



**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2B**

**THE EUROPEAN INSOLVENCY REGULATION**

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

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

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

## INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

1. ***You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.***
2. ***All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters - please do not change the document settings in any way. DO NOT submit your assessment in PDF format as it will be returned to you unmarked.***
3. ***No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).***
4. ***You must save this document using the following format: [studentID.assessment2B]. An example would be something along the following lines: 202223-336.assessment2B. Please also include the filename as a footer to each page of the assessment (this has been pre-populated for you, merely replace the word "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name. Assessments that do not comply with this instruction will be returned to candidates unmarked.***
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- 6.1 ***If you selected Module 2B as one of your compulsory modules (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is 23:00 (11 pm) GMT on 1 March 2023. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2023. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.***
- 6.2 ***If you selected Module 2B as one of your elective modules (see the e-mail that was sent to you when your place on the course was confirmed), you have a choice as to when you may submit this assessment. You may either submit the assessment by 23:00 (11 pm) GMT on 1 March 2023 or by 23:00 (11 pm) BST***

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

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

**ANSWER ALL THE QUESTIONS**

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

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

Question 1.1

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

**Select the correct answer from the options below:**

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

Question 1.2

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

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

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

Question 1.3

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

**(a) Through its case law, the CJEU had altered the literal meaning of several provisions of the EIR 2000. Newly formulated rules, in line with the CJEU interpretation, were therefore needed.**

**(b) The EIR 2000 was generally regarded as a successful instrument in the area of European insolvency law by the EU institutions, practitioners and academics. However, a number of its shortcomings were identified by an evaluation study and a public consultation.**

**(c) The fundamental choices and underlying policies of the EIR 2000 lacked support from the major stakeholders (businesses, public authorities, insolvency practitioners, etc.). A new Regulation was therefore needed to meet their expectations.**

**(d) The EIR 2000 proved to be inefficient and incapable of promoting co-ordination of cross-border insolvency proceedings in the EU.**

Question 1.4

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

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

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

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

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

Question 1.5

**The EIR Recast is an instrument of a predominantly procedural nature (including private international law issues). Nevertheless, it contains a number of substantive**

**provisions. Which one of the following provisions constitutes a harmonised (stand-alone) rule of substantive law?**

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

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: 10 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 addresses Article 3(1) in the EIR Recast, which is headed "International jurisdiction" and provides that the courts of the Member State where the debtor's centre of main interests ("COMI") is located have jurisdiction to open "main insolvency proceedings". Article 3(1) defines COMI as the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties. In order to offer legal certainty, Article 3(1) contains a rebuttable presumption that the debtor's COMI is the registered office of a company, the principal place of business of an individual exercising an independent business or professional activity, and the habitual residence of any other individual. The concept of COMI is specific to the EIR Recast and must be able to be identified by reference to objective criteria. The presumptions are designed to make a debtor's COMI predictable, however they are rebuttable if objectively the debtor's COMI is clearly elsewhere.*

***Statement 2***

*This statement refers to Article 1(1) of the EIR Recast, which is headed "Scope". Article 1(1) provides that the EIR Recast applies to public collective proceedings, including interim proceedings, based on laws relating to insolvency, and include those for the purpose of rescue. In particular, Article 1(1)(c) includes within the scope of the EIR Recast proceedings that involve a temporary stay of individual enforcement proceedings to allow for negotiations between the debtor and its creditors. Article 1(1) expressly states that where the proceedings covered by Article 1(1) can be commenced in situations where there is only a likelihood of insolvency, the purpose of those proceedings is to avoid the debtor becoming insolvent, or the cessation of the debtor's business activities.*

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.***

*Pure universalism would mean that there is one single set of insolvency proceedings within the European Union for a particular debtor, dealing with all of the debtor's assets. Examples of provisions from the EIR Recast that demonstrate the concept of modified universalism are:*

- 1. While Article 3(1) of the EIR Recast provides that "main insolvency proceedings" are to be opened in the courts of the Member State where the*

*debtor has its centre of main interests, Article 3(2) of EIR Recast provides that secondary insolvency proceedings may be opened in the courts of another Member State if it has an establishment within the territory of the other Member State, to be restricted to dealing with the debtor's assets that are situated within that other Member State. An "establishment" is defined in Article 2(10) as any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings, a non-transitory economic activity with human means and assets. This is a clear detraction from a pure concept of universalism in which there would only be one proceeding.*

- 2. Likewise, Article 19(2) provides that the automatic recognition of the main insolvency proceeding opened under Article 3(1), which is provided for in Article 19(1), does not preclude the opening of secondary insolvency proceedings under Article 3(2).*
- 3. A third example is Article 20(1), which provides that the judgment opening the main insolvency proceeding under Article 3(1) has, without any further formalities, the same effects in any other Member State as it does in the Member State where the main insolvency proceeding was opened, unless secondary insolvency proceedings have been opened in that other Member State under Article 3(2). In accordance with Article 20(2), the effects of secondary insolvency proceedings opened under Article 3(2) may not be challenged in other Member States.*

