



**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.***



**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.**

- 1: the COMI Presumption - Article 3(1) of EIR Recast.
- 2: material scope - Article 1 of 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(2) of the EIR Recast permits the opening of separate proceedings in a different state to the main proceedings if it possesses an establishment in that state. The effect of those proceedings is restricted to that state.
- 2: Article 8(1) of the EIR Recast holds that rights in rem held by creditors in relation to specific assets are not affected by the opening of insolvency proceedings.
- 3: Article 19(2) of the EIR Recast records 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.**

- 1: Article 41
- 2: Article 42
- 3: Article 43

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) of EIR Recast, if an insolvency practitioner in the main insolvency proceedings has given an undertaking in accordance with Article 36, the Court shall, upon request from the insolvency practitioner, not open secondary proceedings if it is satisfied local creditors are adequately protected.

### Stay

Pursuant to Article 38(3) of EIR Recast, the Court may grant at the request of an insolvency practitioner, a stay on the opening of secondary proceedings. Again, the Court must be satisfied that local creditors are adequately protected before doing so.

**Total marks : 10 out of 10.**

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

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

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

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

In accordance with its obligations under Article 46 of the EIR, the European Commission was required to report on the application of the Regulation. During the reform process of the EIR, The European Commission identified a number of elements that needed reform in its report titled “a proposal for a regulation of the European Parliament and of the Council amending regulation amending Council Regulation (EC) No 1346/2000 on insolvency proceedings”.<sup>1</sup> The main elements identified as requiring revision in the report are summarised below.

#### Scope

The commission considered that the regulation should be amended to cover restructuring proceedings at a pre-insolvency stage. While EIR 2000 solely focussed on traditional liquidations, EIR recast deals with rescuing economically viable but financially distressed businesses in response to the issues identified by the Commission.

#### Competency of jurisdiction

The commission observed that there were difficulties in identifying the COMI of a business creating issues as to where a main proceeding was located during the reform process. Further, EIR 2000 permitted forum shopping. In response to the European Commission’s findings, the EIR Recast introduced a rebuttable presumption in relation to the COMI and introduced Recital 30 to create certainty. It also introduced provisions to resist forum shopping by creating a three month period in relation to businesses that move their principle place of business.

#### Secondary proceedings

The Commission identified issues with respect to secondary proceedings. The commencement of secondary proceedings was seen by the Commission as limiting the

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<sup>1</sup> COM(2012) 744 final.

efficiency of administering a debtor's estate. While EIR Recast permits secondary proceedings, it limits the scope it introduced provisions (such as the right to give an undertaking) which may reduce their use.

#### Publicity of claims

Under EIR 2000, every member state had its own insolvency registration system and the interconnectedness was not ensured. By requiring member states to establish and maintain insolvency registers, the adoption of Article 24 of EIR Recast addresses a key area of EIR 2000 which required revision as identified by the Commission.

#### Group insolvencies

The Commission identified that the EIR 2000 did not contain rule for dealing with the insolvency of a multi-national enterprise group. This issue was specifically addressed in Chapter V of EIR Recast which creates a framework for responding to group insolvencies.

### **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.***

One flaw or shortcoming of the EIR Recast is the framework established for group coordination of proceedings. The regulation is aimed at securing the efficient administration of group insolvency proceedings. However, there are a number of features of the framework which could go further to achieve the intended effects.

One of the key issues with this part of EIR Recast is that pursuant to Recital 56, it is voluntary in nature and it is possible to opt out without explanation or good cause under Article 64. While the EIR Recast made group coordination proceedings voluntary in order to respect each group's separate legal personality, the effect is that the system is non-committal. The uncertainty that may arise as a result will likely lead to increased costs and complexity in managing group proceedings. One way to correct this part of the EIR Recast would be to restrict the ability for entities to opt out - for example, by requiring a good reason as to why the entity should not be included in the group proceeding. Restricting the ability to opt out would infringe on the entity's legal independence. However, it would promote the use of the group proceeding and its intended aims in circumstances where it should be used.

A second flaw of EIR recast, which also relates to group insolvencies, is the manner in which cooperation and communication is prescribed. While general duties of communication and cooperation are imposed between as between insolvency practitioners, between courts, and insolvency practitioners and the courts under Articles 56 to 58, there are aspects of the cooperation and communication provisions that could have gone further to achieve their aims. For example, Article 56 which sets out the duties of insolvency practitioners to communicate and cooperate in group insolvency proceedings. Article 41 of the EIR Recast similarly sets out duties of cooperation and coordination between insolvency practitioners in main and secondary proceedings. When these two provisions are compared, Article 56 allows for circumstances to avoid adhering to the provision which are not present in Article 41. These

circumstances, being when cooperation does not make commercial sense, and the imperative to avoid a conflict of interest, may create scope for practitioners to refuse to cooperate in circumstances that are inconsistent with the aims of the section. Modifying Article 56 to more similarly reflect Article 41, or clearly defining circumstances when cooperation may be refused may create more certainty and more effectively achieve the intended outcome of cooperation in group proceedings by limiting the scope for non-compliance.

