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**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**.

6.1If 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:

1. True, before the EIR 2000, the EU has not sought to harmonise the insolvency laws of EU Member States.
2. False, there was another EU Regulation regulating insolvency law at EU level before the EIR 2000.
3. False, an EU Directive regulating insolvency law at EU level existed before the EIR 2000.
4. 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:

1. 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.
2. 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.
3. 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.
4. 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?

1. 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.
2. The EIR 2000 was generally regarded as an unsuccessful instrument in the area of European insolvency law by the EU institutions, practitioners and academics.
3. 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.
4. 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*?

1. The EIR Recast is a copy of the EIR 2000. Its structure and the wording of all articles are similar.
2. 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.
3. The EIR Recast has not added any new concept to the text of the EIR 2000.
4. 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?

1. 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.
2. 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.
3. 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.
4. 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?

1. The ECJ has provided a definition of “insolvency” in recent case law.
2. The European Commission has provided a definition of “insolvency” in its Recommendation on a “New Approach to Business Failure” published in 2014.
3. Each Member State will define “insolvency” in national legislation.
4. 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?

1. Article 18 EIR Recast (entitled “Effects of insolvency proceedings on pending lawsuits or arbitral proceedings”).
2. Article 40 EIR Recast (entitled “Advance payment of costs and expenses”).
3. Article 7 EIR Recast (entitled “Applicable law”).
4. 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”?

1. The concept makes it impossible for companies to move jurisdiction, which ultimately, may jeopardise their chances of rescue.
2. The concept does not have any equivalent in international instruments, which makes it difficult for international creditors to understand.
3. 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.
4. 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?

1. “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.
2. “Synthetic proceedings” means that for the case at hand, several main proceedings can be opened, in addition to several secondary proceedings.
3. “Synthetic proceedings” means that when secondary proceedings are opened, these are automatically rescue proceedings, as opposed to liquidation proceedings.
4. “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?

1. Its centre of main interest is located in Spain because the loan agreement will lead to a presumption of COMI.
2. Its centre of main interest is located in Ireland because the warehouse will lead to a presumption of COMI.
3. 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.
4. Its centre of main interest is located in the Netherlands because online customers lead to a presumption of COMI.

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

**Question 2.1 [maximum 2 marks]**

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.

[The statement 1 is regarding the provisions of Rescue Proceedings. The relevant portion of the EIR Recast is Recital 10 and Article 1. As per Recital 10, the scope of EIR Recast should extend to proceedings which provide for restructuring of a debtor at a stage where there is only a likelihood of insolvency, and to proceedings which leave the debtor fully or partially in control of its assets and affairs.

Also, it is evident from the wordings of the Article 1 that the EIR Recast extends not only to traditional liquidation oriented procedures but also to proceedings aiming at rescuing economically viable but financially distressed businesses.

**Statement 2** refers to the provision of Effects of insolvency proceedings on pending lawsuits or arbitral proceedings. As per article 7(2)(f) of the EIR Recast, the lex concursus determines the effects of insolvency proceedings brought by individual creditors, with the exception of pending lawsuits. This exception is dealt with in Article 18 of the EIR Recast. It prescribes that the effect of insolvency proceedings on pending lawsuits or pending arbitral proceedings concerning an asset or a right which forms part of rhe debtor’s insolvency estate, shall be governed solely by the law of the member state in which the lawsuit is pending or in which the arbitral tribunal has its seat.]

**Question 2.2 [maximum 3 marks]**

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.

[Its true that EIR Recast’s objective remains, as much as possible, the universality of proceedings. In this regard article 7(1) of the EIR Recast provides for the general rule, according to which the law applicable to insolvency and its effects shall be that of the Member State within the territory of which such proceedings are opened. This is called lex fori concursus or simply lex concursus. The general rule of Article 7 is followed by several exceptions or specific scenarios in Article 8 to 18 of the EIR Recast.

Following are three examples of provisions from the EIR Recast which departs from the universal approach to cross-border insolvency:

1. Third partis’ rights in rem –

Article 8 of the EIR Recast provides an exception to the general rule of application of lex concursus. Under this exception, the opening of insolvency proceedings shall not effect 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 changes 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 the insolvency proceedings.

