



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2B

THE EUROPEAN INSOLVENCY REGULATION

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

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

NOTE: Points (a) and (b) are identical so I have marked them both as correct.

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”).

The answer was D.

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: 9/10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks] 1/2

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 relates to proceedings promoting the rescue of economically viable debtors, especially at a stage where there is a mere likelihood of insolvency. The correct provision/concept is "Rescue proceedings at the stage of likelihood of insolvency", as outlined in Article 1(2) of the EIR Recast. This is supported by the document's emphasis on the EIR Recast which extends not only to traditional liquidation-oriented procedures but also to proceedings aiming at rescuing economically viable but financially distressed businesses, including those providing for a stay of individual creditors' actions to protect the general body of creditors.

Statement 2 discusses the handling of pending lawsuits in the context of insolvency proceedings, which is not affected by the *lex concursus*. The relevant provision/concept is the "Effects of insolvency on pending lawsuits" covered by Article 32 of the EIR Recast. This article covers the recognition of insolvency-related judgments concerning the course and closure of insolvency proceedings and compositions approved by the court. These judgments are recognized automatically once they become effective in the original venue.

[It is Article 18]

Question 2.2 [maximum 3 marks] 1/3

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.

- Territorial scope of secondary proceedings: the assets situated in the Member State in which they are initiated are the exclusive territory of secondary insolvency proceedings. This limitation departs from the common practice of having a single insolvency estate by establishing a distinct insolvency estate that is cut off from the main insolvency proceeding. [Article?]
- Establishment requirement: only in Member States where the debtor maintains an establishment may secondary proceedings be initiated. Instead of using a purely universal strategy based on the debtor's COMI, this requirement links the initiation of secondary proceedings to the existence of an establishment in a particular Member State. [Article?]
- Distinct goals of main and secondary procedures: main insolvency procedures have a rehabilitation goal, whereas secondary procedures might have a liquidation goal. The divergent goals of primary and secondary proceedings may cause inconsistencies and conflicts in the management and results of the insolvency process, thereby departing from a standard procedure for all proceedings. [Article?]

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.

1. Secondary or territorial insolvency proceedings (Article 3.2): **[This is not about the material scope].**

- While emphasizing the concept of main proceedings with global consequences, the EIR Recast permits secondary or territorial procedures in a Member State where the debtor has an "establishment" (not necessarily its COMI).
- This establishes an exception to universality because these secondary procedures focus on local interests and assets, applying the lex fori concursus (law of the forum court) rather than globally following the primary proceedings.

2. Third-Party rights in Rem (Article 8)

- The EIR Recast protects creditors' and third parties' rights in rem (real rights) in assets located outside of the main proceedings' jurisdiction.
- This provision departs from universality by ensuring that these rights are subject to the law of the asset's location (lex situs) and are unaffected by the commencement of insolvency proceedings in another jurisdiction.

3. Exceptions to the recognition of foreign judgments (Article 19):

- Although the EIR Recast promotes the recognition and enforcement of foreign insolvency judgments, it also allows for exceptions based on public policy or irregularities in the foreign proceedings.
- This recognizes the limitations of universality and emphasizes the ability for local legal systems to prioritize their own public agendas and procedural safeguards in specific circumstances.

Question 2.4 [maximum 2 marks] 1/2

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

1. Undertakings (Article 36)

Insolvency practitioners in the main proceedings may provide an undertaking to the court in a prospective secondary jurisdiction. This pledge ensures that local creditors receive fair treatment, addressing their concerns within the main procedures and potentially avoiding the need for a separate secondary process.

If the court determines that the undertaking effectively protects local creditors' interests, it may waive secondary actions, simplifying the whole process.

2. Coordination of secondary proceedings (Article 29): **[Article 29 is about the registration in public registers of another Member State]**

This clause enables courts to coordinate secondary proceedings with primary proceedings in another member state. This coordination can include activities such as sharing information, holding joint meetings, and even harmonizing specific components of the procedures.

The instrument intends to promote effective administration of the debtor's estate by encouraging communication and collaboration across courts, while eliminating potential conflicts or inconsistencies that may arise from separate proceedings in different jurisdictions.

Total: 5/ 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] 4/5

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)?

