



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.***
5. ***Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.***
- 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*.***

The correct answer was C.

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 refers to the concept of a debtor's centre of main interest (COMI) presumptions which is stated in Article 3 (1) and Recital 30 EIR Recast.

Statement 2 refers to the Scope of the EIR Recast provided for in Article 1.

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.

1. Chapter V on group insolvencies under Recital 53. The EIR Recast allows the possibility for a court to open insolvency proceedings for several companies belonging to the same group in a single jurisdiction if that court finds that the COMIs of those companies are located in a single member state.
2. Chapter II Article 19 contains the general provision on the immediate and automatic recognition of judgements opening insolvency proceedings by a court of a Member State which has jurisdiction, from the moment they become effective in the State of the opening of proceedings.
3. Extension of insolvency jurisdiction of the Courts opening insolvency proceedings with respect to related actions. According to Article 6 of the EIR Recast, courts of a Member State within the territory of which insolvency proceedings have been opened in accordance with Article 3, shall also have jurisdiction for any action which derives directly from the insolvency proceedings and is closely linked with them such as avoidance actions.

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 mandates cooperation between insolvency practitioners;

Article 42 mandates cooperation between courts and

Article 43 mandates cooperation between insolvency practitioners and Courts.

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.

1. Article 38(2), the Court seized with a request to open secondary proceedings should not, at the request of the insolvency practitioner, open where an insolvency practitioner in the main insolvency proceeding has given an undertaking in accordance with Article 36, if the Court is satisfied that the undertaking adequately protects the general interests of local creditors. The undertaking operates in that the insolvency practitioner in the main proceedings may give a unilateral undertaking in respect of assets located in the Member State in which secondary proceedings could be opened, that when distributing those assets or the proceeds received as a result of their realisation, he will comply with the distribution and priority rights under national law that creditors would have if secondary proceedings were opened in the Member State.
2. Recital 45 Empowers the court to temporarily stay the opening of secondary insolvency proceedings, when a temporary stay of individual enforcement proceedings has been granted in the main insolvency proceedings.

Total marks: 10 out of 10.

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

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

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

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

The Commission identified that the insolvency regulation needed to broaden its scope to include restructuring and not just insolvency, unlike under the EIR 2000. The Commission highlighted that there was a need to support a more business-friendly

environment for debtors in financial distress. The rationale for this recommendation was to;

- a. Promote a rescue and recovery culture and
- b. Create a level playing field of national insolvency laws, which would in turn lead to improved access to credit and foreign investment.

This recommendation was reflected in the EIR Recast by the extension of the scope to include pre-insolvency restructuring.

Besides the scope of the regulation the Commission also identified as needing reform the following;

- jurisdictional rules on COMI and forum shopping;
- Publicity Rules.

- The EIR 2000 allowed the opening of secondary proceedings which often compromised the insolvency process by making it more expensive and time consuming and ultimately diminishing the value of the assets for the creditors. The opening of secondary proceedings complicated the task of the insolvency practitioner in the main proceedings since the insolvency practitioner needed to bargain and cooperate with independent officers.

- Rules dealing with group insolvencies under EIR 2000.

Question 3.2 [maximum 5 marks] **2.5**

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.

The COMI principle was meant to prevent abusive forum shopping by allocating jurisdiction to the place of the debtor’s true location. However, there were many cases of COMI shifting within the EU. The COMI model has been criticised as being obscure¹ and allowing for unrestricted forum shopping thus reducing the pay-offs for creditors. Article 3 (1) of the Recast codified the circumstances in which the COMI presumptions could be rebutted following the *Interedil* judgement of the CJEU². A possible solution to the problem of abusive forum shopping is to adopt a choice of law model for the EIR where one can freely and easily change the insolvency law and forum applicable to the company. One thus has the ability to choose the applicable insolvency law through contract regardless of the place of incorporation and the allocation of the applicable law and forum by the way of the place of incorporation. Companies would have the freedom to choose the insolvency law and forum best suiting their circumstances. This approach has already been taken by the EU Legislature with regard to group companies.³ Some of the advantages of this proposal is that the harmonisation of insolvency law and company law avoiding possible frictions due to discrepancies in

¹ Nottingham Insolvency & Business Law e-Journal (2016) 4 (1) Amir ADL Rudbordeh “A Theory on Abusive Forum Shopping in Insolvency Law”.

