



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.**
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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.

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: The concept of restructuring and corporate rescue – Expressly referred to at preamble paragraph (10) and Article 1 of EIR 2015

Statement 2: The exception to the rule that *lex concursus* determines the effects of insolvency proceedings on proceedings brought by individual creditors. This is referred to at paragraph (73) of the Preamble to and Article 18 of the EIR 2015 which subjects the effects of insolvency to the law of the Member State in which the lawsuit is pending (*lex fori processus*) or in which the arbitral tribunal is seated (*lex loci arbitri*).

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.

(1) An exception to the general rule of applying the *lex concursus* (which is a departure from the universal approach) can be found in Article 13 of the EIR Recast (entitled "Contracts of employment"), which states that the effects of insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the Member State applicable to the contract of employment (*lex contractus*). This is acknowledged in Recital (22) as a special rule to address the impracticability of introducing insolvency proceedings with universal scope throughout the Union.

(2) As similarly recognised in Recital (22) of the EIR Recast, Article 8 of the EIR Recast provides an exception to the general rule of application of *lex concursus* and is another special rule to address the impracticability of introducing insolvency proceedings with universal scope throughout the Union. Under this exception, the opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, movable or immovable assets, both specific assets and collections of indefinite assets as a whole which change from time to time, belonging to the debtor and which are situated within the territory of another Member State at the time of the opening of proceedings. Thus, rights in rem are entirely insulated from the effects of the opening of insolvency proceedings. The proprietor of a right in rem should therefore be able to continue to assert its right to segregation or separate settlement of the collateral security (Recital 68 of the EIR Recast). Such a right can still be affected, however, by the opening of secondary insolvency proceedings.

(3) As per Article 16 Recitals paragraphs 23, 37-52 (and others) and Chapter III of the EIR Recast, in order to protect the diversity of interests and mitigate difficulties arising from divergent national laws, the EIR Recast allows for the opening of secondary proceedings, which run in parallel to main insolvency proceedings and produce effects only on assets situated within a state of secondary proceedings (Recital 23). Mandatory rules of coordination with the main insolvency proceedings satisfy the need for unity in the EU but this is still a departure from the universal approach.

Question 2.3 [maximum 3 marks] 1/3

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) Under Recital 9 of the EIR Recast, in respect of the national procedures contained in Annex A to EIR 2015, it is explained that the EIR 2015 should apply without any further examination by the courts of another Member State as to whether the conditions set out in the regulation are met. National insolvency procedures not listed in Annex A are therefore not covered by the EIR Recast.
- (2) Recital 22 of the EIR Recast provides that national proceedings covering only assets situated in the State of the opening of proceedings should also be allowed alongside main insolvency proceedings with universal scope. This is developed in Recital 23 whereby the EIR Recast allows for the opening of secondary proceedings, which run in parallel to main insolvency proceedings and produce effects only on assets situated within a state of secondary proceedings. **[This is not material scope].**
- (3) Some entities are explicitly excluded from the personal scope of the EIR Recast. Thus, according to Article 1(2) of the EIR Recast, it does not apply to proceedings that concern: (a) insurance undertakings, (b) credit institutions, (c) investment firms and other firms, institutions and undertakings to the extent that they are covered by Directive 2001/24/EC, or (d) collective investment undertakings. The listed entities are subject to special arrangements and national supervisory authorities have wide-ranging powers of intervention in the event of their insolvency (Recital 19 of the EIR Recast). This is dictated by the importance of such institutions for the EU financial system as a whole and the need for special measures to minimise the negative effects of their failures, particularly acute in the wake of the global financial crisis. **[This is the temporal scope of the Regulation, not material scope].**

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.

- (1) Synthetic Secondary Proceedings: Pursuant to Article 38(2) of the EIR Recast, where the 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 it is satisfied that the undertaking adequately protects the general interests of local creditors. If an undertaking is given in full compliance with Article 36 of the EIR Recast and if it adequately protects the general interests of local creditors, the court seized of a request to open secondary insolvency proceedings must not open such proceedings (Article 38(2) of the EIR Recast).
- (2) Temporary Stay of Secondary Insolvency Proceedings: the EIR Recast provides for the possibility for the court to temporarily stay the opening of secondary insolvency proceedings, when a temporary stay of individual enforcement proceedings has been granted in the main insolvency proceedings. The stay of the opening of secondary proceedings therefore preserves the efficiency of the stay granted in the main insolvency proceedings (Recital 45 of the EIR Recast).

Total: 8/10

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] 5/5

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)?

While the EIR 2000 was generally regarded functioning well in general, the European Commission recognised in the creation of EIR 2015 that it "would be desirable to improve the application of certain of its provisions in order to enhance the effective administration of cross-border insolvency proceedings" (Recital (1)).

The European Commission identified that it should respond to the need of insolvency practitioners by:

1. broadening the scope of EIR 2000 to include restructuring proceedings,
2. introducing stronger rules for co-operation between insolvency practitioners and courts,
3. considering the possibility of proceedings with regard to members of the same group of companies (see Recital (6) below),
4. improving provisions relating to creditor information and the interconnectivity of insolvency registers; and
5. Introducing provisions to generally modernise the legal rules (including addressing recent developments such as the need for data-protection).

The preamble at recital (6) to EIR 2015 also outlines the need for the Regulation to include provisions on the coordination of insolvency proceedings which relate to the same debtor or to several members of the same group of companies (which was not a matter identified in EIR 2000).

