



## 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.**
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***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.**

**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:**

*This statement is linked to the COMI concept and its presumptions under Article 3 (1) of the EIR Recast. The EIR Recast first establishes the point that in the absence to the contrary, a debtor's COMI is the "place where the debtor conducts the administration of its interest on a regular basis and which is ascertainable by third parties". According , Article 3 is not only the debtor's intentions that is key but also the creditor's view of where the debtor administers its affairs. In addition to this, the EIR Recast sets out COMI presumption guidelines for a natural and artificial persons thus;*

- a. *Where the debtor is an artificial person, it is presumed that the debtor's COMI is the place of the registered office. This presumption is, however, rebuttable if it is found that the "registered office has not been moved to another Member State within the 3-month before the request for the opening of insolvency proceedings".*
- b. *For individuals "exercising an independent business or a professional activity" the presumption is that the individual's COMI is the person's "principal place of business".*

*This implies that should the registered address or place of business change before the request to open the insolvency proceeding is made, there is a 3 month window within which this change will not apply. Thus within the 3 month period, the Court can presume the registered address or place of business of the debtor to still be in the state in which the address or business was before the change or relocation. The 3 months is known as the "suspect" period.*

*Where the individual does not fall in the category outlined in point (b) above, it is presumed that the individual's COMI is at the place of "habitual residence". The "suspect" period is slightly different for an individual who is not "exercising an independent business or a professional activity". The Recast per the cited article gives the individual a 6-months "suspect period" which the person's COMI will be presumed even upon relocation to another Member State. In this case, person's COMI will be deemed to be in the state in which his or her COMI was before the application was made to commence the insolvency proceeding against the debtor.*

*Though not binding, Recital 30 is instructive as it provides direction to the interpretation of the presumptions. Also, Recital 31 sets out the objective for having the suspect periods which is to prevent "fraudulent or abusive forum shopping". The point must be made that forum shopping is necessarily bad or frowned upon as was held in the case of *In re Ocean Rig UDW Inc.* The move from the debtor's COMI from Republic of the Marshall Island to the Cayman Island was found not be forum shopping neither was the Debtor's COMI "manipulated in bad faith" as the "...Debtors' COMI shift to the Cayman Islands was done for legitimate reasons, motivated by the intent to maximize value for their creditors and preserve their assets."*

**Statement 2:**

*This statement relates to the scope of the application of the EIR Recast. The EIR Recast scope of application can be found under Article 1 (1). In addition to this article, Annex A lists all the insolvency proceedings referenced under Article 2(4) and applied in the respective Member State. It is noted that Annex A enumerates no fewer than 112 insolvency proceedings.*

*Recital 9 of the EIR Recast, though not binding, directs that the list provided under Annex A is extensive thus, "in respect of the national procedures contained in Annex A" the EIR Recast will apply to insolvency proceeding that meet the requirements without "further examination by the courts of another Member State as to whether the conditions set out" in the EIR Recast have been complied with. The importance of Annex A was established by the CJEU in the case of *Bank Handlowy w Warszawie SA v Christianapol sp.zo.o.**

*Article 1(1) prescribes that in addition to public collective proceedings, the EIR Recast also applies to "interim proceedings" related to and for the purpose of rescue, adjustment of debt, reorganization or liquidation under one of these three scenarios have been occasioned;*

- a. *an insolvency practitioner is appointed because the debtor in question is "totally or partially" divested of its assets;*
- b. *the debtor's assets are subject to control or supervision of a court or*
- c. *to enable the debtor and its creditors to enter into negotiations, a temporary stay of an individual enforcement proceedings is granted by a court or by operation of law.*

*The EIR Recast also, makes reference to public pre-insolvency related proceedings also based on insolvency laws relating to a debtor's financial crisis. Therefore, the mere "likelihood of insolvency" is enough to commence a proceeding under Article 1 (1) so long as the purpose of the proceeding is to prevent the debtor's insolvency or close the business activities of the debtor.*

**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.***

*There are different approaches commonly regulating cross-boarder insolvency. One such approach is what Prof. Dr. Bob Wessels classifies as "universalist approach". Per this approach, the debtor's assets are dealt with (irrespective of where the claimants are) by one "insolvency office holder." Basically the idea is that the decisions and actions taken under the applicable law and court in the State that the insolvency proceeding is commenced applies globally.*

**Another approach identified by Prof. Dr. Wessels is the “territorial approach.” This approach and as the name suggests, dictates that every territory or state has jurisdiction over the assets situated within its territory. Thus, the territory or state will apply its own rules over the assets of the debtor and all creditors within its territory.**

**No State applies either approach in the strictest sense. There is, therefore, a push for a blend of the two approaches-territorial and universalism- as each has its benefits. An attempt to blend the two approaches has led to the “modified universalism” approach.**

