debtor's business activities".[2]

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 <u>three (3) examples</u> of provisions from the EIR Recast which highlight this modified universalism approach.

The EIR Recast adopts the modified universalism system, because it allows the opening of a main proceeding, while authorizing the opening of secondary proceedings in the Member States where the debtor has an establishment. The first example of a provision that highlights modified universalism is Article 3(2), which establishes the possibility of opening a secondary proceeding. In this sense, the device establishes that "[t]he effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State". In addition to this provision, the second highlight is article 19(2), that establishes that the recognition of the main proceeding does not prevent the initiation of the secondary proceeding by a court of another Member State.[3] In addition, the

[1] WESSELS, Bob *et al*, Module 2B Guidance Text: The European Insolvency Regulation, INSOL International, London (2022), p 17.
[2] WESSELS, Bob *et al*, Module 2B Guidance Text: The European Insolvency Regulation, INSOL International, London (2022), p 11.
[3] WESSELS, Bob *et al*, Module 2B Guidance Text: The European Insolvency Regulation, INSOL International, London (2022), p 32.

> ***third highlight is that the EIR Recast introduced Chapter V dedicated to insolvency proceedings of members of a group of companies, allowing the principles of modified universalism to be applicable to insolvency involving groups of related companies.***[4]

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.***

EIR Recast has three articles that promote co-operation between actors involved in the main and secondary insolvency proceedings. Article 41 provides for co-operation between practitioners of the main insolvency proceedings and the secondary insolvency proceedings. Article 42 deals with co-operation between the main insolvency proceedings court and the secondary insolvency proceedings courts. Finally, article 43 refers to co-operation between practitioners and courts, with three hypotheses: (i) co-operation between the court of the main insolvency proceedings and practitioners of secondary insolvency proceedings; (ii) co-operation between practitioners in main insolvency proceedings and courts in secondary insolvency proceedings; and (iii) co-operation between courts of secondary insolvency proceedings and practitioners of other secondary insolvency proceedings. In all cases, the EIR Recast provides that the co-operation must be compatible with the rules applicable to the respective insolvency proceedings.[5]

Also, Articles 56, 57 and 58 of the EIR Recast have similar provisions in the context of insolvency proceedings of members of a group of companies.[6] ***Furthermore, recital 48 of the EIR Recast points out that***

> ***"insolvency practitioners and courts should take into account best practices for cooperation in cross-border insolvency cases, as set out in principles and guidelines on communication and cooperation adopted by European and international organisations active in the area of insolvency law, and in particular the relevant guidelines prepared by the United Nations Commission on International Trade Law (Uncitral)".***[7]

[4] WESSELS, Bob *et al*, Module 2B Guidance Text: The European Insolvency Regulation, INSOL International, London (2022), p 54-55.
[5] WESSELS, Bob *et al*, Module 2B Guidance Text: The European Insolvency Regulation, INSOL International, London (2022), p 43-47.
[6] WESSELS, Bob *et al*, Module 2B Guidance Text: The European Insolvency Regulation, INSOL International, London (2022), p 44.
[7] WESSELS, Bob *et al*, Module 2B Guidance Text: The European Insolvency Regulation, INSOL International, London (2022), p 44.

Therefore, the EIR Recast establishes the obligation of co-operation between the different actors of the main and secondary insolvency proceedings, in addition to indicating the observance of the best practices available in international mechanisms in the area of insolvency.

Question 2.4 [maximum 2 marks] 0.5

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.***

The first example is Article 7 of the EIR Recast provides that the law of the Member State of the opening of the proceeding shall govern its opening, conduct and closure. This is valid for both the main and secondary insolvency proceedings.[8] The second example involves the recognition of insolvency-related judgments. In this context, Article 32 of the EIR Recast expressly provides for the recognition of judgments on the course and closure of insolvency proceedings.[9] The provision provides that judgments must be recognized in accordance with Article 19 of the EIR Recast, in other words, proceedings that fall within the definition of Article 3 of the EIR Recast. It is worth mentioning that recognition can be withdrawn in accordance with the public policy exception, provided for in Article 33 of the EIR Recast.[10] ***Recognition will not limit the opening of secondary proceedings. You may have wanted to discuss articles 36, 38, or 46.***

Total marks : 8.5 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)?

[8] WESSELS, Bob *et al*, Module 2B Guidance Text: The European Insolvency Regulation, INSOL International, London (2022), p 22-23.
[9] WESSELS, Bob *et al*, Module 2B Guidance Text: The European Insolvency Regulation, INSOL International, London (2022), p 32-33.
[10] WESSELS, Bob *et al*, Module 2B Guidance Text: The European Insolvency Regulation, INSOL International, London (2022), p 34-35.

