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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 first statement is derived from Recital 10 of the EIR Recast and the relevant article is Article 1 and is titled scope, the article looks at the scope of application of the law while the second statement is derived from Recital 66 and article 7 of the EIR recast.]

**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.

[Recital 23 and Article 19(2) states that recognition of the main proceedings does not preclude the opening of insolvency proceedings which run parallel to each other but these secondary proceedings affect the assets in the country where the secondary proceedings are being help there by failing the notion of universality of the assets being pulled together for all creditors. Article 33 also empowers any member state to refuse recognition of proceedings that are contrary to that state’s public policy which in essence gives the domestic laws priority over the EIR recast thereby defeating the notion of universality. Articles 34 and 35 also state that the law applicable for the secondary proceedings is the law of the member state where the insolvency proceedings are being held and that they are limited to the assets in the member state only.

**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.

[Article 1 of the EIR Recast together with Article 2 determines the national insolvency proceedings that fall under the ambit of the EIR Recast. They determine which insolvency proceedings fall under the scope of the regulation. Hence any proceeding not listed herein will not enjoy the application of the EIR Recast.

Article 1 also applies to public collective proceedings which are also listed under Annex A of the EIR recast. The implication of being listed under Annex A is that if the proceeding is not listed under there it does not enjoy the automatic application of the EIR Recast.

In addition to this, there is also the Recital 9 which allows for the automatic application of the EIR without further examination by the national courts. However, for proceedings not listed in Annex A, they do not enjoy this automatic application. An example of this is the United Kingdom’s scheme of arrangement provision that was deliberately left out of the scope of the EIR Recast, which effectively put it out of the jurisdiction of the EIR Recast.[[1]](#footnote-1)]

**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.

[Under Article 38( 2) , if the Insolvency practitioner in the main insolvency proceedings gives an undertaking to the creditors that they will receive the same distribution as they would have received in the secondary proceedings in accordance with Article 36. This allows the liquidator in the main proceeding to be able to fully implement his plans without interference for the benefit of all creditors.

Articles 41 to 44 allow for cooperation and communication between different insolvency practitioners and this communication is vital in the administration of the debtor's assets which serves to promote fairness and equity while dealing with the assets of the debtor. ]

**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)?

[During the reform process of the EIR 2000, the European Commission identified several elements that needed revision as discussed herein below;

1. The commission identified the fact that the concept of COMI was not defined in the EIR 2000 which left it vague. Even though RecitaL 13 attempted to give a definition of COMI it was not binding as it was merely a recital. The case of EuroFood IFSC Ltd[[2]](#footnote-2) elucidated on the meaning of COMI as was in the EIR 2000 where the court noted 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 EIR Recast proceeded to adopt the wording similar to the wording in the Recital 13 of the EIR 2000 thereby giving it legal efficacy.
2. The commission also proposed widening the scope of restructuring proceedings and providing for stronger rules for cooperation between insolvency practitioners and courts. The EIR 2000 contained only one article ( Article 31) that required practitioners in the main and insolvency proceedings to communicate. This scope was widened in the EIR Recast that provided for cooperation between practitioners, courts and between practitioners and courts in Articles 41,42 and 43. The reform also further provided that this cooperation can take any form like a Protocal and this is evidenced in the case of Maxwell Communications Corp where a protocal was adopted between the practitioners to enable smooth execution of the obligations that the company had both in the United States and in the United Kingdom. [[3]](#footnote-3) ]

**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.

[One of the praises for COMI is that it facilitates legal certainty across the EU countries and the stakeholders are able to predict how the debtor will be handled as the law will be the same across all member states.

The other praise is that where group companies are involved it does reduce on transaction costs arising from multiple insolvency proceedings if they are all brought under one jurisdiction. This also enhances chances for a successful restructuring for the group as well and Recital 13 offers guidelines on how this can be achieved.

One of the shortcomings is that it can encourage forum shopping where the debtor moves its assets, personnel or registered office to a different member state with a more favourable legal position that may be detrimental to the general body of creditors. In the case of of re Ocean Rig UDW Inc. 570 B.R 687 (Bankr SDNY 2017) the New York Court noted that forum shopping can only be acceptable where it is done in good faith, with a view of maximizing chances of business rescue or enhancing the recovery of creditors.