**Question 2.3 [maximum 3 marks] 3**

***Because pure universalism has not been adopted under the EIR 2015, main and secondary insolvency proceedings can be opened at the same time against the same debtor. In light of this, it is seminal that proper co-operation between the actors involved in concurrent proceedings takes place. It is therefore not surprising that co-operation has been introduced as an obligation on several actors in the EIR 2015. List three (3) provisions (recitals and / or articles) of the EIR Recast that deal with the obligation to co-operate.***

*Article 41 of EIR Recast concerns cooperation and communication between insolvency practitioners. In particular, Article 41(1) provides that the insolvency practitioners in main and secondary insolvency proceedings concerning the same debtor are to cooperate with each other to the extent that cooperating does not conflict with the rules applicable to the respective proceedings. Article 41(1) continues that cooperation may take any form, including by way of agreement or protocol. Article 41(2) contains a series of obligations on the insolvency practitioners, including:*

- a) to communicate relevant information for the other proceedings to each other as soon as possible, particularly progress made in lodging and verifying claims, towards restructuring or rescuing the debtor, or at terminating the proceedings,*

*provided there are appropriate arrangements in place to protect confidential information;*

- b) to explore the possibility of a restructuring and to coordinate the elaboration and implementation of a restructuring plan; and*
- c) to coordinate the administration of the realisation or use of the debtor's assets and affairs.*

*Article 42 of EIR Recast deals with the cooperation and communication between courts. It provides in Article 42(1) that the courts before which a request to open insolvency proceedings relating to the same debtor are either pending or opened are to cooperate with each other, to the extent that cooperation is not incompatible with the rules applying to each proceeding. Furthermore, the courts may where appropriate appoint an independent person or body to act on its instructions. Article 42(2) provides that the courts or the appointee may communicate directly with, or request information or assistance directly from, each other as long as the parties' procedural rights and the confidentiality of information are respected. Article 42(3) provides the courts with discretion to cooperate by any means considered appropriate, which may include coordination in the appointment of insolvency practitioners, communication of information, coordination of the supervision and administration of the debtor's assets and affairs, coordination in the conduct of hearings, and coordination in the approval of protocols.*

*Article 43 relates to the cooperation and communication between insolvency practitioners and the courts. Article 43(1) provides that an insolvency practitioner appointed in main insolvency proceedings is to cooperate and communicate with any court before which a request to open secondary insolvency proceedings is pending or have been opened, and an insolvency practitioner appointed in secondary insolvency proceedings is to cooperate and communicate with the court before which a request to open main insolvency proceedings or further secondary insolvency proceedings is pending or have been opened. Cooperation must be to the extent that there is no conflict with the rules applying to each proceeding, and do not cause any conflict of interest. The form of cooperation may be by any means listed in Article 42(3).*

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.***

*Article 38(2) of EIR Recast provides that where the insolvency practitioner in the main insolvency proceeding has given an undertaking in accordance with Article 36 of EIR Recast, a court that has been requested to open secondary insolvency proceedings*

*shall not, when requested by the insolvency practitioner, open secondary insolvency proceedings where the court is satisfied that the undertaking adequately protects the general interests of local creditors.*

*Article 36(1) provides that the insolvency practitioner in the main insolvency proceeding may give a unilateral undertaking relating to the assets located in the Member State where secondary insolvency proceedings might be opened. The undertaking will be to the effect that when distributing those assets or their proceeds of realisation, the insolvency practitioner will comply with the distribution and priority rights that creditors would have if secondary insolvency proceedings had been opened in that Member State. Upon giving the undertaking, the law of the Member State in which secondary insolvency proceedings might be opened will apply to the distribution of proceeds from realising those assets, the ranking of creditors' claims, and the rights of creditors in relation to those assets. For the undertaking to become binding, it must be approved by the known local creditors, in accordance with the rules on qualified majority and voting that apply to the adoption of restructuring plans under the law of the Member State in which secondary insolvency proceedings may be opened. Local creditors must then be informed about any intended distributions and if that will not comply with the undertaking, a local creditor has the right to challenge before the courts of the Member State where the main insolvency proceeding has been opened.*

