



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2B

THE EUROPEAN INSOLVENCY REGULATION

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

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

1. ***You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.***
2. ***All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters - please do not change the document settings in any way. DO NOT submit your assessment in PDF format as it will be returned to you unmarked.***
3. ***No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).***
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- 6.1 ***If you selected Module 2B as one of your compulsory modules (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is 23:00 (11 pm) GMT on 1 March 2023. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2023. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.***
- 6.2 ***If you selected Module 2B as one of your elective modules (see the e-mail that was sent to you when your place on the course was confirmed), you have a choice as to when you may submit this assessment. You may either submit the assessment by 23:00 (11 pm) GMT on 1 March 2023 or by 23:00 (11 pm) BST (GMT +1) on 31 July 2023. If you elect to submit by 1 March 2023, you may not***

submit the assessment again by 31 July 2023 (for example, in order to achieve a higher mark).

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

ANSWER ALL THE QUESTIONS

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

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

Question 1.1

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

Select the correct answer from the options below:

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

Question 1.2

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

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

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

Question 1.3

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

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

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

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

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

Question 1.4

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

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

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

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

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

Question 1.5

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

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

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

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.

The First Statement addresses to concept of COMI - Center Of Main Interest, in which the Model Law has no definition (This is not particularly relevant for this module). The COMI concept under the EIR Recast determines two key factors for its determination and those are valid for the Model Law as well:

- *The location where the central administration of the debtor is located, and*
- *Which is readily ascertainable as such by creditors of the debtor*
-

Although the COMI concepts in the EIR and the Model Law are similar, they serve different purposes. In the EIR the institute is related to the jurisdiction in which main proceedings should be commenced. The presumption of the COMI is settled at the register office is rebuttable if the central administration is located in another member state and a comprehensive assessment of all the relevant factors establishes, in a manner that is ascertainable by third parties, that the company's actual center of management and supervision and of the management of its interests is located in that other Member State. -Article 3° of EIR recast

The Second Statement addresses to the concept provided on Recital 10 of EIR Recast 2015. That statement refers to the possibility of applying rescue procedures to viable companies, avoiding the declaration of bankruptcy - winding up.

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.

As a first example of modified universalism, we can mention the possibility of opening secondary proceedings. The secondary procedure (territorial) can only regulate the assets limited to their territorial scope, differently than the main proceeding (Recital 23). This is regulated by article 3 (1) and (2).

Cooperation and Coordination between member states are also an example of modified universalism approach on EIR Recast. Recital 48 says that, seeking to make cross-border insolvency proceedings more efficient, the cooperation and coordination between two member-states are indispensable. Articles 41, 42 and 43 discuss the cooperation and coordination procedure between insolvency practitioners and courts.

It is also an example of modified universalism the possibility of the insolvency practitioner avoids the opening of a secondary proceeding, according to the article 36.

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.

Articles 41, 42 and 43 of EIR Recast introduce the obligation of co-operate between practitioners and courts.

The article 41 determines the obligation of practitioners of the main and secondary proceedings related to the same debtor to co-operate with each other, meaning they have to communicate promptly all relevant information about the proceedings, in particular about the progress with regard to the verification of claims; measures relating to the recovery of the debtor - even a judicial recovery plan; the destination of the debtor's assets and affairs; as well as the termination of the proceedings.

On the other hand, article 42 determines the obligation of courts of the main and secondary proceedings related to the same debtor to co-operate and co-ordinate with each other. Article 42 (3) establishes manners to guarantee the effective co-operation such as: (i) appointment of insolvency administrators; (ii) Communication of information by any means deemed appropriate by the court; (iii) Coordination of the administration and supervision of the debtor's assets and business; (iv) Coordination of the holding of hearings; and (v) Coordinating the approval of protocols, whenever necessary.

It also to be noticed that courts can nominate an independent person or body acting on its instructions in order to enhance the communication.

Practitioners and courts must also keep the communication updated and provide any information needed in order to improve the efficiency of the insolvency proceeding.

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

É 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.

In order to protect and avoid the indiscriminate opening of secondary proceedings the EIR Recast has set requirements for the establishment definition - this is because secondary proceedings can be opened if the company has an establishment in a different member state - such as: non-transitory economic activity with human

means and assets. The term “non-transitory” intends to avoid minimum time requirements, on the other hand, the term “human means and assets” determines the essentiality of human work presence and existence of assets at the Member State. Those requirements aim to guarantee assertiveness, certainty and foreseeability to the court and third parties, showing a minimum level of organisation and a degree of stability.

