



**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: 2021122-336.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 2024**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2024. 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 2024 or by 23:00 (11 pm) BST (GMT +1) on 31 July 2024**. If you elect to submit by 1 March 2024, you **may not** submit the assessment again by 31 July 2024 (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

Article 1(1) of the EIR 2015 relates to the scope of the Regulation. Choose the correct statement from the options below:

- (a) **Proceedings will fall under the scope of the EIR 2015 if they are based on laws relating to insolvency for the purpose of rescue, adjustment of debt, reorganisation, or liquidation; are public; and are collective.**
- (b) Proceedings will fall under the scope of the EIR 2015 if they are based on laws relating to insolvency for the purpose of rescue, adjustment of debt, reorganisation, or liquidation; are public; and are collective.
- (c) Proceedings will fall under the scope of the EIR 2015 if they are based on laws relating to insolvency for the purpose of rescue, adjustment of debt, reorganisation, or liquidation; and are public.
- (d) Proceedings will fall under the scope of the EIR 2015 if they are based on laws relating to insolvency for the purpose of rescue, adjustment of debt, reorganisation, or liquidation; and 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 gone against the literal meaning of several provisions of the EIR 2000. A new Regulation was needed to codify the new rules created by the CJEU.
- (b) The EIR 2000 was generally regarded as an unsuccessful instrument in the area of European insolvency law by the EU institutions, practitioners and academics.

- (c) The fundamental choices and underlying policies of the EIR 2000 lacked support from the major stakeholders (businesses, public authorities, insolvency practitioners, etcetera). A new Regulation was therefore needed to meet their expectations.
- (d) The EIR 2000 was generally considered a successful instrument, but areas of improvement had been identified over the years by practitioners and academics.

#### 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

Article 3 of the EIR 2015 deals with jurisdictional matters. Which statement below is accurate in relation to Article 3?

- (a) Article 3 states that the courts of the Member State within the territory of which the debtor has an establishment shall have jurisdiction to open main insolvency proceedings.
- (b) Article 3 states that the courts of the Member State within the territory of which the debtor has its centre of main interest (COMI) shall have jurisdiction to open main insolvency proceedings.
- (c) Article 3 states that the courts of the Member State within the territory of which the debtor has its centre of main interest shall have jurisdiction to open secondary insolvency proceedings.
- (d) Article 3 states that the courts of the Member State within the territory of which the debtor has an establishment shall have jurisdiction to open territorial insolvency proceedings.

#### Question 1.6

The EIR 2015 does not provide a definition of “insolvency” or “likelihood of insolvency”. What are the consequences hereof?

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

#### Question 1.8

What are some of the main criticisms which have been voiced against the concept of the “centre of main interest”?

- (a) The concept makes it impossible for companies to move jurisdiction, which ultimately, may jeopardise their chances of rescue.
- (b) The concept does not have any equivalent in international instruments, which makes it difficult for international creditors to understand.
- (c) The concept is too similar to that of an “establishment” which makes it difficult for a court to know whether to open main or secondary proceedings.
- (d) The concept is too vague; it may result in higher capital costs; it may lead to manipulation; and it is difficult to assess by creditors.

#### Question 1.9

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 1.10

Carala SARL is a French-registered company selling jam jars made out of glass. The company had opened its first store in Strasbourg, France in 2018. It has since opened another 10 stores in France. Its main warehouse is located in Cork, Ireland. 95% of its employees are located in France and 5% are located in Ireland. Most of its customers are located in France, yet some online purchases are coming mainly from the Netherlands.

In 2020, Bella SARL entered into a loan agreement with a Spanish bank because it was hoping to expand its reach onto the Spanish jam 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 Covid-19 pandemic. By the end of 2021, the company was in financial difficulty, yet managed to keep afloat for another few years. On 10 January 2022, it wants to file for insolvency. In which country is Carala’s centre of main interest presumed to be located?

- (a) Its centre of main interest is located in Spain because the loan agreement will lead to a presumption of COMI.
- (b) Its centre of main interest is located in Ireland because the warehouse will lead to a presumption of COMI.
- (c) Its centre of main interest is located in France because its registration, stores, customer-base and majority of employees lead to a presumption of COMI.
- (d) Its centre of main interest is located in the Netherlands because online customers lead to a presumption of COMI.