*A second example is Article 38(3), which provides the power for the court that is requested to open secondary insolvency proceedings to temporarily stay those proceedings at the request of the insolvency practitioner appointed by the main insolvency proceedings. A stay may be granted for up to 3 months, and only in circumstances where a temporary stay of individual enforcement proceedings has been granted to allow for negotiations between the debtor and its creditors. Suitable measures must be in place to protect the interests of local creditors. These may include an order that the insolvency practitioner or debtor in possession is not to remove or dispose of any assets which are located in the Member State where its establishment is located, unless these steps are taken in the ordinary course of business.*

*The stay may be lifted by the court of its own motion, or at the request of any creditor if an agreement is concluded following the negotiations, or if it becomes apparent that the stay is detrimental to the creditor's rights, if the negotiations have been disrupted or it is clear that they are unlikely to conclude, or if the insolvency practitioner or debtor in possession has taken steps that conflict with the prohibition on the disposal or removal of assets.*

**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 accordance with Article 46 of the EIR 2000, the European Commission was to present a report on the application of the EIR 2000 and include a proposal for its adaptation, if required, by 1 June 2012. On 12 December 2012, the European Commission published its Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings (the EIR 2000) (the "Proposal").<sup>1</sup>*

*The Proposal, at paragraph 1.2, identified five main shortcomings of the EIR 2000, which have been dealt with in the EIR Recast as follows:*

- 1) The Proposal considered that the scope of the EIR 2000 did not cover national procedures for the restructuring or rescue of a company before it was insolvent, or proceedings that would leave a company's existing management in place while they were ongoing. The Proposal noted that these kinds of proceedings had recently been introduced in many Member States, and were considered to increase the chances of a business undergoing a successful restructuring. The Proposal also stated that a number of personal insolvency proceedings currently fell outside the scope of the EIR 2000.*

*This shortcoming has been addressed by the EIR Recast. Article 1(1) of the EIR Recast is clear that the scope of EIR Recast now covers proceedings which aim to restructure or rescue companies before the company is deemed insolvent. In particular, it states "[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". This is an express inclusion of proceedings designed to restructure or rescue a company and means that these types of proceedings now enjoy the automatic recognition rights provided for by the EIR Recast. Furthermore, as set out in more detail below, secondary insolvency proceedings can now include proceedings relating to rescue and restructuring. The previous position under the EIR 2000 was that secondary proceedings could only be winding up proceedings. This means that the chance for a business to undergo a successful restructuring is increased.*

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<sup>1</sup> COM(2012) 744 final at: [https://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/com/com\\_com\(2012\)0744\\_/com\\_com\(2012\)0744\\_en.pdf](https://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com(2012)0744_/com_com(2012)0744_en.pdf), accessed 12 July 2023.

- 2) *Difficulties had been encountered in determining the Member State in which insolvency proceedings should be opened. In particular, while opening main insolvency proceedings in the Member State where the debtor's centre of main interests ("COMI") was located was widely supported, applying the concept of COMI in practice was difficult. Further, the EIR 2000's rules had been criticised as allowing companies and natural persons to abuse the system by relocating their COMI and thus effectively forum-shop.*

*In a key change from the EIR 2000, the EIR Recast contains a formal definition of COMI in Article 3(1). The definition is almost identical to the guidance provided in the EIR 2000 in Recital 13. However, it is now enforceable as a provision of the Regulation whereas before, as a recital, it was not enforceable.*

*In order to assist with applying the definition of COMI, Article 3(1) of the EIR Recast contains rebuttable presumptions in relation to the COMI of a company or legal person, an individual exercising a business or professional activity, and any other individual. The EIR 2000 only contained a rebuttable presumption relating to a company or legal person. These additions go some way to increasing the predictability of COMI and the uniformity of the definition's application. To seek to resolve the issue of forum-shopping, Article 3(1) of the EIR Recast provides that the presumptions as to COMI do not apply where there has been movement of the registered office, principal place of business or habitual residence, as appropriate, within the 3-month period before the request to open insolvency proceedings in the case of a company or entrepreneur, or 6-month period in the case of other individuals.*

- 3) *The Proposal noted that the opening of secondary insolvency proceedings can impede the efficient administration of the debtor's estate. One impact was that where secondary proceedings were opened, the insolvency practitioner in the main proceedings would no longer have control over the assets located in the second Member State, which would make a sale of the debtor on a going concern basis more difficult. In addition, secondary proceedings under the EIR 2000 had to be winding-up proceedings, which would prevent the successful restructuring of a debtor.*

*To address these issues, the EIR Recast in Article 3(2) no longer restricts secondary insolvency proceedings to winding up proceedings alone, but includes all proceedings that could be main insolvency proceedings, such as proceedings for rescue or reorganisation. This means that all proceedings in relation to a debtor can now focus on rescue or restructuring, and so the chance of successfully recovering a business is greater.*

*Furthermore, the EIR Recast has introduced new provisions in Articles 36 and 38 providing that where the insolvency practitioner in the main insolvency proceedings gives an undertaking under Article 36, the court that is requested*