**It is, therefore, believed that the EIR Recast adopts modified universalism in its application.**

**Unlike the other approaches stated above, modified universalism approach dictates that a main insolvency proceeding shall be opened at the debtors COMI (per Article 3(1) subject to the presumptions and rebuttals provided. The main proceeding when opened has universal application in all Member States except Denmark (per recital 89 of the EIR Recast) and in States where secondary proceedings have been opened. (In so far as the EIR Recast applies, Denmark is not a “Member State”).**

**Thus the modified universalism approach centers on one main insolvency proceeding co-existing with secondary proceedings which maybe commenced in other Member States that have “establishements” (as defined under Article 2(10) of the EIR Recast ) belonging to the same debtor. The main and secondary proceedings will consequently ran along side each other.**

**Article 3 (1) of the EIR Recast provides that the “main insolvency proceeding shall be opened in the courts of the Members State which is identified as the debtor’s center of main interests (COMI). This article goes further, and subject to the presumptions outlined in the cited article, to define the COMI of a debtor to be “the place where the debtor conducts the administration of its interest on a regular basis and which is ascertainable by third parties” . This proceeding once opened in the COMI Member State will cover all assets belonging to the debtor and creditors in other Member States. In addition, Recital 23 makes the point that main insolvency proceedings when opened “have universal scope and are aimed at encompassing all the debtor’s assets” .**

**Article 3(2) and Recital 23 also makes the point that main insolvency proceedings are opened in the COMI state of the debtor. When opened, the main proceedings “have universal scope and are aimed at encompassing all the debtor’s assets”. Furthermore, the EIR Recast allows for secondary proceedings to be opened along side the main insolvency proceedings (Article 3 (3) and Article 34). The point with secondary proceeding is that it may be commenced in a Member State “where the debtor has an establishment” as defined in Article 2 (10). The implication is that where a secondary proceeding is opened the proceeding covers only the debtors assets in that particular State and its creditors. In effect the proceeding open in a secondary state will not have cross-border application. The proceedings are therefore restricted within the**

**territory in which the secondary proceeding is opened. Since there is a possibility for a main insolvency proceeding and other secondary proceedings to be opened at the same time in respect of the same debtor, there are mandatory rules of cooperation among the IPs appointed so long as the two proceedings co-exist.**

**The combined effect of Articles 3 , 34 and 35 of the EIR Recast is that, if a debtor has an "establishment" in another Member State (a state other than the COMI State) the courts of that Member state "shall have jurisdiction to open insolvency proceedings against that debtor". The effect of the proceedings in the other Member States is that, the proceedings shall be limited to only the assets and creditors of the debtor situated in the Member State with the "establishment" of the debtor.**

**It is noted that though the two types of proceedings -main and secondary proceedings- can run concurrently, the Insolvency Practitioner (IP) appointed in the main insolvency proceeding has a more central and under some circumstances principal role to play in the two proceedings. For example, the IP appointed in the main insolvency proceeding has the "right to give an undertaking in order to avoid secondary insolvency proceedings" under Article 36 of the EIR Recast.**

**The IP in the main proceeding also has the discretion to apply for a secondary proceeding to be opened in a Member State that has the "establishment" of the same debtor. The appointment of the IP in the main proceeding can access any other court in a Member State that has the debtor's establishment to apply that a secondary proceeding be opened against the same debtor.**

**Article 41 of the EIR Recast also requires cooperation and communication between all actors involved in cross border insolvency matters. This Article outlines a range of obligations which include the obligation to communicate and coordinate with each other and duty to recognise the decisions of other courts.**

**In sum, main insolvency proceedings are commenced in Member States with the debtor's COMI while secondary proceedings may be opened in States in which the debtor has an establishment. The application of the COMI proceedings applies to all Member States while the application of the secondary proceeding is opened in a State with the debtors "establishment". Invariably, the two proceedings allows for individual State laws to have effect whilst at the same time, permits the laws of the COMI to apply to other Member States seamlessly.**

### **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.**

**The EIR Recast imposes an obligation on several actors to co-operate and communicate during insolvency proceedings involving a debtor.**

**Articles 41- 44 of the EIR Recast deals with individual debtors and the obligation on Insolvency Practitioners (IPs) and the Courts to cooperate and communicate. At the same time, Articles 56 and 57 deals with cooperation communication involving corporate groups. I submit that cooperation goes hand in hand with communication.**

**Article 41 of the EIR Recast requires greater cooperation and communication between Insolvency Practitioners(IPs). The cited Article sets out the requirement of an IP in a main proceeding and the IPs in a secondary proceedings appointed in respect of the same debtor, to cooperate to the extent that such cooperation is possible within the applicable law in the respective Member States. Thus the obligation imposed here is for IPs appointed in respect of the same debtor to cooperate. Article 41 (2) goes further to outline how the cooperation shall be applied or done.**