- Clarification and improvement of definitions - to maintain uniformity and predictability across jurisdictions, key phrases such as "centre of main interests (COMI)" and "insolvency" must be defined more clearly.
- Improvements to cooperation and communication - the old system lacked channels for effective communication and collaboration between courts and bankruptcy practitioners, resulting in inefficiencies and potential conflicts.
- Addressing issues related to group insolvency - the difficulties of insolvency processes involving corporate groupings with entities in different jurisdictions necessitated specific provisions for effective coordination and equitable treatment of creditors.
- Streamlining procedures - concerns about lengthy procedures in cross-border cases motivated initiatives to streamline processes, remove formalities, and encourage efficient administration while preserving safeguards and creditors' rights.
- Incorporating CJEU case law - the new regulation sought to conform with CJEU judgments, resolving gaps or ambiguities and ensuring consistency with the Court's interpretations.
+ expanding the scope of the Regulation to encompass rescue procedures.

Question 3.2 [maximum 5 marks] 5/5

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.

1. Praises:
 - a. The COMI establishes a standardized approach to determining the competent court, discouraging strategic jurisdictional manipulation (forum shopping) and fostering predictability for transnational businesses. This clarity is critical for stakeholders, allowing them to anticipate the relevant legal framework and forum for insolvency proceedings.
 - b. By identifying the primary jurisdiction based on COMI, the concept allows for a universal approach to insolvency, ensuring comprehensive administration of the debtor's assets and liabilities across the EU. This promotes the principle of equitable treatment of creditors and improves the efficiency of cross-border proceedings.

2. Shortcomings:

- a. Determining COMI can be difficult in situations with dispersed activities across multiple countries. Employee, customer, and creditor locations may not be concentrated in a single member state, resulting in complexities and potential disputes over the appropriate forum.
- b. In certain situations, the COMI may not precisely represent the actual economic center or the place where the majority of value is created, which could lead to inefficiencies and inconvenience. The conduct of proceedings in a location that may not be convenient for certain stakeholders may result in inefficiencies and increased costs.

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 EIR discusses the mechanics of cross-border insolvency proceedings, whereas the Directive focuses on facilitating and standardizing preventive restructuring measures within individual member states. Both seek to improve cross-border insolvency and restructuring within the EU; however, they differ in two keyways:

1. Focus:

- EIR focuses on cross-border insolvency procedures and procedural harmonization. It seeks to establish efficient administration and collaboration in cases involving debtors, assets, or creditors from multiple EU countries.
- Directive: Identifies preventive restructuring frameworks within individual member states and seeks to standardize substantive aspects of these measures. It encourages early intervention and restructuring to help financially distressed companies avoid bankruptcy.

2. Objectives:

- EIR seeks to establish a standardized framework for the jurisdictional and procedural aspects of cross-border insolvency proceedings. Its goals include:
 - Identifying the relevant court's jurisdiction
 - Recognize and enforce insolvency decisions among member states.
 - Facilitating collaboration and cooperation between courts and insolvency professionals in cross-border cases.
- The directive aims to standardize national insolvency laws in terms of preventive restructuring instruments and frameworks. Its primary objectives include:
 - Encourage member states to establish procedures for the early restructuring of financially challenged businesses.

- Establishing consistent debt discharge procedures for honest entrepreneurs.
- Introducing procedures that may prevent directors from being disqualified in specific cases, allowing them to continue working and potentially contribute to the business's turnaround.

Total: 14/15

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] 5/5

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.

The EIR 2000 does not apply to Dinosaurus SARL's safeguard proceedings because they are restructuring efforts that do not include the collective divestment of the debtor's assets or the appointment of a liquidator, as required by the regulation and supported by CJEU case law.

1. Scope of EIR 2000: The EIR 2000, technically known as Council Regulation (EC) No. 1346/2000, governs cross-border insolvency procedures in the European Union. It is intended to apply to insolvency proceedings including the partial or complete divestiture of a debtor and the appointment of a liquidator. However, safeguard procedures, such as those sought by Dinosaurus SARL, aim to restructure the debtor in order to avoid insolvency and do not always require the debtor's divestiture or the appointment of a liquidator. Such proceedings are expressly excluded from the scope of the EIR 2000, as stated in Recital (7) of the Regulation, which clarifies that the regulation is intended to cover proceedings with a collective impact

on creditors, excluding those aimed solely at the debtor's restructuring without affecting creditors in the same way as liquidation proceedings.

2. CJEU Jurisprudence: In Case C-304/13, the CJEU reaffirmed that restructuring actions that do not result in total debtor divestiture do not fall under the EIR 2000. This jurisprudence strengthens the idea that the EIR 2000 is intended for actions that have a collective impact on the debtor's creditors, as opposed to restructuring or safeguard processes that are concerned with the debtor's existence and continuity.

Question 4.2 [maximum 5 marks] 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.