*to open secondary insolvency proceedings should not do so if it is satisfied that the undertaking provides adequate protection for the general interests of local creditors. This was not provided for in the EIR 2000, but was adopted as a possible practice in accordance with a court ruling.*

*Article 38(3) also provides for a stay on the opening of secondary insolvency proceedings for a period of up to three months where a temporary stay of individual enforcement proceedings has been granted in main insolvency proceedings. The effect of these provisions is to seek to give the insolvency practitioner in the main proceedings control over all of the debtor's assets, with a view to maximising value for creditors, or alternatively promoting a rescue.*

- 4) The EIR 2000 had problems in relation to both the rules on the publicity of insolvency proceedings and the lodging of claims in the proceedings. The EIR 2000 did not provide for mandatory publication or registration of the orders in the Member States where a proceeding was opened, or in the Member States in which the debtor had an establishment. There was no European Insolvency Register in existence that would permit searches in several national registers. The Proposal considered that the successful nature of cross-border insolvency proceedings would rely significantly on the publicity of relevant decisions because judges would need to know whether proceedings had already been opened in another Member State. Likewise, creditors would need to be aware that proceedings had commenced. Furthermore, the Proposal found that creditors, and especially small creditors and small and medium-sized enterprises ("SMEs"), encountered difficulties and costs in lodging claims.*

*The EIR Recast has significantly improved the EIR 2000 in dealing with these issues. Whereas the EIR 2000 left the publication of information on the opening of insolvency proceedings to the discretion of the appointed insolvency practitioner, Article 28 of the EIR Recast makes the publication of a notification on the opening of such proceedings mandatory. Article 24 of the EIR Recast also obliges Member States to establish an insolvency register, and Article 25 provides for a decentralised system for interconnected insolvency registers to be created across the European Union.*

*To address the difficulties and costs in lodging claims, Article 45(2) of the EIR Recast provides that insolvency practitioners in main and secondary insolvency proceedings may lodge the claims they have received in other proceedings. Article 88 provides for a standard claim form and Article 55 permits any foreign creditor to lodge a claim in the form provided in Article 88. The purpose of these amendments is to make it easier for creditors to lodge claims, and to ensure that all creditors are treated equally.*

- 5) The Proposal found that the EIR 2000 did not contain specific rules relating to the insolvency of a multi-national enterprise group, despite a large number of cross-border insolvency proceedings relating to groups of companies. The EIR*



*2000 provided that separate proceedings had to be opened for each individual member of the group and those proceedings were completely independent of each other. This meant that the prospects of the group concluding a successful restructuring were low, and could lead to the splitting up of the group into separate sections.*

*The EIR Recast now contains a whole chapter with over 20 provisions concerning group insolvencies. A "group of companies" is defined in Article 2 as a parent undertaking and all its subsidiary undertakings. There are two particular types of assistance the EIR Recast provides: a) Articles 56 to 60 set out the duties of cooperation and communication between the various insolvency practitioners and courts where proceedings relate to the members of a group, and b) Articles 61 to 77 introduce group coordination proceedings. Further, Recital 53 of the EIR Recast considers the possibility that there can be a judicial consolidation of proceedings relating to group entities where the COMI of each entity is found to be in a single Member State.*

*The duties of cooperation and communication mirror those between main and secondary insolvency proceedings, and provide that there must be no inconsistency with the rules of the proceeding or any conflict of interest.*

*Group coordination proceedings are a useful innovation. Once established, a group coordinator who is an independent insolvency practitioner is appointed. Article 72 provides that the group coordinator is to outline recommendations for a coordinated conduct of the insolvency proceedings and propose a group coordination plan.*

*The option to open group coordination proceedings may be made at the request of any insolvency practitioner appointed in any insolvency proceedings relating to any member of a group. However, Articles 64 and 65 permit an insolvency practitioner in any proceeding concerning a group member to object, in which case their proceeding will not be included in the group coordination proceedings. This is a severe weakness of the EIR Recast, with all the problems caused by the splitting of group members' proceedings that were found in the EIR 2000.*

*In conclusion, the EIR Recast has gone a fair way to addressing the five main issues identified in the Proposal. However, it could have gone further, for example by not permitting insolvency practitioners to object to group coordination proceedings, and arguably the new restrictions on presumptions for COMI where there has been a change within three months do not go far enough in preventing forum shopping.*

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



**While the EIR Recast was welcomed by most stakeholders, it was also criticised by some as a “missed opportunity” and “modest”. List two (2) flaws or shortcomings of the EIR Recast and explain how you consider they could be corrected.**