The rationale behind Article 8 can be found in Recital 68 accordingly, 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.

1. Contracts of employment: Article 13 of the EIR Recast ( entitled “Contracts of employment “) states that the effect 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 an exception to the rule contained in article 7 (2)( e) of the EIR Recast, which attributes the effects of insolvency proceedings on current contracts to the lex concursus. The reasoning behind this special treatment of employment contracts is to protect employees and jobs ( Recital 72 of the EIR Recast).
2. Pending lawsuits or arbitral proceedings : The lex concursus determines the effects of insolvency proceedings brought by individual creditors, with the exception of pending lawsuits (Article 7(2)(f) of the EIR Recast). This exception is dealt with in Article 18 of the EIR Recast. It prescribes that the effect of insolvency proceedings on pending lawsuits or pending arbitral proceedings concerning as asset or a right which forms part of the debtor’s insolvency estate, shall be governed solely by the law of the Member State in which the lawsuit is pending or in which the arbitral tribunal has its seat. ]

**Question 2.3 [maximum 3 marks]**

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.

[Here are three elements of the EIR Recast that deal with the material scope of the Regulation in relation to national insolvency proceedings in Member State:

1. Article 1- Scope and Annex A-

Article 1 of the EIR Recast read in conjunction with Article 2 and Annex A, determines which national insolvency proceedings are subject to its regulation.

EIR Recast 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 creditor’s actions for the sake of protecting the general body of creditors (Recital 10).

Under Recital 9 of the EIR Recast, **in respect of the national procedures containing in Annex A,** it is explained that the EIR Recast 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. However, National insolvency procedures not listed in Annex A are not covered by the EIR Recast. It is clear that should a proceeding be mentioned in Annex A, it automatically (with no further examination) falls within the scope of the EIR Recast.

Therefore, the Element of Annex A being determinative factor for application of the EIR Recast, the definition of an insolvency proceeding in Article 1 loses its salience and becomes a guidance for national policy makers to consider introducing new national insolvency proceedings to annex A. This Annes base system, although rigid and somewhat inflexible, supplies efficiency, clarity and respect to the sovereignty of the EU Member States.

1. Article 3 – Opening of proceedings:

Article 3 addresses the opening of insolvency proceedings and determines which member state’s court have jurisdiction to open such proceedings. It establishes the principle that main insolvency proceedings should be opened in the Member State where the debtor has its center of main interest (COMI). This Article ensures that there is clarity regarding the jurisdiction of courts in opening insolvency proceedings and set out the criteria for determining the debtors COMI.

1. Article 2- Definitions:

Article 2 provides definitions of key terms used in the Regulation. It defines terms such as “insolvency proceedings “, “court” and “center of main interest” among others. These definitions are crucial for determining the applicability and interpretation of the Regulation, especially in relation to national insolvency procedures. For example, the definition of “insolvency proceedings” clarifies the types of proceedings covered by the Regulation, while the definition of “COMI” is fundamental for determining jurisdiction.

These elements ensure that the EIR Recast appropriately regulates the material scope of the Regulation in relation to national insolvency proceedings in Member States by defining the types of proceedings covered, establishing rules for jurisdiction, and providing clear definition of key terms.]

**Question 2.4 [maximum 2 marks]**

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.

[ The EIR Recast contains a number of options to avoid the opening of the secondary insolvency proceedings. The following are 2 such examples:

1. Right to give an undertaking (“Synthetic” secondary proceedings):

According 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.

Additionally, Article 35(5) of the EIR Recast prescribes that an undertaking must be approved by “known local creditors”.

1. Stay of the opening of secondary insolvency proceedings (Article 38(3) read with Recital 45 of the EIR Recast):

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. (Recital 45 of the EIR Recast).

However, the stay of the opening of secondary insolvency proceedings does not take place automatically (ex officio). It requires a request from the insolvency practitioner or the debtor in possession (Article 38(3) of the EIR Recast).]

**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]**

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)?