² Case C-396/09, ECLI:EU:C:2011:671(Oct.20,2011).

³ See footnote 1. Paragraph 13.

applicable company and insolvency law. It also provides clarity unlike the COMI model leading to a reduction in associated transactional costs. The weakness of the proposal is that it is prone to regulatory competition within the EU States.

The Recast allows for the opening of secondary and synthetic proceedings as did its predecessor EIR 2000. It refined the prerequisites for opening them. One disadvantage of secondary synthetic proceedings is that the approval of an undertaking is subject to creditors' consent and to national law reservations.⁴ This could be used by local creditors to resist the process in ring-fencing their claims making insolvencies more expensive and less expedient. **How could this be corrected?**

Question 3.3 [maximum 5 marks] **5**

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

1. PUBLIC PROCEEDINGS

The EIR Recast applies only to public and not private proceedings.⁵ On the other hand the Directive of 2019 refrained from requiring publicity of preventative restructuring frameworks leaving the question for determination by Member States. Confidentiality may be of particular importance as it can be crucial for exploring and obtaining the support of key creditors in a restructuring.⁶

2. DIVESTMENT OF DEBTOR AND APPOINTMENT OF INSOLVENCY PRACTITIONER

Another condition on the application of the Recast is that for the purposes of rescue, adjustment of debt, re-organisation or liquidation a debtor should be partially or totally divested of its assets and an insolvency practitioner appointed.⁷ Article 5 of the Directive differs in that it allows for a debtor-in possession proceedings. The debtor is not expected to be partially or totally divested of its assets. This encourages debtor in possession finance in the restructuring process. The appointment of an insolvency practitioner is not mandatory in all circumstances.⁸

⁴ Article 36(5).

⁵ Recital 12.

⁶ <https://doi.org/10.1002/iir.1447> Jessica Schmidt.

⁷ Article 1(1). EIR RECAST.

⁸ Article 5(3). DIRECTIVE.

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

Scenario

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

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

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

Question 4.1 [maximum 5 marks] 5

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

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

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

EIR 2000 reflected a traditional concept of insolvency namely that it applied to collective insolvency proceedings which entailed a partial or total divestment of a debtor and the appointment of a liquidator.⁹⁹ It did not incorporate pre-insolvency proceedings or anticipate restructuring and debtor in-charge proceedings. A Safeguard proceeding can be considered as a pre-insolvency proceeding where the debtor seeks a temporary stay order to get breathing space and re-organise its debt while remaining in control of its assets.

⁹⁹ Art 1(1) EIR 2000.

The Strasbourg High Court would therefore not have jurisdiction to determine Bella SARL's petition to open safeguard proceedings under EIR 2000 as such proceedings were not insolvency proceedings that were collective, partially or totally divested the company of its assets and involved the appointment of a liquidator.

Question 4.2 [maximum 5 marks] **2**

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

Will the EIR Recast be applicable to the proceedings?

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

The EIR Recast came into force on 26th June 2017 applicable to insolvency proceedings opened after the 26th June 2017. Article 1 EIR Recast unlike its predecessor, EIR 2000, applies to pre-insolvency and hybrid proceedings. The proceedings must be collective, public, include interim proceedings, they must be based on a law relating to insolvency and they must entail certain restrictions on the individual rights of the debtor and/or creditor. They must be included in Annexure A of the Regulation.

Safe-guard proceedings are based on a law relating to insolvency *'for the purpose of rescue, adjustment of debt, reorganisation or liquidation'*¹⁰, namely restructuring/debt rescue. They are a form of hybrid proceedings.

The EIR Recast maintains COMI (Centre of Main Interest) as the connecting factor for opening of universal proceedings. Article 3(1) defines COMI as *"the place where the debtor conducts the administration of his interests on a regular basis and which is ascertainable by third parties"*.

In the CJEU's decision of *Interedil Srl v Fallimento Interedil Srl*,¹¹ the court provided the following guidance;

When bodies responsible for the management and supervision of the debtor are in the same place as its registered office, and the management decisions of the company are taken in that same place in a manner that is ascertainable by 3rd parties, the registered office presumption is irrefutable. The presumption is rebutted when the place in which the company's central administration does not coincide with the jurisdiction of the registered office. Further, the mere presence of assets will not rebut the registered office presumption. The court further stated that assets encompassed bank accounts, moveable and immoveable assets.