*Two flaws or shortcomings of the EIR Recast are a) the scope of the EIR Recast under Article 1 and b) the manner in which the insolvency proceedings of groups of companies are carried out, in particular the ability for an insolvency practitioner appointed over a member of a group to object to group coordination proceedings, and the fact there is no provision for the pooling of assets and liabilities, or for the determination of a single group COMI to permit one set of proceedings in one Member State.*

### Scope of the EIR Recast

*In respect of the scope of the EIR Recast, Article 1(1) provides that the EIR Recast applies to the proceedings listed in Annex A to the EIR Recast. Annex A contains a list of national insolvency procedures, which are automatically covered by the EIR Recast. If a proceeding is not listed in Annex A, it is not within the scope of the EIR Recast. While this provides for maximum certainty as to whether a proceeding is included in the EIR Recast or not, the problem caused is that certain proceedings are excluded from the remit of the EIR Recast. For example, prior to the UK's withdrawal from the European Union, the list of proceedings relating to the UK did not include a scheme of arrangement under Part 26 of the English Companies Act 2006, despite this providing a way in which a company could restructure its debts and be rescued.*

*Further, it is possible that a Member State could legislate for a new type of collective and public insolvency proceeding that falls within the definition of Article 1(1), but which is not included in Annex A. Wessels describes this as “[t]he formulation of the definition allows that sly governments can manipulate the EIR Recast's application by arranging that a specific proceeding will or will not fall under its scope.”<sup>2</sup> The result of this is that such proceedings do not benefit from automatic recognition in other Member States under Article 19 of the EIR Recast, and this will cause uncertainty for all involved.*

*The EIR Recast does not contain any provision that would permit a Member State to apply for a particular type of insolvency proceeding to be included in Annex A. The only method available is for the EIR Recast to be amended by a further Regulation. This issue could be corrected by the following:*

- a) *The introduction of a simplified procedure by which a Member State can include a specific type of proceeding in the scope of the EIR Recast in Annex A. For example, this could be aligned with the introduction of a decentralised insolvency register, as in there could be a register listing the different types of proceedings subject to the EIR Recast. This would, however, need to provide*

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<sup>2</sup> Wessels, Bob. 'The European Union Regulation on Insolvency Proceedings (Recast): The First Commentaries'. *European Company Law* 13, no. 4 (2016): 129-135.

*that proceedings can only be added; Member States cannot simply remove types of proceedings at their whim, which would only lead to uncertainty.*

- b) Alternatively, a provision by which a debtor or creditor or insolvency practitioner applying for a proceeding that would fall within the scope of Article 1(1), but which is not listed in Annex A, could apply for an order that the proceeding is subject to the EIR Recast. While this detracts somewhat from the certainty offered by Annex A, the inclusion would be at the request of one of the parties, and then would be publicised in accordance with Articles 28 and 54 of the EIR Recast to enable foreign creditors to be notified.*

### **Insolvency of Groups of Companies**

*A second shortcoming in the EIR Recast is the treatment of groups of companies. The EIR Recast does not go so far as to provide for one set of insolvency proceedings to cover all members of a group of companies. There are only provisions for the cooperation and communication between courts and insolvency practitioners, and for group coordination proceedings to be established, that employ an independent insolvency practitioner to set out a proposed direction and plan for the individual insolvency proceedings. In addition, pursuant to Article 64, an insolvency practitioner appointed in respect of any member of a group of companies may object to that company's inclusion within group coordination proceedings. Upon such objection, Article 65 provides that those proceedings will not be included in the group coordination proceedings. There is also a provision in Article 70 that insolvency practitioners need not follow the coordinator's recommendations, or the group coordination plan, though they must provide reasons.*

*The clear impact of this is that there is the potential for the fragmentation of insolvency proceedings relating to the members of a group of companies, with one set of proceedings being able to effectively exclude itself from the coordination sought in respect of the remainder of the group. Even if all group members are included in coordination proceedings, there are still a number of separate insolvency proceedings, each with different rules and this can cause uncertainty and needless complexity.*

*It may be difficult to correct this by providing that there can be one set of insolvency proceedings to cover all members of a group of companies, given that each will have different assets and liabilities and there are questions as to why a set of creditors of a group entity with a bigger deficit should benefit from a single set of proceedings pooling assets and liabilities to the detriment of creditors of a group entity with a smaller deficit. However, the EIR Recast could seek to alleviate these issues by providing:*

- a) An option for the opening of a single, pooled proceeding in the Member State with the closest connection to the group, in respect of group entities that are intertwined to the extent that it is difficult to separate them, where creditors are the same across all entities, or where a certain percentage of creditors consent.*