Total : 10/10

### QUESTION 2 (direct questions) [10 marks]

#### Question 2.1 [maximum 2 marks] 2/2

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. Proceedings covered by the scope of the EIR 2015 should include proceedings promoting the rescue of economically viable debtors, especially at a stage where there is a mere likelihood of insolvency.

Statement 2. Pending lawsuits are not covered by the effects of the *lex concursus* in insolvency proceedings.

Statement 1: Article 1 of the EIR Recast deals with the material scope of the regulations around business to whom the regulations apply. The move from EIR 2000 to EIR Recast broadens the coverage to include businesses that are likely to be restructured thus bringing regulations in line with the general trend of promoting effective restructuring for the benefit of the economy and affected persons.

Statement 2: Article 7(2) of EIR Recast deals with the *lex concursus* dealing with a number of subject matters including the effects of proceedings brought by creditors. The exception is that of pending lawsuits which is dealt with separately under Article 18 of the EIR Recast.

**Question 2.2 [maximum 3 marks] 3/3**

The EIR Recast's objective remains, as much as possible, the universality of proceedings. However, several exceptions to this universal vision exist throughout the Regulation. Provide **three (3) examples** of provisions from the EIR Recast which depart from a universal approach to cross-border insolvency.

Article 8 to 18 of the EIR Recast provides exceptions to the general rule of application of *lex concursus*.

Article 13 (entitled "Contracts of Employment") states that the effect of insolvency proceedings on employment contracts shall be governed by the law of the Member States. This protects employees and jobs aligning with Member States objectives.

Article 8's exception states that the opening of proceedings in the Member States does not affect the rights *in rem* of creditors in relation to assets belonging to the debtor in that Member State.

Article 18 refers to pending lawsuits. This allows lawsuits that are pending to reach a conclusion (or suspension) depending on the specific laws of the Member State.

**Question 2.3 [maximum 3 marks] 2/3**

The EIR Recast regulates the material scope of the Regulation in relation to national insolvency proceedings in Member States. List **three (3) elements** of the EIR Recast that deal with this matter and explain how they relate to this.

[Article 1 of the EIR Recast deals with the proceedings of the Member States with the objective of ensuring efficiency and effectiveness.

The EIR Recast has extended beyond the traditional liquidation proceedings and now includes provisions for rescuing economically viable businesses as is the trend in European countries.

Annex A lists the proceedings covered by the EIR Recast. Proceedings listed here are enjoy the benefit of automatic recognition in other Member States.

When Member States are with to introduce new policy these procedures listed in Annex become guidance for national policy makers.]

[Article 1 and Annex A. You were meant to list three elements.]

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

It is widely accepted that the opening of secondary proceedings can hamper the efficient administration of the debtor's estate. For this reason, the EIR Recast has introduced a number of legal instruments to avoid or otherwise control the opening, conduct and closure of secondary proceedings. Provide **two (2) examples** of such instruments and briefly (in one to three sentences) explain how they operate.

[Article 36 deals with the “synthetic” or “virtual” secondary proceedings. The Article allows the administrators in the main proceedings to assure the creditors of the secondary location that their claims will be dealt with in terms of the local laws and that a formal proceeding is not necessary. This approach is a practical and commercially driven solution empowering administrators to implement assurances.

EIR Recast also allows for a “stay of opening of secondary procedures” to give the administrators and creditors time to negotiate restructuring deals. In terms of Article 38 the insolvency practitioner needs to make a request. This is not automatic. This stay is limited to 3 months and must have suitable measures to protect the creditors.]

Total: 9/10

### 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] 2.5/5

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)?

[EIR Recast was adopted in 2015 after 15 years after adopting EIR2000. EIR 2000 was considered successful but after 15 years needed some modification in order to iron out some of the nuances and take into effect the changing trends.

Article 1 deals with the scope of the regulations and extends the regulations from the ‘traditional’ liquidation-oriented procedures to encompasses the need to apply the regulations to rescuing economically viable but distresses businesses.

Annex A (referred to in point 4 of Article 2) lists all the names of the insolvency procedures across the 27 countries covered by the EIR Recast. (Annex A already existed before) If the country’s regulations are listed, they automatically fall within the material scope of the EIR Recast. This provides the necessary recognition and enforcement of the Member States legislature. These regulations also form a knowledge base for policy makers in other Member States when drafting policy.