The principle has also been criticised for being vague with insufficient guidance thereby jeopardizing legal certainty and predictability. However, this was resolved in the case of EuroFood IFSC Ltd, which defined COMI as was in the EIR 2000 where the court noted 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.]

**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.

[a) The EIR regulates the opening of extraterritorial effects of insolvency proceedings in member states with the overall objective of ensuring the efficiency and effectiveness of those proceedings in cross-border cases while the directive focuses on the establishment of a minimum set of standards for preventive restructuring procedures across member states to enable debtors in financial distress to restructure at an early stage and avoid insolvency.

b) Some entities are exclusively excluded from the personal scope of the EIR as per Article 1(2), like insurance undertakings and credit institutions while they are catered for under the directive. [[4]](#footnote-4)]

**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.

[a) The EIR 2000 applies to this case because while the company has stores in other countries its center of main interest( COMI) is in France and this is provided for under Article 3(1) of the EIR 2000. This is supported by the fact that the company was incorporated in France, has 10 stores in France, 80% of the employees work in France and most of the customers are from France. While the EIR 2000 unfortunately aside from merely offering guidance under recital 13 did not define what COMI means. However, this was defined in case law in the case of Euro Food IFSC Ltd, which defined COMI as was in the EIR 2000 where the court noted 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.

b) The EIR does allow for the opening of safeguarding provisions like the provision on automatic recognition of judgments in insolvency proceedings (lex concursus) which is applied in the country of recognition as well as judgments concerning the course and closure of the insolvency proceedings and this is evident in Articles 16,17 and 25 of the EIR 2000. ]

**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.

[The EIR Recast entered into legal force on 26th June 2017, therefore any proceedings initiated after 2017 automatically fall under its jurisdiction. The Insolvency Proceedings that fall under the ambit of this law are listed under Annex A and these proceedings fall thereunder. Article 3(1) of the EIR Recast already classifies France as the Center of main interest since the company was incorporated there , it has ten stores there and 80% of its employees are from France with the majority of customers also being from France. Therefore the COMI is ascertainable by third parties as the COMI. Therefore the EIR Recast is applicable and allow for the opening of the safeguarding provisions in France. ]

**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.

[Article 3(1) of the EIR Recast already classifies France as the Center of main interest since the company was incorporated there , it has ten stores there and 80% of its employees are from France with the majority of customers also being from France. Therefore the COMI is ascertainable by third parties as the COMI. Article 3(2) of the EIR Recast goes further to allow for secondary proceedings by stating that where the center of the debtor’s main interest is situated within the territory of a member state, the courts of another member state have jurisdiction to open insolvency proceedings against the debtor if the debtor possesses an establishment within the territory of the member state

While Italy is a member state of the European Union[[5]](#footnote-5), it is important to establish whether the company has an establishment in Italy. According to Article 2(10 ) of the EIR Recast an establishment is any place of operations where a debtor carries out or has carried out three months prior to the request to open main insolvency proceedings a non-transitory economic activity with humans and assets. This definition was further emphasized by the CJEU in the case of Interedil Srl v Fallimento Interedil Srl[[6]](#footnote-6) where noted that to be able to establish that there is an establishment, the pursuit of economic activity should connect to the presence of human resources which show a minimum level of organization and a degree of stability. Going by the facts in the present case, the only presence the company has is in Spain, a warehouse, with no presence in Italy. Therefore there is no legal basis under the EIR Recast for opening secondary insolvency proceedings in Italy as the company has no economic activity or presence of human resource there.

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

1. Module 2B Guidance Text , Foundation Certificate in international insolvency Law [↑](#footnote-ref-1)
2. Case C-341/04,ECLI:EU:C:2006:281(May 2,2006) [↑](#footnote-ref-2)
3. Maxwell Communications Corp [1992]B.C.L 465. [↑](#footnote-ref-3)
4. Module 2B Guidance Text , Foundation Certificate in international insolvency Law [↑](#footnote-ref-4)
5. https://european-union.europa.eu/principles-countries-history/eu-countries/italy\_en [↑](#footnote-ref-5)
6. C-396/09 ECLI:EU:C:2011:671 (Oct 20,2011) [↑](#footnote-ref-6)