- b) *Alternatively or in addition, that the court of the Member State to whom a request for group coordination proceedings is made must determine whether the reasons for an objection to inclusion are such that a particular proceeding is permitted to be excluded from the scope of group coordination proceedings. The reasons would need to be that there is evidence inclusion in the coordination proceedings will be to the detriment of that company's creditors.*
- c) *Further, that in respect of group coordination proceedings, where all insolvency practitioners have had the chance to make representations to the coordinator, and the coordinator has decided upon a particular course or coordination plan, that should be accepted and followed by all the proceedings.*

### Conclusion

*The EIR Recast is much improved on the EIR 2000, however it does still have shortcomings. Perhaps the reason for the flaws in terms of group proceedings is that the addition of provisions dealing with groups are new, and it will take some time to see how useful they are in practice. It is to be noted that Article 90 of the EIR Recast provides that by 27 June 2027 and every five years after, the Commission is to report on the application of the EIR Recast and propose any adaptations. There was also to be a report on the application of group coordination proceedings by 27 June 2022, though it does not appear that has yet been published. This will afford the Commission the opportunity to see how the EIR Recast is operating in practice and to make any necessary recommendations.*

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 European Insolvency Regulation ("EIR") is a European Union regulation and therefore has automatic direct effect in each Member State immediately. The Directive on Preventive Restructuring Frameworks (the "Directive") does not have direct effect and must be implemented by Member States into their national law. Article 34 of the Directive provides that Member States must do so by 17 July 2021, save for two aspects which must be transposed by subsequent dates. This means that there may be differences in how Member States have implemented the Directive into their national law. For example, Article 4(3) of the Directive provides that Member States "may" (have the option) to include a viability test under national law as to whether debtors may participate in a restructuring framework, to ensure that debtors with no prospect*

*of viability are excluded. However, this is not mandatory and so one Member State may have such a provision and another may not.*

*While the scope of the EIR in Article 1(1) of the EIR concerns proceedings involving restructuring and rescue where there is a likelihood of insolvency, as well as proceedings where a debtor is insolvent, the Directive's scope in Article 1(1) is limited to proceedings to restructure and prevent insolvency, or which lead to the discharge of debt incurred by insolvent entrepreneurs. Article 1(1) of the EIR confirms that the EIR only applies to "public" proceedings, whereas the Directive contains no such restriction and could apply to confidential proceedings as well. Furthermore, Article 1(2)(h) of the Directive is clear that the Directive does not apply to procedures concerning natural persons, whereas Article 3(1) of the EIR is clear from the definition of centre of main interests in respect of "any other individual" that individual debtors (natural persons) fall within its scope.*

*There are a number of key differences between the EIR and the Directive. The Directive is solely focused on national laws of Member States; it contains no provisions dealing with any cross-border matters. The EIR, conversely, is focused on choice of jurisdiction and choice of law for insolvency proceedings and will apply in circumstances where there is only one proceedings, but also where there is more than one proceeding and therefore a cross-border element. This means that there is scope for both the EIR and the Directive to apply to the same set of proceedings; the EIR will start where the Directive ends in respect of those proceedings, by providing which jurisdiction those proceedings should take place in, and the law that should apply. The EIR will also deal with any secondary insolvency proceedings requested in another Member State in respect of the same debtor.*

*The scope of the EIR concerns procedural matters, particularly where proceedings are to be filed, how concurrent proceedings are to be dealt with, the recognition of proceedings from one Member State to another, the cooperation between courts and insolvency practitioners, and how group entities can be dealt with. The EIR does not concern itself with substantive insolvency law, which is left to the relevant Member State's national laws. The Directive, on the other hand, covers substantive issues of insolvency law. For example:*

- 1) The Directive, in Article 4, provides that debtors are to have access to a preventive restructuring framework that enables restructuring with a view to avoiding insolvency.*
- 2) The Directive provides in Article 6 that there must be a stay of individual enforcement actions to support the negotiation of a restructuring plan.*
- 3) Restructuring plans are to have at least the content set out in Article 8 of the Directive.*

- 4) *Article 11 of the Directive provides that measures should be introduced to permit the cram-down of a restructuring plan that has not been approved by all affected parties.*
- 5) *One of the key substantive provisions is Article 19, which provides that directors are to have due regard to the interests of creditors and other stakeholders and the need to avoid insolvency where there is a likelihood of insolvency.*

*There are therefore a number of differences between the EIR and the Directive, both in terms of their direct effect and their content. Notably, in a recent development, the European Commission has produced a Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law,<sup>3</sup> which is to cover avoidance actions, access to information on bank accounts and beneficial ownership information, pre-pack proceedings, the winding up of insolvent microenterprises in a simplified procedure, and provisions on creditors' committees. The proposal scope covers issues relating to both the Directive and the EIR and there is a clear move towards further harmonisation of substantive insolvency law.*

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

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

Scenario

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

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

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

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

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<sup>3</sup> COM(2022) 702 final dated 7 December 2022.