[Despite the general acknowledgement of the EIR 2000’s success, after 15 years of its existence it had became clear that some of its provisions needed adjustment, while other developments required totally new rules. Following main elements were identified by the European Commission as needing revisions within the framework of the Regulation:

1. Broadening of the Scope to restructuring proceedings:

The European Commission emphasized the importance of promoting rescue and rehabilitation of financially distressed businesses, This involved introducing mechanism to facilitate restructuring efforts and encourage the continuation of viable businesses, thus maximizing returns for creditors and preserving jobs. ( Article 1 read with Recital 10 of the EIR Recast). This emphasis on restructuring is a noticeable innovation of the EIR Recast.

1. Stronger rules for cooperation between insolvency practitioners and courts:

It must be noted that the EIR 2000 contained only one article mandating insolvency practitioners in main and secondary proceedings to communicate information to each other (Article 31 od the EIR 2000). In contrast, the EIR Recast introduces a comprehensive framework for co-operation and communication between insolvency practitioners 9Article 41 of the EIR recast), between courts 9Article 42 of the EIR Recast) and between insolvency practitioners and courts(article 43 of the EIR recast). Such a framework was required to enable the efficient deployment of the debtor’s assets and protection of creditor’s rights.

1. Possibility of proceedings with regard to members of the same group of companies:

The need to ensure the fair and efficient administration of cross-border insolvencies concerning enterprise group members and to guarantee protection and maximization of the overall combined value of the operations and assets of the enterprise group, has gradually drawn attention of World bank, International Insolvency Institute INSOL International, UNICITRAL and other standard-setting organizations. The matter was dealt in Eurofood IFSC Ltd also.

As opposed to the EIR 2000 and the Model Law, which do not touch upon the issues pertinent to the insolvencies of different group members, the EIR Recast contains a whole chapter(Chapter V) dedicated to group insolvencies, with over twenty articles.

1. Improvement of creditor information (interconnectivity of insolvency registers):

The efficient functioning of cross-border insolvency proceedings relies on the exchange of information between insolvency practitioners, courts and creditors. Under the EIR 2000, every Member State had its own insolvency registration system ( which did not work always work adequately) and the interconnectedness of these registers was not ensured.

The EIR Recast has made considerable progress in this regard. Article 24 prescribes and determines the minimum amount of information to be published in the insolvency registers.

Article 25 of the EIR Recast prescribes the creation of decentralized system of the interconnection of insolvency registers.]

**Question 3.2 [maximum 5 marks]**

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.

[Before going into the praises and /or shortcomings of the concept of COMI lets first discuss the concept of COMI and its relevance.

Main insolvency proceedings are intrinsically connected to the debtor’s centre of main interest (COMI). Such proceedings can only be opened in a jurisdiction of the debtor’s COMI. The EIR 2000 did not contain a definition of COMI, it however provided some guidance in its Recital 13. By contrast, the EIR Recast mandates that the center 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). In Eurofoods IFSC Ltd case, the court stressed that the concept of COMI is peculiar to the regulation. It has an autonomous meaning and must therefore be interpreted in a uniform way, independently of what a similar term mat mean in national legislation ( paragraph 31).

To make COMI determination more predictable, the EIR Recast did not introduce a stricter definition of COMI; rather it offered several presumptions including its location. One of the main presumption relating to COMI is the registered office presumption. In the case of a company or a legal person, the place of registered office shall be presumed to be the place of COMI (Article 3(1) of the EIR Recast). However, this presumption shall apply only if the registered office has not been moved to another Member State within the three-month (“Suspect”) period prior to the request for the opening of the insolvency proceedings.