**Article 42 (1) of the EIR Recast emphasises on the obligation for a court "before which a request to open an insolvency proceedings is pending or which has opened" an insolvency proceeding to cooperate with "any other court " before which an insolvency proceeding is pending or is about to be initiated. The caveat here is that the cooperation must be done in line with the applicable rules of the insolvency proceedings in question. Again the insolvency proceeding (whether opened or pending) must be in respect of the same debtor.**

**Also, in so far as the cooperation does not infringe any applicable rule pertaining to the proceedings, the courts may, if they deem fit, appoint "an independent person or body" to act on their instructions. The obligation to cooperate is evidenced by the communication and cooperation between the applicable courts.**

**Article 43 on the other hand makes it an obligation for IPSs appointed and the Courts before whom the insolvency proceedings are pending or yet to be opened in relation to the same debtor to cooperate. Hence this specific article makes it clear that;**

- a. **IPs appointed in main insolvency proceedings shall cooperate with any other court before whom an insolvency proceeding is pending or yet to be opened;**
- b. **IPs appointed in secondary insolvency proceeding shall cooperte with "the court before which a request to open main insolvency proceeding is pending or which has yet to be opened"**
- c. **IPs appointed in secondary insolvency proceedings shall cooperate "with the court before which a request to open other secondary insolvency proceedings is pending or which has been opened".**

**It is added that the type of cooperation anticipated under this Article can be realised in the same manner as outlined under Article 42(3) of the EIR Recast.**

**Article 44 states that the courts in carrying out their cooperation and communication obligations shall not charge each other for the cost of the cooperation and communication**

**Chapter V of the EIR Recast, deals with insolvency proceedings of members of a group of companies. In particular, Article 56 (1) provides an obligation of cooperation and communication between IPs appointed in insolvency proceedings relating to members of a group of companies. Thus where an IP is appointed in an insolvency proceeding regarding a company belong to a group of companies, the IP is obligated to cooperate with any other IP appointed in respect of any insolvency proceedings involving another company of the same group. The cooperation anticipated here must be done within laid down limits i.e to "facilitate the effective administration of those proceedings" and the cooperation should be done in line with the applicable rules of the insolvency proceeding. Article 56 (2) specifies how the cooperation shall be implemented.**

**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.**

**Whilst the EIR Recast allows for secondary proceedings to run "parallel" with a main proceeding, the EIR has introduced "a number of legal instruments to avoid or otherwise control the opening, conduct and closure of" territorial or secondary proceedings.**

**One such instrument adopted by the EIR Recast can be found under Article 36. Article 36 allows for an IP appointed in the main insolvency proceedings to give a "unilateral undertaking" to the court before which a secondary insolvency proceeding could be opened to the effect that the assets realised from the main insolvency proceeding would "comply with the distribution and priority rights under the national law that creditors would have if secondary proceedings were opened in the Member State". Where such a request is made, the court before whom the request is made must first satisfy itself that the undertaking given sufficiently protects the "general interest of local creditors"(Article 38(2).**

**The form in which the undertaking should take is outlined under Article 36 (1), (3) and (4). In addition to the form, Article 36 (5) specifies that the undertaking "shall be approved by the known local creditors".**

*Based on the undertaking given under Article 36 and the conditions having being met, a court in a Member State before which a secondary proceeding can be opened, will not permit the opening of a secondary proceeding. It must be noted that an IP appointed in a secondary proceeding cannot undertake to avoid the commencement of a main insolvency proceeding.*

*Secondly, Article 38(3) permits, on the application of an IP or a "debtor in possession" to apply to a court for a stay in opening a secondary insolvency proceedings. This request if granted is for a maximum period three months so long as suitable measures are put in place to safeguard the interest of creditors within the State that the secondary proceedings may be opened. The purpose of the application for the stay is to "allow for negotiations between the debtor and its creditors and the court".*

**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)?***

*In general and as stated in Recital 1 of the EIR Recast, though EIR 2000 was performing well, there were still some gaps that needed to be filled when it came to its application and implementation. To improve the application of some of the provisions in the EIR 2000 and to "enhance the effective administration of cross-border insolvency proceedings" it was resolved that the EIR 2000 will be amended. Hence pursuance to the review Article 46 of EIR 2000, the European Commission presented a report on the amendment of EIR 2000 accompanied by proposals for consideration and adoption.*

*The accompanying document submitted to support the revision of EIR 2000 outlined the following issues that were proposed for consideration and possible revision "within the framework of the" EIR 2000.*

*One main drawback outlined in the report of the European Commission was on the issue of scope and application of the EIR 2000. Per its Article 1 provision, the EIR 2000 applied to "collective proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator". Aside from the areas expressly excluded under Article 1 (2), the EIR 2000 did not apply to provisions on pre-insolvency matters, debt-discharge procedures for individuals and precise rules and procedures for group of companies.*

*It was evident from the report submitted that since the enactment of the EIR, many Member States have enhanced their national laws on insolvency with the aim of rescuing viable businesses, giving second chances to business that have prospects and generally, placing emphasis on saving jobs. The Heidelberg study uncovered that almost two thirds of Member States had pre-insolvency or hybrid proceedings that were not covered by the EIR 2000.*