**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.**

*Article 1(1) of the EIR 2000 provides that the EIR 2000 applies to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator. Article 2(a) defines "insolvency proceedings" as the proceedings listed in Annex A to the EIR 2000. Under the section for France, Annex A lists "sauvegarde" as insolvency proceedings in France that are subject to the scope of the EIR 2000. "Sauvegarde" translates to "safeguard". Therefore the safeguard proceedings in France fall within the scope of the EIR 2000.*

*Article 3(1) of the EIR 2000 provides that the courts of the Member State within the territory where a debtor's centre of main interests ("COMI") is located have the jurisdiction to open insolvency proceedings. The EIR 2000 does not contain a definition of COMI, but provides guidance in Recital 13 that the COMI should "correspond to the place where [Bella] conducts the administration of [its] interests on a regular basis and is therefore ascertainable by third parties". In the case of *Eurofood IFSC Ltd* (Case C-341/04, ECLI:EU:C:2006:281 (May 2, 2006)), the Court of Justice of the European Union ("CJEU") stated at paragraph 33 of its judgment that the definition in Recital 13 shows that the COMI must be identified by reference to criteria that are both objective and ascertainable by third parties, which are necessary to ensure legal certainty and foreseeability.*

*Article 3(1) provides that in the case of a company or legal person, the place of the registered office is presumed to be the COMI, in the absence of proof to the contrary. *Bella SARL* ("Bella") is registered in France and therefore France is presumed to be *Bella's* COMI, in the absence of proof to the contrary.*

*Paragraphs 34 to 35 of the CJEU's *Eurofood* judgment explained that the simple presumption laid down in favour of the registered office can only be rebutted if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect. That could be so in the case of a "letterbox" company which is not carrying out any business in the territory of the Member State in which its registered office is situated.*

*Clearly *Bella* is not a "letterbox" company because it opened its first store in Strasbourg, France, in which it has its registered office.*

*The presumption that a company's COMI is located in the jurisdiction where it is registered was further considered in the case of **Interedil Srl v Fallimento Interedil Srl** (Case C-396/09, ECLI:EU:C:2011:671 (October 20, 2011)). In that case, the CJEU at paragraph 50 of its judgment stated that where the bodies responsible for the management and supervision of a company are in the same place as its registered office and the management decisions of the company are taken, in a manner ascertainable by third parties, in that place, the presumption in Article 3(1) that the COMI is located in the Member State where the company is registered is wholly applicable. In such a case, it is not possible that the COMI is located elsewhere.*

*Paragraph 51 of the judgment explained that the presumption may be rebutted where from the viewpoint of third parties the place in which a company's central administration is located is not the same as that of its registered office. Paragraph 52 stated that the factors to be taken into account include, in particular, all the places in which the debtor company pursues economic activities, and all those in which it holds assets, in so far as those places are ascertainable by third parties. Those factors must be assessed in a comprehensive manner, account being taken of the individual circumstances of each particular case.*

*Paragraph 53 continued that in that context, the location, in a Member State other than that in which the registered office is situated, of immovable property owned by the debtor company in respect of which the company has concluded lease agreements, and the existence in that Member State of a contract concluded with a financial institution, may be regarded as objective factors and, in the light of the fact that they are likely to be matters in the public domain, as factors that are ascertainable by third parties. Nevertheless, the CJEU considered that the presence of company assets and the existence of contracts for the financial exploitation of those assets in a Member State other than the state with the registered office cannot be regarded as sufficient factors to rebut the presumption laid down in the EIR 2000 unless a comprehensive assessment of all the relevant factors makes it possible to establish, in a manner ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests is located in that other Member State.*

*Applying this to Bella, it is not known where the bodies responsible for the management and supervision of Bella are located, or where the management decisions of the company are taken. We are told that the main warehouse is in Ireland, and that there are warehouses and employees in Germany, Italy, Spain and Portugal, with most customers in those countries. Further, that Bella has entered into a loan agreement with a Spanish bank and signed non-binding memoranda of understanding with three suppliers based in Madrid. On the basis of the *Interedil* decision, the locations of Bella's warehouses and the Spanish loan agreement are factors that are likely to be ascertainable by third parties. However, they are not enough to rebut the presumption that Bella's COMI is in France unless it is possible to establish that Bella's centre of management and supervision is actually located in another Member State.*

*Given that Bella owns property in France, and must have employees at its store in France, but it also owns property and has employees in a large number of other Member States, it does not appear that any factors objectively point to one Member State in particular as being the centre of management and supervision. On that basis, it does not appear that there is enough to rebut the presumption that Bella's COMI is in France. Therefore, the Strasbourg High Court does have jurisdiction to open the safeguard proceedings under the EIR 2000 in accordance with Article 3(1) of the EIR 2000.*