Now, lets first discuss the praises of the concept of “centre of main interest”(COMI) as under:

One of the praises of the COMI concept is that it provides a clear and objective basis for determining the jurisdiction of insolvency proceedings. According to EU commission, the concept ensures that cases are handled by a jurisdiction with which the debtor “has a genuine connection rather than in the one chosen by the incorporators”. This supports the view that both jurisdiction and applicable law should match what most creditors expect or are familiar with. In view of the Virgos-Schmit report, this enables creditors to better forecast the legal risks of their debtor’s insolvency and to achieve a more accurate pricing of the risk. Involuntary creditors, mal-adjusting creditors and weak creditors ( such as employees) may also benefit from the COMI approach. They are more likely to reside in the same Member State as the debtor’s COMI, since the COMI signals the debtor’s involvement in a particular Member State (Assuming that COMI does not shift after these obligations are incurred). These creditors will be more familiar with the legal system in this jurisdiction. The COMI criteria also mirrors the one adopted by international instruments, such as the United Nations Commission on International Trade Law (UNICITRAL) Model Law on Cross-Border Insolvency 1997 (Model Law).

Now lets discuss the criticism as under:

There was, however, a constant and rising stream of criticism leading upto the 2015 reform of the EIR Recast. The COMI Concept was criticized as vague and the interpretations of it did not provide enough guidance to provide a reliable practical test. This could jeopardise legal certainty and predictability, contrary to its objectives. This criticism has been levelled against various variants of the “real seat theory” in international company law for a long time. Creditors may price in risk and uncertainty dealing with insolvency, resulting in higher capital costs. In addition, critics of the concept contend that COMI concept, as envisioned in the EIR Recast, is open to arbitrage and manipulation. More generally, it has been contended that the COMI may be difficult to assess and to determine by creditors. This argument has since been addressed by the interpretation of the COMI test following Eurofood IFSC Ltd and Interredil.]

**Question 3.3 [maximum 5 marks]**

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.

[Following are two ways in which the European Insolvency Regulation (EIR) and the Directive on Preventive Restructuring Framework differ:

1. Scope and Purpose:

The European Insolvency Regulation (EIR) primarily deals with the coordination of cross-border insolvency proceedings. Its main purpose is to determine the jurisdiction for opening insolvency proceedings, recognize and enforce judgements in other Member States, and coordinate the administration of assets and claim in cross-border cases.

On the other hand, the Directive on Preventive Restructuring Frameworks aims to harmonize national laws regarding preventive restructuring procedures within the EU. It focuses on facilitating the early detection of financial difficulties and providing viable businesses with efficient restructuring tools to avoid insolvency. Unlike the EIR, the Directive is not concerned with cross-border issues but rather with harmonizing preventive restructuring frameworks within individual Member State.

In June 2019, the EU adopted the Directive and the text was the result of long and complex negotiations since the proposal was presented in 2016. In short, the debtors will have access to early warning tools that enable them to detect the deterioration of the business, leading, in turn, to engaging in restricting process at an early stage. The overarching objective is to promote the development of a new culture of preventive restructuring with viable companies experiencing financial difficulties being offered early access to restructuring procedures, irrespective of their location in the European Union. It is the first instrument that substantively harmonizes insolvency law across the EU, albeit only a narrow aspect of it, that is, preventive restructuring, and as a result it represents a milestone in the development of European Insolvency law.

1. Legal nature and binding force:

The European Insolvency Regulation (EIR) is a directly applicable regulation that applies automatically in all EU Member States. It creates binding rules and obligations for Member States and their national courts regarding cross-border insolvency cases.

In contrast, the Directive on Preventive Restructuring frameworks is a directive that sets out common minimum standards for preventive restructuring frameworks across the EU. Member States are required to transpose the provisions of the Directive into their national laws, adapting them to their legal system and practices. While the Directive sets common objectives, Member States have some discretion in implementing its provisions, which may lead to differences in the national laws of each Member State.

These differences highlight how the EIR and the Directive on Preventive Restructuring Frameworks serve distinct purposes and operate in different ways to address the complexities of insolvency and restructuring within the EU.]

**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]**

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.

[In the given scenario the COMI is located in France but there are offices in and around Ireland and a Major Warehouse in Spain.

EIR 2000 established that main insolvency proceedings could be initiated at the place of the debtor’s centre of main interest (COMI) (Article 3(1) of the EIR 2000. The EIR 2000 did not contain a definition of COMI;it however provided some guidance in its Recital 13.