*In addition, it was clear that the EIR 200 did not, in effect, expand to include detailed debt discharge procedures for individuals. Admittedly, the EIR 2000 covered several personal insolvency procedures, however, some others were left out. The fact that the EIR 2000 did not cover regimes for some individuals meant that individuals given a second chance could not take full advantage of the opportunities afforded by the single market. This it was identified to be inconsistent with EU policy on entrepreneurship.*

*Thirdly, under the scope, it was raised that the EIR 2000 did not efficiently deal with insolvency of group of companies. It was reported that though there was evidence that a considerable number of cross-border insolvency proceedings involve corporate groups, the EIR 2000 did not sufficiently deal with how such insolvency matters among group of companies should be dealt with. Thus the EIR 2000 did not cite a "compulsory coordination of insolvency proceedings opened for a parent company and its subsidiaries." The gap in the EIR 2000 therefore weakened the possibility of restructuring and reduced the likelihood of reducing the assets of the group.*

*Determining the COMI of a debtor is important in establishing the international jurisdiction. The need for a clear definition of this COMI concept is important.*

*The EIR 2000 was not clear definition of what ones COMI is, it can lead to difficulties in deciding the appropriate jurisdiction of opening insolvency proceeding and possible forum shopping by debtors.*

**Recital 13 of the EIR 2000 reads;**

**"The 'center of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties"**

**The Recast goes a step further and provides a definition of COMI Article 3 (1). It also provides in addition to that provided in the EIR 2000 two additional presumptions to help check forum shopping by debtors. The definition provided in the Recast is to aid in determining the appropriate forum for opening insolvency proceeding and set out a measures to prevent forum shopping.**

**Question 3.2 [maximum 5 marks] 2**

**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.**

*EIR Recast was welcomed by most stakeholders as it brought some needed reform to the regulation of cross-border insolvency within the European Union. Although this was the case, it has been argued that the EIR Recast has some shortcomings. Below are two shortcomings identified in the EIR Recast;*

- a. *The EIR Recast scope of application can be found under Article 1 (1). In addition to this article, Annex A lists all the insolvency proceedings referenced under Article 2(4) and applied in the respective Member State. It is noted that Annex A enumerates no fewer than 112 insolvency proceedings. Recital 9 of EIR Recast directs that, the list provided under Annex A are extensive thus, "in respect of the national procedures contained in Annex A" the EIR Recast will apply to insolvency proceeding that meet the requirements without "further examination by the courts of another Member State as to whether the conditions set out" in the EIR Recast have been complied with.*

*The importance of Annex A was established by the CJEU in the case of Bank Handlowy w Warszawie SA v Christianapol sp.zo.o. In the cited case, the court held the opinion that "once proceedings are listed in Annex A to the Regulation, they must be regarded as coming within the scope of the Regulation. Inclusion in the list has the direct, binding effect attaching to the provisions of a regulation."*

*Simply put, the EIR Recast does not apply to national insolvency procedures not specifically included in Annex A . Once a procedure is listed under Annex A, it requires no further examination by a court in a Member State. The court is to presume that all acts and steps required to be taken under the relevant national law was compliant with hence, the proceedings enjoys automatic recognition in other Member States per Article 19 of the EIR Recast.*

*Thus, the EIR Recast applies to proceedings only adopted in Member States and incorporated in the EIR Recast by reference to Annex A.*

*Per the scope of application, it is deduced that the respective Member States retain*

*Considerable powers to decide on the content of insolvency proceedings. The territorial jurisdiction within the respective Member States. For instance, it has been criticised that the EIR Recast failed to harmonise the national laws and procedures of the Member States. In this regard, there appear to be considerable differences between the laws and procedures on insolvency among Member States. These differences may bring about some confusion and much uncertainty in cross-border insolvency proceedings among Member States. The result of this is that, the whole insolvency procedure may turn out to be quite costly to all parties involved in the insolvency proceedings. **Good but you were supposed to also explain how to correct this situation.***

- b. Flowing from the above point, there appear to be a lack of harmonisation of national laws of the Member States. There still appears to be differences between national insolvency laws among the Member States.

As noted under point (a) above, the scope of the EIR Recast is as set under Article 1 (1). In addition to this article, Annex A lists the proceedings by which the EIR Recast applies pursuant to Article 2 (4). Considering the number of Member States and the different proceedings listed under Annex A, it appears the EIR Recast did not entirely achieve its ultimate aim to harmonise the laws and procedures of the Member States. This is because, there are still significant differences between the laws of each Member States and differences can create some confusion and uncertainty in cross border insolvency proceedings. **Good but you were supposed to also explain how to correct this situation.**

Question 3.3 [maximum 5 marks] 5

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

The EIR Recast and the Directive on Preventive Restructuring Framework (DPRF) have both been introduced to address insolvency and restructuring proceedings in the European Union. However, the Regulation and the Directive differ in the scope of its application and eligibility criteria.

