



**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*.***

**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.***

- The presumption on “centre of main interest” (COMI) - Article 3(1), EIR Recast***



**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.**

- **“Material scope” - Article 1, EIR Recast**

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. Article 3(1), EIR Recast - states that the courts of the Member State within the territory of which the centre of the debtor’s main interests is situated, shall have jurisdiction to open insolvency proceedings (“main insolvency proceedings”). Such proceedings have universal scope and aim at encompassing all the debtor’s assets.**
- 2. Article 8, EIR Recast - insulates rights *in rem* (i.e. pledge or mortgage) of creditors or third parties in respect of assets owned by the debtor. Pursuant to Article 8, the opening of insolvency proceedings shall not affect the rights *in rem* of creditors in respect of immovable assets belonging to the debtor and within a member State, other than the state of the opening of insolvency proceedings.**
- 3. Article 19(2) of the EIR Recast - provides that recognition of main proceedings shall not preclude the opening of the proceedings referred to in Article 3(2) by a court in another Member State.**

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, EIR Recast**
- **Article 42, EIR Recast**
- **Article 43, EIR Recast**

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.**

- Right to give an undertaking. *Pursuant to Article 38(2), where the IP in the main insolvency proceedings has given an undertaking in accordance with Article 36, the Court being asked by the IP to open secondary proceedings she refuse to do so - if the Court is satisfied that the undertaking adequately protects the general interest of local creditors*
- Stay of the opening of secondary proceedings. *Pursuant to Article 38(3), an IP or debtor in possession to apply to the Court for a temporary stay of the opening of secondary 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)?**

*Under Article 46, EIR 2000, the European Commission was required to present a report on the application of the EIR 2000 and make a proposal for its adaptation.*

*Some critical elements that required revision include:*

- *The lack of harmonisation of insolvency laws of the Member States which had caused 'forum shopping' for COMI.*
- *A broadening of scope of the EIR's application.*
- *The need for a chapter relating to group insolvencies to cover proceedings where no liquidator had been appointed, and other rescue and reorganisation processes relevant to insolvency.*
- *The need for insolvency practice - i.e. broadening the scope to restructuring proceedings, stronger rules for cooperation as between insolvency practitioners and between Courts of Member States, the possibility of proceedings with regard to members of the same group of companies, etc.*
- *Improvement of creditor information - i.e. interconnectivity of insolvency registers*
- *General modernisation of the legal rules.*

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 contains a whole Chapter (Chapter V) dedicated to group insolvencies, with over twenty articles. The EIR Recast seemingly fills a gap (whereby the former regime had an entity-by-entity approach). The chapter introduces a concept of group coordination proceedings.*

*Recital 51 of the EIR Recast indicates the aim of the new chapter is to achieve the efficient administration of insolvency proceedings relating to different companies forming part of group companies.*

*Under chapter V, insolvency practitioners appointed in insolvency proceedings, opened against members of the same corporate group, must co-operate to the extent that such co-operation is appropriate to facilitate the effective administration of those proceedings and so far as it is compatible with the rules applicable to them and does not entail any conflict of interest. The EIR Recast does not mandate co-operation if such co-operation does not make commercial sense, that is, it is not necessary for the effective administration of each insolvency proceeding. One criticism is that being an “open norm” with unclear subject matter, creates risks of loose interpretation and ample grounds to refuse co-operation. As it is a new regime, there would be no case law clarifying how the provisions are to be interoperated. This could be corrected by clarifying language being added to the Recast or a guidance note being published with examples to guide statutory interpretation.*

*Another criticism is that in practice, without a developed regulatory framework, purely voluntary co-operation may be stalled by high transaction costs and collection action problems. A potential way to resolve this is for rules to be added which provide for situations where group’s cannot opt out - i.e. if certain criteria are met then the framework is not voluntary (for example, if the group has common directors / one sole controller etc.*

Question 3.3 [maximum 5 marks] **1.5**

**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.**

*While the Directive was a welcome step towards harmonisation of the frameworks by addressing various issues relating to restructuring, it will not achieve the harmonisation envisioned by the 2014 Recommendation. For example, the Directive does not harmonise core aspects of substantive insolvency law - such as a common definition of insolvency, the conditions for opening insolvency proceedings, the ranking of claims, avoidance actions, and the identification and tracing of assets.*

*Certain differences in the instruments include:*

- 1. The Directive introduced substantive minimum standards for the preventative restructuring procedures across Member States to enable debtors in financial difficulty to restructure at an early stage with a view to avoiding insolvency. This means the scope of the Directive caters to a jurisdiction's status quo, permitting only minor adjustments to the procedures that exist in that system. **What is the position of the Regulation?***
- 2. Under the Directive, debtors have access to "early warning tools" that enable them to detect the deterioration of the business, which can enable them to engage in restructuring processes at an early stage. The underlying objective is to promote the development of a new culture of preventive restructuring procedures - irrespective of where the process is taking place within the European Union. **What is the position of the Regulation? You were required to compare.***