**While your reasoning is sound, the 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] **4**

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

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

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

*Article 92 of the EIR Recast provides that the EIR Recast will apply from 26 June 2017, save in relation to:*

- a) Article 86, which applies from 26 June 2016;*
- b) Article 24(1), which applies from 26 June 2018; and*
- c) Article 25, which applies from 26 June 2019.*

*Article 91 of the EIR Recast repeals the EIR 2000.*

*Article 84(1) of the EIR Recast provides that its provisions will apply only to insolvency proceedings that are opened from 26 June 2017. Any acts committed by a debtor before that date will continue to be governed by the law that applied at the time they were committed. Article 84(2) states that notwithstanding Article 91, the EIR 2000 continues to apply to insolvency proceedings which fall within the scope of the EIR 2000 and which have been opened before 26 June 2017.*

*Article 2(8) of the EIR Recast provides that "the time of opening of proceedings" means the time at which judgment opening insolvency proceedings becomes effective, regardless of whether the judgment is final or not. Article 2(7) then provides that*



*"judgment opening insolvency proceedings" includes the decision of any court to open insolvency proceedings, or to confirm the opening of such proceedings, and the decision of a court to appoint an insolvency practitioner.*

*While Bella SARL ("Bella") filed a petition to open safeguard proceedings on 20 June 2017, before the EIR Recast became applicable, the French High Court opened the proceedings on 30 June 2017, which is after the EIR Recast applies. In accordance with Article 2(7) and 2(8) of the EIR Recast referenced above, it is clear that the time of opening proceedings was 30 June 2017 when the French High Court decided to open proceedings, rather than 20 June 2017 when the proceedings were filed. This means that the EIR Recast applies in temporal scope.*

*Article 1(1) of the EIR Recast states that the EIR Recast applies to public collective proceedings, including interim proceedings, based on laws relating to insolvency, and which are listed in Annex A. Annex A to the EIR Recast includes "sauvegarde" proceedings as those to which the EIR Recast applies. "Sauvegarde" translates as "safeguard", so the safeguard proceedings opened by the French High Court do fall within the scope of the EIR Recast.*

**You were also required to discuss**

- **Article 1(2) EIR Recast. Bella SARL is not a credit institution, insurance undertaking or any other 'excluded' entity.**

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.**

*Article 3(3) of the EIR Recast provides that where main insolvency proceedings have been opened in accordance with Article 3(1), any proceeding opened subsequently in accordance with Article 3(2) shall be secondary insolvency proceedings. Article 3(2) provides that where the debtor's centre of main interests ("COMI") lies within the territory of a Member State, the courts of another Member State have jurisdiction to open insolvency proceedings against that debtor only if it has an "establishment" within the territory of that second Member State. The secondary insolvency proceedings are limited to the assets of the debtor situated in the territory of the second Member State.*

*Article 2(10) of the EIR Recast defines an "establishment" as "any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets".*

*In the case of **Interedil Srl v Fallimento Interedil Srl** (Case C-396/09, ECLI:EU:C:2011:671 (October 20, 2011)), the Court of Justice of the European Union ("CJEU") in its judgment at paragraph 62 explained (in relation to the equivalent definition in the EIR 2000) that the fact that Article 2(h) of the EIR 2000 links the pursuit of an economic activity to the presence of human resources shows that a minimum level of organisation and a degree of stability are required. The CJEU considered that the presence alone of goods in isolation or bank accounts does not, in principle, satisfy the requirements for classification as an establishment. At paragraph 63, the CJEU considered that the existence of an establishment must be determined in the same way as the location of the debtor's COMI, on the basis of objective factors that are ascertainable by third parties.*

*We are advised that Bella has one or more warehouses in Italy, with employees and customers located there. Clearly Bella has both assets and human means in Italy, and makes sales to customers in Italy, which would constitute an economic activity that is of a non-transitory basis. If the warehouses were located there without any employees, it is likely that under the *Interedil* case this would not satisfy the requirements for an establishment, but given there are employees located there too, it appears that the criteria are met. On that basis it can be said that Bella has an establishment in Italy and therefore the Italian courts have jurisdiction under Article 3(2) of the EIR Recast to open secondary insolvency proceedings against Bella.*

*However, the Italian bank should be aware that under Article 3(2), the secondary insolvency proceedings will only apply to the assets of Bella that are situated in Italy. This means that the Italian bank will not be able to secure an Italian insolvency distribution ranking in relation to all of Bella's assets that are subject to the main insolvency proceedings in France. The ranking will only relate to those of Bella's assets that are situated in Italy.*

**While your reasoning is sound, your 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: 8 out of 15.**

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

Total marks: 43/50.