The European Commission presented the report determined in Article 46 of the EIR 2000. In this sense, the success of the EIR 2000 was demonstrated, but the practice evidenced the need for adjustments.[11]

Within the changes aimed at improving the practice of insolvency procedures, we have the expansion of the material scope of the EIR Recast in relation to the EIR 2000. While the EIR 2000 had a restricted focus on liquidation, the EIR Recast included in its material scope procedures of rescue, adjustment of debt and reorganization, in order to expand the list of procedures recognized in Annex A.[12]

Another practical improvement promoted at EIR Recast was the expansion of co-operation between main proceedings and secondary proceedings. Article 31 of the EIR 2000 provided only for cooperation between the liquidator of the main proceeding and the liquidators of the secondary proceedings. The EIR Recast included Articles 41, 42, 43 and 44, providing for cooperation between insolvency practitioners, between courts and between insolvency practitioners and courts.[13]

The practice of the EIR 2000 demonstrated the need for predictions regarding the insolvency of groups of companies. With that in mind, the legislator included Chapter V in the EIR Recast with specific provisions to enable the insolvency of corporate groups.[14]

Furthermore, the EIR Recast introduced improvements regarding creditor access to information and a general modernization of the EIR 2000.[15]

Therefore, the criticisms made by the European Commission were largely implemented. Thus, with the practical application of the EIR Recast it will be possible to verify the use of the new forecasts and identify the need for new changes.

Question 3.2 [maximum 5 marks] 0

[11] WESSELS, Bob *et al*, Module 2B Guidance Text: The European Insolvency Regulation, INSOL International, London (2022), p 9.
[12] WESSELS, Bob *et al*, Module 2B Guidance Text: The European Insolvency Regulation, INSOL International, London (2022), p 9 and 11-12.
[13] WESSELS, Bob *et al*, Module 2B Guidance Text: The European Insolvency Regulation, INSOL International, London (2022), p 9 and 43-47.
[14] WESSELS, Bob *et al*, Module 2B Guidance Text: The European Insolvency Regulation, INSOL International, London (2022), p 9 and 51-61.
[15] WESSELS, Bob *et al*, Module 2B Guidance Text: The European Insolvency Regulation, INSOL International, London (2022), p 9.

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.***

[Type your answer here]

You did not answer this question.

You could have considered, e.g.

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

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

The fact that the procedure established in Article 36 EIR Recast has not gained ground since its introduction in summer 2017 may indicate that its improvement or simplification may be necessary. The value of the undertaking is in its flexibility, but overregulation may stifle such flexibility. Giving more freedom to the parties involved and to the Member States in devising the most appropriate solutions on a case-by-case basis can prove to be more desirable and functional.

Question 3.3 [maximum 5 marks] 2

The European Insolvency Regulation is a choice-of-forum instrument, which although aiming at procedural harmonisation, did not harmonise the substantive insolvency laws of the Member States. Because of lingering disparities among the national insolvency regimes across the EU, the European institutions introduced the Directive on Preventive Restructuring Frameworks in 2019, which is meant to dovetail the European Insolvency Regulation. List two (2) ***ways in which the Regulation and the Directive differ.***

The first difference is related to scope. While the Directive on Preventive Restructuring Frameworks in 2019 aims to indicate paths that can be adopted by Member States to improve their restructuring framework, the EIR Recast has rules for the application of cross-border insolvency.[16]

*The second difference relates to the applicability of the instrument and its effects in relation to harmonization. The Directive on Preventive Restructuring Frameworks in 2019 is a soft law **(it is not. A Directive is binding)**, therefore, its intention is to approximate the insolvency framework of the Member States, so that there is harmony between the instruments adopted by each Member State. On the other hand, EIR Recast is a choice-of-forum instrument of hard law with immediate application in Member States. Its objective is to guarantee cooperation between the proceedings opened in relation to the same debtor, in addition to enabling the recognition of these processes.*[17]

Therefore, together the EIR and the directive have the function of harmonizing and coordinating the existing insolvency procedures within the Member States.

Total marks : 7 out of 15.

QUESTION 4 (fact-based application-type question) [15 marks in total]

Scenario

[16] WESSELS, Bob *et al*, Module 2B Guidance Text: The European Insolvency Regulation, INSOL International, London (2022), p 62-65.
[17] WESSELS, Bob *et al*, Module 2B Guidance Text: The European Insolvency Regulation, INSOL International, London (2022), p 62-65.

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.

The EIR 2000 has a limited material scope compared to the EIR 2015, which innovated by including restructuring procedures. Accordingly, Article 1(1) of the EIR 2000 applies only to collective insolvency proceedings involving the partial or total disposal of the debtor and the appointment of a liquidator.[18]

In addition, Article 2(a) provides that the insolvency proceedings are those listed in Annex A. Checking the Annex, we see that only the French procedures of "liquidation judiciaire" and "redressement judiciaire avec nomination d'un administrateur" were recognized by EIR 2000. Therefore, it would not be possible for the Strabourg High Court to open a safeguard procedure under EIR 2000. Good.