The EIR Recast applies to cross-border insolvency proceedings whilst the Directive on Preventive Restructuring Framework on the other hand, applies to preventive restructuring proceedings.

The EIR Recast applies to proceedings indicated under Article 1(1). This article specifically states that the EIR Recast applies to "public collective proceedings". These collective proceedings are "based on laws relating to insolvency". The EIR Recast specifically excludes proceedings relating to "insurance undertakings, credit institutions, investment firms and other firms, institutions and undertakings to the extent that they are covered by Directive 2001/24/EC or collective investment undertakings."

The scope of the EIR Recast further extends to insolvency proceedings listed under Article 8 (1). Recital 10 also gives guidance on the scope of the EIR Recast to include "proceedings which promote rescue of economically viable but distressed businesses and which give a second chance to entrepreneurs", "proceedings which provide for

*restructuring of a debtor at a stage where there is only a likelihood of insolvency”, “proceedings providing for a debt discharge or a debt adjustment in relation to consumers and self employed persons” by “reducing the amount to be paid by the debtor or by extending the payment period granted to the debtor”. The guidance provided under Recital 10 is that because the proceedings anticipated do not necessarily require the appointment of an Insolvency Practitioner, the EIR Recast shall apply in so far as the proceedings is under the “control or supervision” of a court.*

*Alternatively, the DPRF per its Article 1 applies to;*

- a. *Preventive restructuring frameworks for debtors in financial difficulties when there is a likelihood of insolvency, with a view to preventing the insolvency and ensuring the viability of the debtor;*
- b. *Procedures leading to a discharge of debt incurred by insolvent entrepreneurs; and*
- c. *Measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt.*

*The DPRF specifically excludes procedures indicated under Article 2 and also permits Member states to pick and choose which proceeding the Member State will be bound by under Article 1. The catch is that it should not include procedures expressly excluded under Article 2.*

*In sum, the scope of application for the EIR Recast applies to cross-border insolvency proceedings whilst the DPRF in contrast, applies to preventive restructuring proceedings. The DPRF is focused on providing a framework for companies facing financial difficulties to restructure outside of formal insolvency proceedings, before they become insolvent.*

**Total marks: 12 out of 15.**

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

##### **Scenario**

**Bella SARL is a French-registered company selling cosmetic products. The company had opened its first store in Strasbourg, France in 2010 and has warehouses across Europe, including in Germany, Ireland, Italy, Spain and Portugal. Its main warehouse is located in Cork, Ireland. All of its employees are located in these countries and most of its customers are also located in these countries, yet some online purchases are coming mainly from the Netherlands and Poland.**

**In 2011, Bella SARL entered into a loan agreement with a Spanish bank because it was hoping to expand its reach onto the Spanish luxury cosmetic market. It opened a bank account with the bank while also negotiating prices with local suppliers. It signed some (non-binding) memoranda of understanding with three Madrid-based suppliers.**

**Unfortunately for Bella SARL, the timing of this initiative coincided with the Great Economic and Financial crisis which hit Europe in the late 2000s. By 2014 the company was in financial difficulty, yet managed to keep afloat for another few years. On 20 June 2017, it filed a petition to open safeguard proceedings in the Strasbourg High Court in France.**

Question 4.1 [maximum 5 marks] **2**

**Assume that the timeline is slightly different and, therefore, assume that it is not the EIR 2015 that applies but the EIR 2000.**

*Does the Strasbourg High Court have jurisdiction to open the requested safeguard proceedings under the EIR 2000?*

**You must justify your answer when explaining why it does or does not have jurisdiction. Your answer should contain references to the applicable law and the relevant CJEU jurisprudence.**

#### **Assumptions**

**From the facts, the following assumptions are made;**

1. **The petition filed to open the safeguard proceedings in the Strasbourg High Court was filed after 31 May under Regulation (EC) No 1346/2000 (hereinafter referred to as EIR).**
2. **That the governing rules of the petition filed in the High Court is that of EIR.**

**The issue at hand is; whether or not the Strasbourg High Court in France has jurisdiction to open the safeguard proceedings requested by Bella SARL under the EIR 2000.**

**In determining the issue, reference is made to the following rules under the EIR and CJEU decision in the cited case below.**

**The first rule I would rely on is established under Article 1 (1) of the EIR which article outlines the scope as follows;**

**"This Regulation [EIR] shall apply to collective insolvency proceedings which entail**

**the partial or total diversion of a debtor and the appointment of a liquidator."**

**Further to this Article, Annex A of the EIR lists the proceedings covered under the EIR.(see Article 2(a) and Recital (9).The EIR per Article 1(2) that the EIR specifically excludes "insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings which provide services involving the holding of funds or securities for third parties,or to collective investment undertakings" from its scope and application.**