EI Recast defined the jurisdiction in which the main proceedings are opened as well as how and when the secondary proceeding are dealt with. This includes the definition of the COMI (centre of main interest) as well as stays on opening secondary proceedings as well as dealing with ‘virtual’ or ‘synthetic’ secondary proceedings. This is all done in order to make the secondary proceedings more flexible and less prone to manipulation.

EIR Recast also provides a list of exceptions, these being within the boundaries of *lex concursus* (that being laws of a Member State that apply to proceedings) (Some of these already existed under EIR 2000). These include rights of creditors, lodging procedures, bearer of costs, distribution of proceeds etcetera. The exception to the general rule of *lex concursus*, are dealt with in specific articles (such as Article 13 on contracts of employment) that consider for example the protection of vulnerable parties.]

You could have mentioned the need to regulate group insolvencies and to be more transparent with information published (i.e. the need for registers).

#### Question 3.2 [maximum 5 marks] 3/5



The concept of the “centre of main interest” has been both praised and criticised by EU institutions, academics, and practitioners. List **two (2) praises and / or shortcomings** and explain why they are considered praises / shortcomings.

[The COMI (centre of main interest) defines the jurisdiction in which a main proceeding would be launched. While EIR 2000 did not contain a definition of COMI it did provide guidance. EIR Recast mandates that the COMI is where the debtor conducts administration on a regular basis. This definition is backed by settled case law of the CJEU (Eurofood IFSC Ltd). Several presumptions were also made, one being the where the registered office is located (this being presumed to be the location of the centre of main interest), subject to the ‘suspect period’ innovation. The introduction of ‘suspect period’ is an innovation of the EIR Recast to create safeguards against manipulation of registered offices changing prior to formal insolvency filing.

The benefit of having a clear-cut COMI is to reduce complexity and provide certainty to the creditors on the regulations that apply to an insolvent debtor. Parties can plan and manage risk effectively in a cost-efficient manner.

Debtors will however attempt to manipulate the COMI definition in order to find a more ‘friendly’ jurisdiction that gives the debtor a better outcome (often called ‘Forum Shopping’).] **You said above that the introduction of a “suspect period” is an innovation to safeguard against forum shopping. So, what the “suspect period” a positive innovation or a failed attempt?**

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

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 on Preventive Restructuring (“Directive”) aims to set the minimum standards across Member States that enables debtors in financial difficulty to avoid insolvency by embarking upon a restructure. EIR Recast only comes into effect once the debtor declares itself insolvent – the definition of which is not covered under the EIR Recast but is defined within the individual Member States. EIR is a regulation that governs jurisdiction, process and procedures and recognition in an effort to have creditors treated fairly across Member States. The Directive is more focused on pre-insolvency and is a framework (not a regulation) that promotes restructuring over insolvency.

The EIR Recast is a regulation, backed up by court rulings, that provide the basis on which there is a uniform application of the regulations. The aim is for clear and predicable cross-border insolvency proceedings. The Directive is a framework which Member States can adopt within their own laws with the purpose of providing debtors with an approach once they approach insolvency. There are minimum requirements that must be met and the individual Member States are responsible for the implementation thereof.]

**Total: 10.5/15**

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

#### **Scenario**

Dinosaurus SARL is a company selling children stuffed animals. It is incorporated in France and has opened its first store in La Flèche in 2015 and another 10 stores across France since. 80% of its

employees work in France. It also has an office in Cork, Ireland, as well as three stores around Ireland. 20% of its employees are located in Ireland. Its main warehouse is in Spain. Most of its customers come from France, and some online purchases are coming mainly from the United Kingdom.

In 2020, Dinosaurus SARL entered into a loan agreement with a Spanish bank because it was hoping to expand its reach onto the Spanish children toys 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 Dinosaurus SARL, the timing of this initiative coincided with the Covid-19 pandemic which hit the world in 2020. By 2021, the company was in financial difficulty, yet managed to keep afloat for another two years. On 20 June 2023, it filed a petition to open safeguard proceedings in the Commercial Court in Le Mans, France.

**Question 4.1 [maximum 5 marks] 0/5**

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 EIR 2000 apply to this case and to the opening of safeguard proceedings?***

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

[EIR 2000 prescribes that the laws of the State in which insolvency proceedings were opened determine the effects of such proceedings (Article 4 of the EIR2000). This law applied to the applied to the powers of the debtor and liquidator, ranking of creditors claims and the effect of the proceedings on contracts and creditors rights on conclusion of the insolvency proceedings. Secondary proceedings were allowed but limited to the assets within that geographical scope. Article 16, 17 and 25 of the EIR 2000 prescribed automatic recognition of judgements opening insolvency proceedings and their effects. This *lex concursus* is applied in the country of recognition.