In one on the most important cases on the interpretation of the EIR 2000, Eurofoods IFSC Ltd, the court stressed that the concept of COMI is peculiar to the regulation. It has an autonomous meaning and must therefore be interpreted in a uniform way, independently of what a similar term may mean in national legislation. The issue of COMI presumption was further dealt with by CJEU in Interedil Srl V Fallimento Interedil Srl.

Such Proceedings under EIR 2000, had universal scope and encompassed all the debtor’s assets throughout the EU. The EIR 2000 also prescribed that the law of the state of the opening of insolvency proceedings, the lex concursus, determines the effects of such proceedings (Article 4 of the EIR 2000). This law governed, inter alia, the respective powers of the debtor and the liquidator, ranking of creditor’s claims, the effect of insolvency proceedings on current contracts, and creditors’ right after the closure of insolvency proceedings.

However, the system of EIR 2000 was not purely universal, as it provided for the possibility of opening of secondary (territorial) proceedings in a Member State where the debtor has an establishment, and for coordination between main and secondary proceedings. Unlike main insolvency proceedings, secondary proceedings could cover only assets falling under their limited geographical scope. Importantly, the EIR 2000 prescribed the automatic recognition of judgements opening insolvency proceedings and their effects ( lex concursus to be applied in the country of recognition) as well as judgements concerning the course and closure of insolvency proceedings 9Article 16, 17 and 25 of the EIR 2000).

The EIR 2000 does not include specific regime for safeguard proceedings. Instead, it primarily deals with bankruptcy proceedings for the reorganization of debtor’s assets. Safeguard proceedings, which are focused on the prevention of insolvency through restructuring, were introduced in the EIR Recast and are not provided for in the EIR 2000.

Therefore, filing safeguard proceedings in France will not provide safeguard against the assets located outside the jurisdiction of France. The creditors in Ireland and Spain may also file winding up petitions under EIR 2000, because the secondary proceedings prescribed under EIR 2000 cover only winding up proceedings, therefore safeguard proceedings filed in France will not provide safeguard for assets located outside France.]

**Question 4.2 [maximum 5 marks]**

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.

[In the given scenario the EIR Recast is very well applicable for opening of the safeguard proceedings filed at French High Court on 23rd June 2023.

Relevant facts of the given case:

1. The company Dianosaurus SARL is incorporated in 2015 in France, it has first and another 10 stores in France, 80% of employees work in France. Most of customers come from France
2. It has an office in Ireland and 3 stores around Ireland. 20% employees are in Ireland
3. It has main warehouse in Spain
4. Some online purchases are coming mainly from UK
5. In 2020 Loan agreement with a Spanish bank for expansion in Spain. Opened a bank account in Spain. Non binding MOU with 3 Spanish suppliers.
6. On 23 June 2023, company filed a petition to safeguard proceedings in France.

Now, Lets discuss the scope of the EIR Recast and steps to be taken to satisfy ourselves that the provisions of EIR Recast are applicable for such opening of safeguard proceedings in France.

Scope:

Determination of the EIR Recast’s scope requires answering the following questions

1. When does it apply in time(temporal scope)
2. To whom does it apply ( personal scope)
3. Which proceedings are covered by it (material scope) and
4. What are its geographical limitations ( geographical scope).

A step-by-step plan can be schematically drawn as follows:

1. Geographical scope- Whether the debtor has COMI is a Member State of the EU, except Denmark- if Yes
2. Personal scope- Whether the debtor is not a bank, insurance company or another “excluded” undertaking – if Yes
3. Material scope- Whether the proceedings opened against the debtor is listed in Annex A to the EIR Recast- if Yes and
4. Temporal scope- Whether the proceedings is opened after 26th June 2017- if yes.

If all four steps have led to a “Yes”, the EIR Recast should be applicable to the opened safeguard proceedings.