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.

Two Praises:

(1) COMI is beneficial in that it allows for the practical recognition of where a company operates by reference to its centre of main interest and not necessarily where a company is incorporated. In an EU context, it allows for companies outside of the EU to be subject to EIR 2015 provided that company has its COMI in a Member State (other than Denmark). The alternatives to COMI do not have this flexibility.

(2) Those in favour of COMI would argue that the autonomous meaning of COMI facilitates legal certainty across the EU as, in principle, its application must be uniform in all Member States. Legal certainty and foreseeability for all stakeholders dealing with the debtor, if it goes insolvent, is further encouraged by the objectivity and ascertainability of the place of COMI. In order to make COMI even more predictable, the EIR Recast contains a registered office presumption, namely that the insolvent company's COMI is presumed to be the jurisdiction (of the country) where such company has been registered. This presumption can be rebutted

only if the objective factors indicate that the administration of the debtor's interest happens in a state different from the state of the registered office (for example, in the case of a "letterbox" company).

Two Shortcomings:

- (1) Those who criticise COMI argue that it is vague and the interpretations of it did not provide enough guidance to provide a reliable practical test. As a result, creditors may price in risk and uncertainty when dealing with insolvency, resulting in higher capital costs, which is a shortcoming as it goes against the objective of increasing economic activity within the EU and among Member States. This could also jeopardise legal certainty and predictability, contrary to its objectives.
- (2) Critics of the concept contend that the COMI concept, as envisioned in the EIR Recast, is open to arbitrage and manipulation so could potentially be abused by both creditors and debtors to suit their own needs. One particular concern is where practitioners actively seek to shift the centre of main interest to what they believe to be a more favourable jurisdiction for an insolvency proceeding. This is clearly a shortcoming as may be abused to the detriment of the debtor's general body of creditors. The CJEU has sought to address these concerns by interpreting the COMI test in its decisions of Eurofood IFSC Ltd and Interedil.

Question 3.3 [maximum 5 marks] 1.5/5

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.

- (1) The objective of the Directive is to promote harmonization of preventative restructuring only, i.e. measures to prevent or avoid insolvency. The objective of the Regulation on the other hand is harmonise insolvency procedures between the Member States (No, it is not. The Directive is a minimum harmonisation instrument which does harmonise some substantive aspects of insolvency law, i.e. preventive restructuring mechanisms. The Regulation does not harmonise substantive insolvency law; instead, it sets out rules to determine which country has jurisdiction over a cross-border case).
- (2) The Directive's harmonization method is to impose minimum standards for preventive restructuring mechanisms, whereas the Regulation does not impose any minimum standards but rather applies procedural rules in relation to insolvency proceedings that fall within its temporal, personal, material and geographical scope.

Total: 11.5/15

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] 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.

It does not have jurisdiction as safeguard proceedings are not listed in Annex A of EIR 2000 and thus do not constitute "insolvency proceedings" as referred to in Article 2(a) of EIR 2000. Such proceedings are included in Annex A of EIR Recast (see below).

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.

Firstly, it is necessary to look for the "centre of the debtor's main interest" (Article 1(1) of the EIR Recast), ie the debtor's COMI. The EIR Recast applies only when the debtor's COMI is located within the EU (excluding Denmark). The EIR Recast mandates that the centre of main interest shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties (Article 3(1) of the EIR Recast). The CJEU in *Eurofood IFSC Ltd* (Case C-341) held that the term COMI must be identified by reference to criteria that are both objective and ascertainable by third parties (paragraph 33). Ascertainability or visibility by third parties (mainly creditors) is closely related to the time factor. In other words, the activity of the debtor in a particular Member State should be regular and lasting to create COMI. In the hypothetical case, the COMI of Dinosaurus SARL is likely to be in France, which is an EU Member State. Thus, the requirement of the geographical scope is satisfied.

Secondly, one needs to check whether the personal scope of the EIR Recast is complied with. As Dinosaurus SARL is neither a bank, nor any other excluded" entity, it falls within the personal scope of the EIR Recast.

Thirdly, in order to fall within the scope of the EIR Recast, an insolvency proceeding has to be listed in Annex A (material scope). The proceeding of "sauvegarde" is mentioned in Annex A which appears to relate the safeguarding proceedings that were commence. If so, it falls within the material scope of the EIR Recast.

Fourthly, temporal scope must be checked. This scope requires that the insolvency proceeding is opened after 26 June 2017 (the entry of the EIR Recast into force). The facts of the case indicate that the insolvency proceeding in question was opened on 20 June 2023, which is within the temporal scope of the EIR Recast.

Having studied the facts of the case against the background of the EIR Recast, we can conclude that the EIR Recast is applicable to the insolvency proceeding opened against Dinosaurus SARL.

Question 4.3 [maximum 5 marks] 5/5

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.

According to Article 3(2) of EIR Recast, secondary proceedings are permissible in a Member State where the debtor has an "establishment" rather than its COMI. According to Article 2(10) of the 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.

This concept of "establishment" was examined by the CJEU in *Interedil*, and based on the facts provided in the hypothetical case, it does not appear that secondary proceedings could be opened in Italy as there is no evidence the company has an establishment in Italy.

Total: 15/15

*** END OF ASSESSMENT ***

Total: 44.5/50