**Articles 2 (d) define a court to be "the judicial body or any other competent body of a Member State empowered to open insolvency proceedings or to take decisions in the course of such proceedings. This Article in particular (f), states the "time of the opening of proceedings shall mean the time at which the judgement opening proceeding becomes effective, whether it is a final judgement or not". Recital 10 also explains that a "court" in the EIR is "given a broad meaning and include a person or body empowered by national law to open insolvency proceedings."**

**Under Article 3 of the EIR , the rules on the jurisdiction of the EIR are determined. Generally, an insolvency proceeding is opened in the courts of the "Members State within which the center of a debtor's main interests is situated". Thus Article 3(1) establishes and mandates the jurisdiction of the court seized with jurisdiction within which an insolvency proceeding shall be opened. Recital 13 of the preamble also explains that the centre of main interests (COMI) "should correspond to the place where the debtor conducts the administration of his interests regularly and is therefore ascertainable by third parties." Thus the EIR regulates proceedings where "the centre of the debtor's main interest is located in the Community" (Recital 14). Article 3(2) and (3) makes the point that courts in other Member States do have secondary jurisdiction to open insolvency proceedings against the same debtor only if it is found that the debtor has an "establishment" within that State.**

**Article 4 of the EIR indicates the applicable law to be "that of the Member State within the territory of which proceedings are opened." Such a Member State is known as the "State of the opening of proceeding". This same article also determines the conditions under which the proceedings may be opened. (Article 2 (a) -(m). Articles 5-15 outlines the exceptions to the applicability of the law of the State in which the proceedings are opened.**

**In addition to the cited rules, Article 43 provides that;**

**"The provisions of this Regulation [EIR] shall apply only to insolvency proceedings opened after its entry into force. Acts done by a debtor before the entry into force of this Regulation shall continue to be governed by the law which was applicable to them at the time they were done".**

**Article 47 indicates 31 May 2002 as the date on which EIR came into force.**

**Point of note, the referenced recitals provide only guidance to interpret aspects of the EIR. So though reference has been made to the EIR recitals, the said recitals are not enforceable but only gives direction on interpretation.**

**Precedence set in the Susanne Staubitz-Schreiber case**

**The main issue referred to the CJEU in the case of Susanne Staubitz-Schreiber [2006] ECR 1-701 was;**

**"Does the court of the Member State which received a request for the opening of insolvency proceedings still have jurisdiction to open insolvency proceedings if the debtor moves the centre of his or her main interests to the territory of**

*another Member State after filing the request but before the proceedings are opened, or does the court of the other Member State acquire jurisdiction?."*

*In this case, the applicant, Ms Staubitz-Schreiber, sought the interpretation of Article 3(1) of the EIR after a German Court held that it did not have jurisdiction to open an insolvency proceeding involving the applicant. It was evident in the case that the applicant operated her business in Germany. She requested the court in Germany to open an insolvency proceeding on 6 December 2001 "regarding her assets before the Amstsgericht-Insolvenzgericht Wuppertal" before she relocated to Spain on 1 April 2002 to live and do business. Considering the request before the German court, the court had to first determine whether or not it had jurisdiction to open the insolvency proceeding as requested. This question was most important as following the request on 6 December 2001 the applicant had relocated to another Member State, Spain.*

*After consideration, the German court declined to open the insolvency proceeding on the basis that the applicant did not have assets in Germany. The applicant appealed the decision of the court. The appeal was subsequently dismissed "on the ground that the German courts did not have jurisdiction to open insolvency proceedings by Article 3(1) of the Regulation since the centre of the main interests of the applicant in the main proceedings was situated in Spain" (paragraph 16 of the Judgement).*

*The applicant again appealed the decision on jurisdiction and suggested that the issue of jurisdiction should be looked at with reference to when she requested for the insolvency proceeding to be opened and not by reference to her present location.*

*In determining the issue at hand and after consideration, the CJEU held that the German Court had jurisdiction to entertain the request by the applicant. The decision was based on the fact that the applicant had lodged her request in the German Court before she relocated to Spain. Thus the German Court "retain[ed] jurisdiction to open the proceedings if the debtor moves the center of his main interests to the territory of another Member State after lodging the request but before the proceedings are opened".*

#### **The facts**

*The facts establish that though Bella SARI has a presence in other European countries, it is registered in France. The company opened its first store in France in 2010. The company sought to expand its business activities but the efforts were hampered by hit by the Financial Crisis experienced all over Europe in the late 2000. The company then started experiencing some financial difficulties in 2014 and on 20 June 2017 the Company requested a Strasbourg High Court in France to open a safeguard proceeding.*

*The question that arises is; whether or not the High Court in France has the jurisdiction to honour or entertain the request filed by the applicant.*