In our case let’s see how it goes:

1. Geographical scope- Firstly it is necessary to look for the center of main interest (COMI) (Article 1(1) of the EIR Recast). The EIR Recast applies only when the debtors COMI is located within the EU (excluding Denmark). EIR Recast mandates that the COMI shall be a 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. In the given case since the company Dianosaurus SARL is incorporated in France, it has first and another 10 stores in France, 80% of employees work in France. Most of customers come from France, therefore there is no doubt that the COMI is presumed to be in France. Having another establishment in Spain and Ireland having minor operations will change the COMI here. There is no mention of shift of the registered of the company within a suspect period of 3 months. Therefore, the COMI can be presumed to be in France. Hence the condition of geographical scope is met and hence the answer is YES.
2. Personal Scope: Since the company is not a bank, nor an insurance company and also not another excluded undertaking. Rather it is a private entity – so it falls within the scope of EIR Recast -- so the answer is YES
3. Material scope- In order to fall within the scope of the EIR Recast, an insolvency proceeding has to be listed in Annex A (material scope). The proceedings of Dinosaurus SARL is mentioned in Annex A. Therefore, it falls within the Scope of EIR Recast – so YES.
4. Temporal scope: temporal scope must be checked. This scope requires that the proceedings is opened after 26th June 2017 (entry of EIR Recast into force). The facts of the case indicate that the insolvency proceedings in question was opened on 23 June 2023 which is after the prescribed date in EIR Recast. Hence this condition is also met. So, the answer is YES.

One more thing has been understood here that the proceedings are filed to safeguard. It is evident from the wordings of the Article 1 that EIR Recast 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 for the sake of protecting the general body of creditors.

The opening of safeguard proceedings on 23 June 2023 by the French High Court are well within the scope of EIR Recast since all the conditions are met.]

**Question 4.3 [maximum 5 marks]**

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.

[Under the European Insolvency Regulation (EIR Recast), secondary insolvency proceedings can be open in another Member State if the debtor has an establishment in that Member State.

In the case of Dinosaurus SARL:

The concept of “establishment” is essential to the opening of secondary insolvency proceedings, as such proceedings can only be opened in the Member state in which the debtor has an establishment. According to Article 2(10) of the EIR Recast, “establishment” means any place of operations where the debtor carries out or has carried out in the three-months period prior to the request to open making insolvency proceedings a non-transitory economic activity with the human means and assets.

The non- transitory character of the debtor’s activities indicates a certain degree of continuity and stability. A purely occasional place of operations cannot be classified as an establishment. The decisive factor is how the activity appears externally, in the perception of third parties, and not the intention of the debtor (paragraph 71 of Virgos-schmit report).

The presence of human resources and assets is another criterion for determining the establishment. It shows that the debtor shall conduct its activities with the involvement of human resources (people) and assets, which together demonstrate the organizational presence in the forum.

In Interedil case the CJEU examined the concept and concluded that the fact that the definition connects the pursuit of an economic activity to the presence of human resources, shows that a minimum level of organization and a degree of stability are required. It follows conversely, the presence alone of goods in isolation or bank account does not, in principle, satisfy the requirements of classification as an establishment (paragraph 62).

Dinosaurus SARL does not have its COMI in Spain but let’s see whether it had an establishment there.

1. The company entered into loan agreement with the Spanish bank because it was hoping to expand its reach onto the Spanish children toys market, so the facts do not not show that any loan was disbursed by that time.
2. The company opened a bank account with the bank.
3. Negotiating prices with local suppliers
4. It signed some non-binding memoranda of understanding with three Madrid based suppliers and also
5. It had its main warehouse is in Spain.

While carefully examining the requirements prescribed for establishment and discussed by ECJ also in Interedil case, the presence alone of goods in isolation or bank account does not, in principle, satisfy the requirements of classification as an establishment (paragraph 62). However, since it had its main warehouse in Spain, which I believe must have an element of human resource, was in operation even prior to opening of main insolvency. Hence, The Spanish bank’s petition to open secondary insolvency proceedings in Spain aims to secure a Spanish insolvency distribution raking are permitted as per EIR Recast.

Now, the question is that whether such proceedings can be opened in Italy?

So, while going through the facts of the case I do not find anything which indicate that the Company has any establishment in Italy. The only imagination can be that some online orders are coming that too coming from UK. So, some orders may also be placed by Italian parties. It does not satisfy any criterion as discussed in the matter of Spain above, the proceedings can not be opened in Italy.]

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