**Total marks : 11.5 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] **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.**

*It would seem the question of whether the Strasbourg High Court has jurisdiction to open safeguard proceedings is not a matter for determination under the EIR 2000. Given that the EIR 2000 defines the international jurisdiction for insolvency cases - whether a member state may or may not open proceedings is a matter of domestic law. On this basis, it is a question of French law.*

*Article 3(1) of the EIR 2000 provides that main insolvency proceedings may be opened in the place of the debtor's COMI - but this term is not defined by the EIR 2000. However, in the decision in Eurofood IFSC Ltd, the CJEU stressed that the concept of COMI is peculiar to the regulation; that it has an autonomous meaning and must therefore be interpreted in a uniform way independently of what the term means in domestic law. When determining the question of jurisdiction, the CJEU held that COMI must be identified by reference to criteria that are both objective and ascertainable by third parties.*

*In these circumstances, it is likely that Bella SARL's COMI will be determined to be France. The fact of Bella SARL's incorporation being in France is an indication that the appropriate jurisdiction is in fact France. This is supported by the fact that the company has operations in France (albeit in many other places also).*

*While the company engages in activity in various places in Europe, there does not appear to be evidence suggestive of a COMI that is more likely than France. A purely occasional place of operations cannot be classified as an establishment for the purposes of determining COMI - and what is critical is the perception from third parties and how they would perceive the situation.*

*The loan agreement entered into with the Spanish Bank does not of itself suggest that the bank is a substantial secured creditor or that this is enough to change the COMI. Nor is this conclusion reached based on the opening of a bank account or negotiation with suppliers.*

Notwithstanding the above, EIRO 2000 does not appear to refer to “safeguard proceedings”. On this basis, the proceedings would not be able to be commenced under the EIR 2000. **Very good!**

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.**

*The EIR Recast is an EU instrument of private international law governing (international) jurisdiction for opening insolvency proceedings and actions deriving from them. It occupies a specific niche, dealing exclusively with matters of insolvency (or insolvency related law).*

#### Temporal scope

*The EIR recast applied from 26 June 2017. The provisions of the recast shall apply only to insolvency proceedings opened after that date (Article 84(1)). Proceedings opened before this date shall be governed by the EIR 2000. As the French proceedings were opened on 30 June 2017 (as stated in the wording of the question) the EIR Recast would apply.*

#### Material scope

*Pursuant to article 1, the material scope of the EIR Recast is that it applies to public collective proceedings (including interim proceedings) which are based on laws relating to insolvency in which, for the purposes of rescue, adjustment of debt, reorganisation or liquidation: (a) a debtor is totally or partially divested of its assets and an insolvency practitioner is appointed; (b) the assets and affairs of a debtor are subject to control or supervision by the court; or (c) a temporary stay of individual enforcement proceeding is granted by the court or by operation of law, in order to allow for negotiations between the debtor and its creditors. The proceedings referred to in Article 1 are listed in Annex A to the Recast. Annex A under “France” lists “sauvegard” which is French for “Safeguard”*

#### Personal scope

*The application of the EIR Recast extends only to those proceedings that are adopted in Member States and subsequently included Annex A. France is included in Annex A.*

#### Territorial scope

*The EIR Recast applies in all member States (except Denmark), however it does not provide clear rules regarding geographical application. Recital 25 provides that it shall apply to proceedings in respect of a debtor whose centre of main interest (COMI) is located in the EU. As set out above, the COMI is likely to be France, therefore the EIR Recast will apply.*

*As the temporal, material, personal and territorial scope of the Recast have been satisfied it would apply here.*

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 safeguard petition has been filed in France. Noting the conclusion at 4.1, namely, that France is the likely COMI - it is reasonable to expect that the French insolvency proceeding would be considered the main insolvency proceeding. As also stated above, there does not appear to be evidence suggesting that Bella SARL's actual centre of management and supervision and of its interests is somewhere that would displace France as COMI - and on this basis, it is unlikely that the presumption would be rebutted.*

*In these circumstances, secondary proceedings could be opened in any Member State in which the debtor has an "establishment" - which is defined by Article 2(10) of the EIR Recast to mean 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 means and assets.*

*Rebutting the presumption of COMI was considered by the CJEU in Interedil Srl v Fallimento Interedil Srl. In that case, the company was originally registered in Italy but subsequently relocated to the UK and registered there as a foreign company. Insolvency proceedings were sought to be commenced in Italy and the Court accepted its jurisdiction noting that the location of office presumption was rebutted by reference to matters such as presence of immovable property in Italy, lease agreements in Italy, a contract with an Italian banking institution and the fact that the Italian register had not been informed of the company's change in location of registration.*

*Given the Court's decision in this case, it is likely that the fact that Bella SARL has a warehouse in Italy, and has employees working in Italy, that this would be considered*

*to satisfy non-transitory economic activity - and as such - that secondary proceedings could be successfully opened in Italy.*

**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 : 12 out of 15.**

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

**Total marks : 43.5 / 50**