Given the broader scope of the EIR Recast compared to the EIR 2000, the nature of Dinosaurus SARL's safeguard proceedings, the company's COMI in France, and the timing of the proceedings, the EIR Recast governs the safeguard proceedings opened by the French High Court for Dinosaurus SARL. The analysis of the EIR Recast's scope, Annex A for specific inclusion, and the procedural steps outlined, all point towards the applicability of the EIR Recast to the safeguard proceedings initiated by Dinosaurus SARL on 23 June 2023

Steps to be taken:

- Type of Proceedings: The EIR Recast applies to collective proceedings based on insolvency laws that include goals such as rescue, adjustment of debt, reorganization, or liquidation. French safeguard proceedings, aimed at restructuring to prevent insolvency, align with these goals, suggesting their inclusion under the EIR Recast's scope.
- Annex A Inclusion: A definitive determination of the EIR Recast's applicability requires checking if French safeguard proceedings are specifically listed in Annex A of the EIR Recast. This annex enumerates the proceedings covered by the regulation across member states.
- Centre of Main Interests (COMI): The EIR Recast applies when the debtor's COMI is within the EU. Given Dinosaurus SARL's substantial operations and employee base in France, France likely represents the company's COMI, making the proceedings fall within the EIR Recast's jurisdiction.
- Personal Scope: The EIR Recast applies to debtors that are not excluded entities like banks. Dinosaurus SARL, a company selling children's stuffed animals, falls within the personal scope of the EIR Recast.
- Material Scope: The inclusion of safeguard proceedings within the material scope of the EIR Recast, especially considering the regulation's extension to pre-insolvency restructuring efforts, further supports its applicability.
- Temporal Scope: The safeguard proceedings for Dinosaurus SARL, initiated on 23 June 2023, fall within the temporal scope of the EIR Recast, which applies to proceedings opened after 26 June 2017.

Question 4.3 [maximum 5 marks] 3/5

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.

Secondary insolvency proceedings can be initiated in Spain under the European Insolvency Regulation (EIR) Recast, based on an analysis of the EIR Recast and taking Dinosaurus SARL's specific scenario into account. The EIR Recast, also known as Regulation (EU) 2015/848, applies to insolvency proceedings with cross-border implications within the EU. It seeks to improve the efficiency and effectiveness of insolvency proceedings involving companies with assets or operations in more than one EU Member State, allowing creditors and courts to better coordinate.

1. The applicability of EIR Recast to secondary proceedings:

- Under the EIR Recast, secondary insolvency proceedings can be initiated in any EU Member State where the debtor has a presence. The term "establishment" refers to the presence of a location where the debtor engages in non-transitory economic activity using human resources and goods (Article 2(10) of the EIR Recast). Dinosaurus SARL's main warehouse is in Spain, so it qualifies as an establishment, allowing secondary insolvency proceedings to be initiated in Spain.
- Secondary proceedings can be opened to protect creditors' local interests or to realize assets in that Member State. Given Dinosaurus SARL's significant operations and assets in Spain, a Spanish bank's petition to open secondary proceedings there, with the goal of obtaining a Spanish insolvency distribution ranking for its claims, is consistent with the EIR Recast.
- The EIR Recast ensures that insolvency proceedings opened in one Member State are recognized in all other Member States (except Denmark), facilitating the efficient administration of assets and liabilities across borders. This means that secondary proceedings in Spain would be recognized and could run parallel to the main proceedings in France, with coordination between the proceedings as necessary.

2. References to the applicable law and CJEU jurisprudence:

- Specifying when and how secondary proceedings may be initiated, the regulation establishes the legal framework for cross-border insolvency proceedings within the European Union. [(EU) Regulation 2015/848 (EIR Recast)].
- The Court of Justice of the European Union (CJEU) has consistently interpreted the provisions of the EIR to facilitate the smooth functioning of cross-border insolvency proceedings, emphasizing the importance of protecting local creditors and realizing assets in a manner that respects the diverse legal environments of the Member States.

Ultimately, under the EIR Recast, the Spanish bank may open secondary insolvency proceedings in Spain against Dinosaurus SARL. These proceedings seek to protect the rights of local creditors and ensure the orderly realization of the debtor's assets in Spain, in accordance with the EIR Recast's overarching goals of harmonizing cross-border insolvency proceedings across the EU.

Given that Dinosaurus SARL's operational activities and establishments are located in France, Ireland, and Spain, with no mention of any operations or assets in Italy, secondary insolvency proceedings

under the EIR Recast could not be justified in Italy based on the scenario presented. The Spanish bank's petition would be relevant to Spain, given the company's main warehouse and financial dealings with Spanish entities, not Italy.

While a lot of your reasoning is correct, the answer is not correct.

- 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: 13/15

*** END OF ASSESSMENT ***

Total: 41/50