*In answering this question and from the cited rules, there is the need to determine whether the debtor has its center of main interests (COMI) in France. This is because, whether the applicant can access the forum in France or not is connected to the COMI. Unfortunately, the EIR did not define the COMI concept however and as indicated above, Recital 13 gives some direction on the meaning of the concept. With reference to Recital 13, can it be said that the applicant "conducts the administration of [her] interests on a regular basis" in France? Is France "ascertainable by third parties".*

*Again from the facts it is adduced that Bella SARL is registered in France. France is also a location for at least one of the stores of the company together with some employees and customers. Per the guidance provided under Recital 13 and the jurisdictional rules contained under Article 3 (1) of the EIR I am of the view that France is the COMI of the applicant i.e. Bella SARL Also, per the Sussane case, Article 3 (1) of the EIR was interpreted to set a standard for the interpretation of jurisdiction to mean that the court within the jurisdiction of which the center of the applicant in this case has her main interests is situated at the time when the request for safeguard proceeding to be opened possesses or keeps the jurisdiction to open the proceeding.*

*Having come to such a conclusion, it can also be said that the Strasbourg High Court in France is a "court" within the meaning of Article 2(d). Having made the point that the court has jurisdiction, it must also be determined whether the safeguard proceeding falls within the proceedings under Article 1 and Annex A. On the issue of the applicability of the, as already noted the EIR came into force on 31 May 2002. From the facts, the EIR 2002 is the applicable Regulation.*

*Article 1 and Annex A indicates the proceedings and scope of the application of EIR. The combined effect of Article 1 and Annex A, implies that the provides that the applicant has the right to seek legal redress in France.*

*The next issue for discussion is whether safeguard proceedings are proceedings anticipated under the EIR.*

*Although the Court has jurisdiction, the request made is not within the scope of the EIR as the EIR does not make room for such proceedings. The EIR does not deal with restructuring. The emphasis of the scope of EIR 2000 as captured under Article 1. The scope of the EIR is not to rescue viable debtors nor help breath new life in financially distressed businesses.*

*The scope of the application of the EIR is only to liquidation oriented procedures strictly , without dealing withany other aspect of liquidation. The EIR does not extend to proceedings which provide for restructuring of a debt at a stage where there is a "likelihood of insolvency".*

*The safeguard proceeding request suggests that the company is facing financial difficulties but not in a state of insolvency. There is a possibility that the company can be revived and there is a likelihood that the company maybe insolvent. The present*

requested proceeding before the court is not one anticipated under the EIR. France does not also fall in the category of Denmark who opted not to participate in the EIR and is not bound by the EIR. France is thus, bound by the text of the EIR.

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

- **Annex A of the EIR 2000 only listed two French insolvency proceedings which came under the scope of the EIR 2000: (i) liquidation; (ii) redressement judiciaire (rehabilitation).**
- **Therefore, the EIR 2000 would not apply to safeguard proceedings.**

Question 4.2 [maximum 5 marks] 5

**Assume that the timeline is as explained in the original scenario above and that the French High Court opens safeguard proceedings on 30 June 2017.**

*Will the EIR Recast be applicable to the proceedings?*

**Your answer should address the EIR Recast's scope and contain all steps taken to answer the question.**

Articles 91 and 92 of the EIR Recast repealed and replaced EIR 2000 effective 26 June 2017. Thus provisions of the EIR Recast apply only to proceedings under Article 1 (1) and Annex A from 26 June 2017. Any insolvency proceeding commenced before 26 June 2017 will hence be regulated by EIR 2000.

From the timeline provides, it is assumed that the French High Court opened safeguard proceedings on 30 June 2017. With reference to the above Articles, the EIR Recast is the applicable regulation to the proceedings at hand.

Further, reference is made to Article 1 (1) of the EIR Recast. For emphasis, Article 1 (1) is reproduced as follows:

1. This 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:
  - 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 controls 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 proceeding in which the stay is granted provide for suitable measures to protect the general body of creditors, and, were no agreement is reached are preliminary to one of the proceedings referred to in point (a) or (b).

**Where the proceedings referred to in this paragraph may be commenced in situations where there is only a likelihood of insolvency, their purpose shall be to avoid the debtor's insolvency or the cessation of the debtor's business activities.**

**The proceedings referred to in this paragraph are listed in paragraph are listed in Annex A.**

**Article 1 (1) defines insolvency proceedings to be the proceedings indicated in Annex A to the EIR Recast. Annex provides a list of insolvency proceedings applicable in all Member States to which the EIR Recast applies.**

**The next question to deal with is whether the "safeguard proceeding" opened in the French High Court falls within the scope of the EIR Recast. To answer this, reference is again made to Article 1 (1) of the EIR Recast. It is clear from the cited Article that the EIR Recast applies to "public collective proceedings" and "interim proceedings" for the "purpose of "rescue, adjustment of debt, reorganisation or liquidation." In addition to the above, where there is a "likelihood of insolvency", the proceedings referred to under Article 1 "may be commenced...to avoid the debtor's insolvency or the cessation of the debtor's business activities."**