]

Your answer is unclear. It was meant to be a yes or no answer.

The Commercial Court in France does not have international insolvency jurisdiction to open insolvency proceedings.

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. The place of the registered office shall be presumed to be the COMI in the absence of proof to the contrary = France.

**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] 0.5/5**

Assume that the timeline is as explained in the original scenario above and that the French High Court opens safeguard proceedings on 23 June 2023.

***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.

[EIR Recast does apply to the proceedings. The COMI (centre of main interest) is in France. This is defined by the location in which the main administrative activities of the business occur. Article 3(1) states that the court of the Member State on the main interests shall have the jurisdiction to open proceedings. The EIR Recast contains a registered office presumption i.e. the insolvent company's COMI is where the office is registered and can only be rebutted if there it is a 'letterbox company' (where the administrative office is objectively different). This is backed up by the CJEU case of *Interedil Srl v Fallimento* where the courts held that where bodies of management and supervision of the debtor were at the same place as the registered office that was deemed the centre of main interest. 'Forum Shopping' is a term used where debtors try and manipulate the COMI in order to achieve a more favourable jurisdiction. The regulations have been put in place to try and ensure consistency and predictability in the launching of proceedings. As such the French courts can open liquidation proceedings for Dinosaurus SARL.

Secondary proceedings can be opened in Spain and Ireland, where Dinosaurus SARL have offices. The proceedings in these Member States can be delayed (stay of opening procedures) or could be 'virtual' or 'syntetic' – where commercially driven agreements between the debtor and creditor are entered into in order to give creditors assurances.]

Your answer is incomplete.

The EIR Recast will be applicable. The logical order of the steps to be taken is the following:

- Article 3(1) EIR Recast. COMI of Dinosaurus SARL is in the EU (and not in Denmark), i.e. in France (as stated in the answer to Question 4.1.). YES
- Article 1(2) EIR Recast. Dinosaurus SARL is not a credit institution, insurance undertaking or any other 'excluded' entity. YES
- Article 2(4), Recital 9, Annex A EIR Recast. The opened proceeding 'Safeguard' is listed in Annex A to the EIR Recast. YES
- Article 2(7), 84(1), 92 EIR Recast. The proceedings in question were opened on 23 June 2023, i.e. after the EIR Recast has entered into force. The filing date is not determinative for the temporal scope. YES

**Question 4.3 [maximum 5 marks] 2/5**

A Spanish bank files a petition to open secondary insolvency proceedings in Spain with the purpose of securing a Spanish 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.

[For the purposes of answering the question I will assume the question is opening in 'Spain' and not Italy. Should the question be Italy the answer is No. Italy doesn't feature in the organogram of the company. They have no operations in Italy and thus can't deem any operations, whether COMI or secondary in Italy.

On the basis that the question should have read Spain the answer is Yes. Spain would fall under the definition of Article 3(2) of EIR Recast where a 'secondary' or 'territorial' insolvency procedure is permitted. These are permitted when a debtor has an establishment rather than its COMI in a Member State. An establishment is defined according to Article 2(10) as a place where the debtor carried out a non-transitory economic activity with human means and assets. It's clear that both Italy and Ireland fall into that category. Secondary proceedings are restricted to the assets within that State and creditors are protected in that State by the local proceedings as governed by the *lex concursus* of that State.

Secondary proceedings provide a supporting role to the main proceedings and are therefore generally opening after the main proceedings (with exceptions). The intention of the secondary proceedings is to provide creditors certainty around their ability to share in the distributions on the basis of the local laws within that state. 'Syntetic' or 'virtual' secondary proceedings are permitted – this occurs where commercially driven agreements between the debtor and creditor are entered into in order to give creditors assurances. This pragmatic approach underpinned by Article 36 allow for centralization of control over major decisions affecting the debtor but also safeguards the rights of the creditor under relevant local laws.]

While some of your reasoning is correct – and you were right to focus on Spain, your 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 Dinosaurus SARL in Spain. 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 Spain.

Total: 2.5/15

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

**Total: 32/50**