Under Article 3(1) the Strasbourg High Court would have jurisdiction if the French Law so designates it with such jurisdiction. As a member of the EU, the EIR Recast is

¹⁰ Article 1(1) I Recast.

¹¹ Case C-396/09, ECLI:EU:C:2011:671(Oct.20,2011).

binding and applicable to France. The next issue for examination is whether one could say the COMI of Bella SARL is France for the Strasbourg Court to exercise jurisdiction. The registered office is in France. On the Jurisprudence of *Interedil*, has the presumption of the registered office been rebutted because of the presence of assets and employees all over Europe and the main warehouse being in Cork, Ireland? It is clear from the above decision that the mere presence of assets in other jurisdictions does not rebut the registered office presumption. It cannot be decided with certainty from the given facts that because the main warehouse was in Cork, Ireland and not at its registered office in France that the Company's central administration did not coincide with the jurisdiction of the registered office. In conclusion the Strasbourg Court would have jurisdiction to open the requested safeguard proceedings under the registered office presumption.

Some elements were not discussed.

- **The EIR Recast will be applicable. The logical order of the steps to be taken is the following:**
- **Article 3(1) EIR Recast. COMI of Bella SARL is in the EU (and not in Denmark), i.e. in Ireland (as stated in the answer to Question 4.1.). YES**
- **Article 1(2) EIR Recast. Bella SARL is not a credit institution, insurance undertaking or any other 'excluded' entity. YES**
- **Article 2(4), Recital 9, Annex A EIR Recast. The opened proceeding 'Safeguard' is listed in Annex A to the EIR Recast. YES**
- **Article 2(7), 84(1), 92 EIR Recast. The proceedings in question were opened on 30 June 2017, i.e. after the EIR Recast has entered into force. The filing date (20 June 2017) is not determinative for the temporal scope. YES**

Question 4.3 [maximum 5 marks] **2.5**

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.

The EIR Recast provides for the opening of secondary insolvency proceedings against a debtor in any Member State where it possesses an establishment.¹² An "establishment" under Article 2 (10) Recast means "any *place of operations where a debtor carries out or has carried out in the three-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human*

¹² Article 3(2) EIR Recast.

means and assets". Secondary proceedings are linked to a debtor's establishment. Secondary proceedings can only follow in time after the opening of the main insolvency proceedings. Secondary insolvency proceedings are confined to the assets of the debtor situated in the territory of the Member State where secondary proceedings have been opened. The proceedings protect local interests.

In *Interedil* the CJEU in examining the concept of establishment, held that the fact that definition of establishment links the pursuit of an economic activity to the presence of human resources demonstrates some organisation and a degree of stability are required. The decisive factor is how the activity appears externally to third parties.

From the facts of the case, a warehouse with employees was opened in Italy as in many countries across Europe. This satisfies the definition of an establishment in terms of the EIR Recast as the pursuit of an economic activity has the presence of a human resource. Insolvency proceedings have not been opened. Rather Bella SARL has requested protection from the Court in France to enable it to restructure the business. Secondary Insolvency proceedings can only be opened under the EIR Recast where Main insolvency proceedings have already been instituted. Safeguard measures in France cannot be equated to Insolvency proceedings as is being sought in Italy. For the reasons stated above insolvency proceedings cannot be opened in Italy under the EIR Recast.

While your reasoning is sound, the answer is incorrect.

- The facts of the case do not support the finding of an establishment of Bella SARL in Italy. The presence alone of assets (leased-out warehouse) in isolation, contractual relations with a local bank (including maintenance of a bank account) and occasional negotiations (whether individual or collective) with local distributors do not qualify as 'non-transitory economic activity with human means and assets'. The requisite minimum level of organisation and a degree of stability (see para. 64 in *Interedil*) is evidently missing.***
- Therefore, under the EIR Recast, secondary insolvency proceedings cannot be opened in Italy, nor Spain.***

Total marks: 9.5 out of 15.

END OF ASSESSMENT ***

Total marks: 41 / 50