**Annex A of the EIR Recast, has a list of all the insolvency proceedings that fall within its scope. Recital 9 of the EIR Recast, states that the EIR Recast "should apply without any further examination by courts of another member state as to whether the conditions set out in the regulation are met". The importance of Annex A was established in the case of Bank Handlowy w Warzawie SA v Christianapol sp.zo.o. The court in evaluating the issues indicated that "once proceedings are listed in Annex A to the Regulation, they must be regarded as coming within the scope of the Regulation. Inclusive in the list has the direct, binding effect attaching to the provisions of the Regulation". Though the issue of the relevance of Annex A was decided under EIR 2000 the decision by the CJEU aptly describes the importance of the Annexure of the EIR 2000 and in like manner, the EIR Recast.**

**It is clear that for a proceeding to be regulated by the EIR Recast, it must be listed under Annex A. If the proceeding is not found under the referenced Annexure then the EIR Recast will not apply to that proceeding. Once a proceeding is found under the Annexure, it automatically enjoys automatic recognition in the other Member States as per Article 19 of the EIR Recast. If a Member State's insolvency procedure is not listed in Annex A then that particular matter would not be regulated by EIR Recast at least under the the proceedings of a Member State.**

**In sum, whether or not the EIR Recast will apply to a proceeding will require in the first instance, a determination of whether the proceeding falls within the scope of the application of the EIR Recast as per Article 1(1) and Annex A. In addition, it must also be determined whether or not the request to open any of the proceedings under Article 1 and Annex A was initiated before or after the repeal of EIR 2000.**

**From the above, it is concluded that the EIR Recast applies to the proceedings in the scenario as**

- a. **The request to open the safeguard proceeding was done after the repeal of EIR 2000.**
- b. **Safeguard proceedings falls within the anticipated proceedings in France as per Article 1 and Annex A to the EIR Recast.**

**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.**

**From the facts, Bella SARL "has warehouses across Europe, including Germany, Ireland, Italy, Spain and Portugal." In addition to this, "an Italian bank has filed a petition to open secondary insolvency proceedings in Italy" to secure "an Italian insolvency distribution ranking". For this question, I have presumed that a main insolvency proceeding has been opened in another Member State.**

**Recital 23 of the EIR Recast states that "To protect the diversity of interest, this Regulation permits secondary insolvency proceeding to be opened to run in parallel with the main insolvency proceedings." Further, a secondary proceeding may be opened in another Member state if it is established that the debtor has an "establishment" in the member state. Where it is established that an establishment is present, then the court in the state will have jurisdiction over the assets of the debtor in that jurisdiction.**

**Recital 24 of the EIR Recast guides where the secondary insolvency proceedings should be opened. The recital indicates that a secondary insolvency proceeding may be opened in a Member State where the debtor has its "registered office, provided that the debtor is carrying out an economic activity with human means and assets in that State." It is provided under Recital 40 that a purpose for initiating a secondary proceeding is to protect "local interests."**

**Apart from the guide provided under the stated Recitals, Article 3 (2) provides as follows;**

**"Where the centre of the debtor's main interests is situated within the territory of a**

**Member State, the court of another Member State shall have jurisdiction to open**

*insolvency proceedings against that debtor only if it posses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to assets of the debtor situated in the territory of the latter Member State."*

*In addition, Article 3(4) empowers creditors "whose claims arises from or is in connection with the operation of an establishment situated within the territory of the Member State where the opening of territorial proceedings is requested" to open the secondary proceedings.*

*From the above, the determination of an "establishment" is of utmost importance to the opening of a secondary proceeding. Article 2(10) of the EIR Recast, defines an "establishment" to mean "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-transactional economic activity with human means and assets." The issue of "establishment" was dealt with in the CJEU in Interedil Srl v Fallimento Interedil Srl. The term "establishment" was interpreted to require "the presence of a structure consisting of a minimum level of organisation and a degree of stability necessary for the purpose of pursuing an economic activity." The CJEU further added that "the presence alone of goods in isolation or bank accounts does not, in principle, meet" the definition of an "establishment". It is noted that the interpretation given to the concept of establishment was done under the EIR 2000, however, the interpretation of the concept is relevant to the EIR Recast since an interpretation of the concept is necessary to commence a secondary proceeding under the Recast.*

*As already indicated, the company has a warehouse in Italy. The locus of the Italian Bank is not clear from the facts, but assuming it is a creditor, it must first establish that the debtor company has an "establishment" in Italy to open the secondary proceeding in Italy. From the facts, the company has a warehouse, employees and customers in the country. Thus in my opinion satisfies the requirements under EIR Recast and the interpretation given in the referenced case.*

*Based on the company's connection to Italy and the interpretation given in the cited case, I am of the opinion that the Italian bank (if it is a creditor) can file a petition to open a secondary proceeding in Italy to secure an Italian insolvency distribution ranking as directed under Recital 40 of the EIR Recast.*

**Again, your reasoning is sound but 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: 40 / 50