Another instrument to avoid the opening of secondary proceedings is foreseen in article 36 of EIR Recast, where it permits the insolvency practitioner to give, with respect to assets located in the Member State in which secondary insolvency proceedings may be opened, a unilateral undertaking that, when distributing the assets or the proceeds from its liquidation, it will respect the distribution rights and privileges of creditors under national law which creditors would enjoy if secondary insolvency proceedings are opened in that Member State.

We can also mention the possibility of the main proceeding court to temporarily stay the opening of secondary proceeding, when a temporary stay of individual enforcement proceedings has been granted in the main insolvency proceedings.

You only discussed article 36. You were required to provide two examples of provisions.

Total marks: 9 out of 10.

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

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

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

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

The application of the 2000 Regulation was generally satisfactory, some adjustments were necessary to improve the application and the efficient management of cross-border insolvency proceedings.

Among the innovations brought by EIR Recast, in accordance with the European Commission, we can mention: (i) treatment of corporate groups in insolvency. This matter was not touched by EIR 2000 neither Model Law and has an entire chapter on EIR 2015; (ii) facilitation of cross border proceedings by enhance coordination and cooperation; (iii) Publicity and access to Information; (iv) Scope and Material Scope -

the EIR Recast brought a broader range of insolvency proceedings, as seen on article 1 (1); (v) mechanisms to prevent forum shopping and (vi) cooperation with non-member states.

On the other hand, EIR Recast did not adopt some provisions made by European Commissions, such as: (i) harmonization of national insolvency laws and (ii) the definition of the concept of insolvency.

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.

The EIR Recast, although its success on cross boarder insolvency matters, it missed the opportunity to bring more resources to guarantee efficient insolvency proceedings regarding corporate groups, since there is no substantive, procedural or jurisdictional sanction of group consolidation. Instead, EIR Recast provides co-ordination mechanisms for corporate groups insolvencies, and does not provide binding rules to regulate an insolvency corporate case dealing with non-member states, for example.

Another issue on EIR Recast can be mentioned, regarding corporate groups. The instrument does not introduce the concept of a group or enterprise COMI and does not indicate the main court, which is decisive in performing the tasks of co-ordination.

In order to solve the problem, the EIR Recast should be amended providing binding rules to regulate the corporate groups insolvency, notably making the co-ordination mechanism obligatory.

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 Directive was adopted by EU on June 2019 with the main objective of improving the European Union's restructuring system, creating harmonised restructuring frameworks throughout the member states. However, the Directive is focused on insolvency prevention mechanisms, being more efficient and effective in dealing with the initial financial difficulties faced by companies before they become insolvent. Its

goal is to facilitate the restructuring and turnaround of viable companies to avoid unnecessary insolvency proceedings.

The EIR Recast, on the other hand, has as its main scope to deal with cross-border insolvency cases by defining rules on jurisdiction, applicable law and recognition of insolvency proceedings in Member States when the debtor has assets.

Another point to be highlighted is the fact that the EIR Recast, even though provides harmonization on conflict-of-law rules applicable to cross-border insolvency cases, does not provide for harmonization for the substantive rules, it does provide mechanisms to promote better cooperation and coordination between countries and parties involved.

In contrast, the Directive on Preventive Restructuring Frameworks specifically focuses on harmonizing the substantive laws related to preventive restructuring frameworks within member states, by establishing minimal rules for preventing restructuring procedures.

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**

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.

Just as EIR Recast, EIR 2000 does not provide a clear definition of COMI. However, Recital 13 elucidates that COMI would be "should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties", that is where the insolvency proceeding should be opened.

Since the EIR is not clear, the CJEU jurisprudence brings more assertiveness in the judgment of the Eurofood IFSC LTD case, where it defines that the interpretation of COMI is an objective place, recognized by third parties, independent of definitions provided by domestic law in a specific case.

It is also to be noticed that EIR, according to Recital 15, establishes only international jurisdiction.

In accordance with the definition of COMI given by the CJEU jurisprudence, considering that Bella SARL is a French-registered company and has operated in Strasbourg over the years, it can be said that the French Court has international jurisdiction to open the insolvency proceeding.

In contrast, in attention to the jurisdiction of the Strasbourg High Court to open the requested safeguard proceeding is to be decided by the domestic law.