Question 4.2 [maximum 5 marks] 5

[18] WESSELS, Bob *et al*, Module 2B Guidance Text: The European Insolvency Regulation, INSOL International, London (2022), p 11.

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.

First, the temporal scope of the EIR Recast should be noted. In this sense, Article 92 of the EIR Recast establishes that the regulation must be applied from 26 June 2017, with some exceptions. Furthermore, Article 84 provides that the EIR Recast shall apply only to insolvency proceedings opened after 26 June 2017.[19] Considering that the French High Court opens safeguard proceedings on 30 June 2017, it would fall within the temporal scope of the EIR Recast.

Second, it must be assessed whether the debtor falls within the personal scope of the EIR Recast. Article 1(2) excludes from the personal scope of the EIR Recast certain entities, namely: (i) insurance undertakings; (ii) credit institutions; (iii) investment firms and other firms, institutions and undertakings to the extent that they are covered by Directive 2001/24/EC; and (iv) collective investment undertakings. Considering that Bella SARL is a French-registered company selling cosmetic products, it does not fall within one of the personal scope exceptions, so the EIR would apply.

Third, the material scope must be checked. Article 1 provides that the EIR Recast applies to public collective proceedings that are based on law relating to insolvency, the proceedings recognized by the EIR Recast being listed in its Annex A, according to Article 2(4) of the EIR Recast. In this context, the French Sauvegarde proceedings is listed in Annex A, so that the material scope requirement has been met.

Finally, there is the territorial scope. Recital 25 indicates that the EIR Recast is applied only to debtors whose centre of main interests (COMI) is located in the European Union (EU). Still, Denmark is an exception to this rule.[20] Article 3 of the EIR Recast provides the legal presumption that the registered office is the COMI of the company.[21] Therefore, considering that Bella SARL is a French-registered company, the territorial scope is also present.

Therefore, in a step-by-step it is possible to verify that the EIR Recast will be applicable to the proceedings. In this sense: (i) the debtor has COMI in a Member State of the EU, except Denmark; (ii) the debtor is not one of the personal scope exceptions provided for in Article 1(2) of the EIR Recast; (iii) the French Sauveguard proceedings is provided

[19] WESSELS, Bob *et al*, Module 2B Guidance Text: The European Insolvency Regulation, INSOL International, London (2022), p 12.
[20] WESSELS, Bob *et al*, Module 2B Guidance Text: The European Insolvency Regulation, INSOL International, London (2022), p 13.
[21] WESSELS, Bob *et al*, Module 2B Guidance Text: The European Insolvency Regulation, INSOL International, London (2022), p 17-18.

for in Annex A of the EIR Recast; and (iv) the opening of the proceedings was after June 26, 2017.

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.

Provided that the French proceedings has been opened as a main insolvency proceeding under Article 3(1) of the EIR Recast, it is possible for a secondary insolvency proceeding to be opened by the court of a Member State where the debtor has an establishment, in accordance with Article 3(2) of the EIR Recast. In this regard, Article 2(10) of the EIR Recast provides for the definition of establishment. According to the device, 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".[22]

The Court of Justice of the European Union (CJEU) has interpreted the concept of establishment In Interedil. According to the CJEU, recognition of the existence of an establishment depends on demonstrating a minimum level of organization and stability. In this context, the presence of economic activity combined with human resources would be sufficient.[23]

In Caso, Bella SARL has warehouses in Italy, in addition to employees and consumers. In this way, a secondary insolvency proceeding can be opened Italy under the IER Recast.

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

- ***Relevant case law: Interedil Srl, in liquidation v Fallimento Interedil Srl, Case C-396/09, ECLI:EU:C:2011:671 (Oct. 20, 2011), Burgo Group SpA v Illochroma SA, Case C-327/13, ECLI:EU:C:2014:2158 (Sep. 4, 2014).***

- ***The facts of the case do not support the finding of an establishment of Bella SARL in Italy. The presence alone of assets (leased-out warehouse) in isolation, contractual relations with a local bank (including maintenance of a bank account) and occasional negotiations (whether individual or collective) with local***

[22] WESSELS, Bob *et al*, Module 2B Guidance Text: The European Insolvency Regulation, INSOL International, London (2022), p 18-19.
[23] WESSELS, Bob *et al*, Module 2B Guidance Text: The European Insolvency Regulation, INSOL International, London (2022), p 19.

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 : 12 out of 15.

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

Total marks : 35.5 / 50