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.***

One way in which the Regulation and the Directive differ is that the Directive provides debtors with access to "warning tools". These warning tools are aimed at providing debtors with the ability to identify, at an early stage, when their business is struggling so that they can engage in a restructuring process. By requiring member states to ensure access to early warning tools, the business may have a better chance successfully restructuring than they might have under the Regulation.

Another way in which the regulation and the directive differ is that the Directive introduces a minimum standards for preventative restructuring mechanisms. While the Regulation covers preventative procedures, it does not address the disparities between national laws regulating those procedures. Accordingly, the Directive introduces substantive minimum standards required in member states in order to create further procedural harmonisation. Ultimately, however, these minimum standards introduced under the Directive permit a wide scope for derogation so are not likely to achieve the desired harmonisation that was absent under the Regulation.

**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] **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.***

The EIR 2000 defines the international jurisdiction for insolvency cases with the EU. However, whether a member state may open proceedings is a question of national or domestic law of that country. In the circumstance, whether the Strasbourg High Court has jurisdiction to open safeguard proceedings does not strictly arise under the EIR 2000 but will rather be a question of French law.

Despite the technical observation detailed above, main insolvency proceedings may be initiated at a place of a debtors COMI pursuant to Article 3(1) of EIR 2000. The EIR does not provide a definition for COMI. However, the Decision of *Eurofood IFSC Ltd*<sup>2</sup> provides a guidance as to determining where a COMI is located. As noted in that case, COMI has an autonomous meaning and must be interpreted in a uniform way that is independent of what a similar term may mean in national legislation. Further, the COMI must also be determined by reference to criteria that are both objective and ascertainable by third parties. The fact that Bella SARI is incorporated in France weighs in favour of France being the COMI. Furthermore, the fact that it has operations in France, it cannot be said to be a “letterbox” company.

There is activity across Europe but two potential alternative countries might arguably be held to be the COMI. The fact that the main warehouse is located in Ireland is indicative that the COMI might be based there. Further, there is a additional activity occurring in Spain (in addition to the presence of a warehouse which is present in the other European Countries). Ultimately, the activity in the member state should be regular and lasting. The additional activities in Spain are more aspirational than regular lasting activity so do not add much additional weight to a suggestion that it should be the COMI rather than France.

Ultimately, however it is noted that Annex A of the EIR 2000 does not refer to safeguard proceedings. Rather, only “Liquidation judiciaire” and “Redressement judiciaire avec

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<sup>2</sup> Case C-341/04, ECLI:EU:C2006:281 (May 2, 2006).

nomination d'un administrateur" are listed in Annex A. Accordingly, the requested safeguard proceedings would not fall under the EIR 2000.

**Excellent!**

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.**

Determination of applicability of EIR Recast will require consideration of temporal scope, personal scope, material scope and geographical scope.

#### Territorial scope

The first step is to determine whether Bella SARL has its COMI in a Member state of the EU (That is not Denmark). The fact that the company is French registered would create a rebuttable presumption that its COMI is in France. However, given the Company has operations in a number of other countries, it may be that it's COMI is located elsewhere such as Ireland where its main warehouse is located or Spain where it has a recent expansion of activity. In any case, the countries are EU member states so the COMI location will invariably be in a member state.

#### Personal scope

It is then necessary to consider whether Bella SARL is a bank, insurance company or other excluded undertaking. On the facts, no exclusion applies.

#### Material scope

The next question to consider is whether the safeguard proceedings as opened are listed in Annex A to the EIR Recast. Annex A makes specific reference to safeguard (or sauvegarde) proceedings under the French heading.

#### Temporal scope

The final question is to consider whether the proceeding was opened after 26 June 2017. As the petition was filed on 20 June 2017, EIR Recast will not apply.

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.**

As set out in the facts, a safeguard petition has been filed in France. Under Article 3(1) the EIR Recast, it is likely that the French proceeding will be the main proceeding given the presumption which follows from its registered office being located there. Subject to a consideration of the relevant factors as set out in Recital 30 which requires consideration of whether, as ascertainable by third parties, the company actual centre of management and supervision and of the management of its interests is located – it does not seem that the presumption would be rebutted and that France would be the COMI and the safeguard proceeding would be the main proceeding.

The EIR Recast permits the opening of secondary proceedings in any member state in which the debtor has an establishment. As set out under Article 2(10) of EIR Recast, “Establishment” 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 means and assets. The CJEU in *Interedil SRI v Fallimento Interedil SRI*<sup>3</sup> set out that the pursuit of an economic activity is linked to the presence of human resources. Accordingly, a minimum level of organisation and degree of stability are required. It is necessary to conduct the analysis of whether an establishment exists as at the time of filing the petition to open secondary proceedings.

From the facts, we know that Bella SARL has a warehouse in Italy which would satisfy the asset requirement of the analysis. Further, we also know that the company has employees working in Italy. Accordingly, it is likely that its operations in Italy would be considered as non-transitory economic activity with human means and assets such that secondary proceedings may be opened in Italy.

**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 : 12 out of 15.**

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

**Total marks : 47 / 50**

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<sup>3</sup> Case C-396/0, ECLI:EUC:2011:671 (Oct 20, 2011),