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

- The Strasbourg High Court does not have international insolvency jurisdiction to open insolvency proceedings.**
- Students are expected to mention that under the EIR 2000 (Article 3), the determination of international jurisdiction to open main insolvency proceedings is linked to the debtor's centre of main interest (COMI). According to Article 3 EIR Recast, COMI shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties (see also Recital 28). The place of the registered office shall be presumed to be the COMI in the absence of proof to the contrary.**
- Relevant case law: Eurofood IFSC Ltd, Case C-341/04, ECLI:EU:C:2006:281 (May 2, 2006) and Interedil Srl, in liquidation v Fallimento Interedil Srl, Case C-396/09, ECLI:EU:C:2011:671 (Oct. 20, 2011).**
- However, Article 1 of the EIR 2000 states that 'this Regulation shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator.**

- **Article 2 EIR 2000 states that “insolvency proceedings” shall mean the collective proceedings referred to in Article 1(1). These proceedings are listed in Annex A.**
- **Annex A of the EIR 2000 only listed two French insolvency proceedings which came under the scope of the EIR 2000: (i) liquidation; (ii) redressement judiciaire (rehabilitation).**
- **Therefore, the EIR 2000 would not apply to safeguard proceedings.**

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

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

Will the EIR Recast be applicable to the proceedings?

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

In order to EIR Recast be applicable to the mentioned proceeding, it should check the temporal, material, territorial and personal extent.

Assuming that the safeguard proceeding was opened on 30 June 2017, the EIR Recast would be applicable considering the temporal scope since its article 92 determined that the instrument entered into force on 26 June 2017 and will apply to all proceedings opened thereafter. Which means, the EIR Recast will be applicable to insolvency proceeding opened from the mentioned date.

EIR Recast also determines that it will be applicable to all proceedings listed on the Annex A (article 2 [4]), even without further examination by the courts of another Member State, which includes the safeguard proceeding.

On another aspect, the EIR Recast on article 1, determines the regulation will be applicable on insolvency, collective and public proceedings. The safeguard fulfill this requirement. The personal scope, as foreseen in Recital 9, determines that EIR Recast applies to insolvency proceedings which meet the conditions set out in it, irrespective of whether the debtor is a natural or legal person, a trader or a consumer, excluding, however proceedings that concerns (a) insurance undertakings; (b) credit institutions; (c) investment firms and other firms and institutions. In the case herein discussed, Bella SARL is a legal person and is not covered in the excluded classifications.

Finally, as seen before, the territorial extent is also fulfilled. EIR Recast determines that the regulations applies when the COMI - Centre of Main Interests - is located in a Member-State of European Union - excepted Denmark, and therefore applicable to the case at hand.

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.

A seen on the given facts, Bella SARL has a warehouse in Italy with employees and customers.

In order to open a secondary proceeding, according to EIR Recast regulations - article 3 (2) and article 2 (10), the company must have an establishment in a member state, developing non-transitory economic activity with human means and assets.

The secondary proceeding is also an instrument to protect local creditor's interests and rights, since the universalism scope of the main proceeding will be limited.

Assuming that the Warehouse located in Italy has more than 3 months with employees and local costumers (human activity and assets); it is possible to infer that the requirements to open a secondary proceeding are fulfilled.

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

- **According to Article 3(2) EIR Recast, where the debtor's COMI is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if it possesses an establishment within the territory of that other Member State.**
- **Under Article 2(10) EIR Recast, 'establishment' means any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets.**
- **Relevant case law: *Interedil Srl, in liquidation v Fallimento Interedil Srl*, Case C-396/09, ECLI:EU:C:2011:671 (Oct. 20, 2011), *Burgo Group SpA v Illochroma SA*, Case C-327/13, ECLI:EU:C:2014:2158 (Sep. 4, 2014).**
- **The facts of the case do not support the finding of an establishment of Bella SARL in Italy. The presence alone of assets (leased-out warehouse) in isolation, contractual relations with a local bank (including maintenance of a bank account) and occasional negotiations (whether individual or collective) with local distributors do not qualify as 'non-transitory economic activity with human means and assets'. The requisite minimum level of organisation and a degree of stability (see para. 64 in *Interedil*) is evidently missing.**
- **Therefore, under the EIR Recast, secondary insolvency proceedings cannot be opened in Italy, nor Spain.**

Total marks: 9 out of 15.

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

Total marks: 42 / 50