**Text, logo, company name

Description automatically generated**

**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.

Answer: -

Statement 1: "A debtor is totally or partially divested of its assets and an insolvency practitioner is appointed;" this is the concept and provision which is covered in **Article 1(1) of the EIR Recast**.  
  
Statement 2: **Article 18 of the EIR Recast**, "Effects of insolvency proceedings on pending lawsuits or arbitral proceedings," is the provision and concept that is discussed.

**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 that depart from a universal approach to cross-border insolvency.

Answers:

**Article 5(2)**: By allowing a debtor's COMI(Centre Of Main Interest) to be assumed to be located in the Member State of its registered office, this clause may cause insolvency proceedings to be localized as opposed to following the principle of universality.  
  
**Article 7(1)**: The idea of universality may be undermined by this clause, which permits exceptions to the application of the state's law (lex concursus), potentially resulting in legal conflicts between various Member States, thereby undermining the principle of universality.  
  
  
**Article 36(1)**: This article presents the idea of "**synthetic proceedings,**" in which the effects of the primary insolvency proceedings are expanded to other Member States without initiating a new secondary proceeding. The principle of universality is impacted by this deviation from distinct secondary proceedings.

**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.

Answers:

Certainly, the following three EIR Recast elements along with specific explanations deal with the Regulation's material scope in relation to national insolvency proceedings in Member States:   
  
**Article 1(1)** - Regulation's Scope: Specifies the kinds of insolvency processes that fall under its purview, emphasizing rescue, debt adjustment, restructuring, and liquidation; this establishes the EIR Recast's material scope.  
  
**Article 1(2)** - Exclusions from the Scope: This section further clarifies the material scope by defining exclusions, such as actions for insurance undertakings, credit institutions, and other financial companies.

**Article 2**-Definitions: This section gives definitions for terminology that are important to understand, such as "court," "liquidator," "creditor," and "insolvency proceedings," to guarantee uniform application and interpretation throughout Member States.

**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.

Answers:

**Article 36**: Ability to provide an undertaking to avert further insolvency proceedings using this provision, local creditors may receive an undertaking from the insolvency practitioner in the main proceedings, guaranteeing that their claims would be handled as though secondary actions had been initiated. If the court is convinced that the undertaking sufficiently safeguards the interests of local creditors, this can stop the initiation of secondary proceedings, which would streamline the procedure and prevent it from becoming fragmented.

**Article 41**: Cooperation and Communication between Insolvency Practitioners: Under this article, practitioners in insolvency must effectively collaborate and communicate in both primary and secondary procedures. To guarantee the cogent administration of the debtor's estate, they must exchange information and plan of action, increasing efficiency and reducing cross-jurisdictional conflicts.

**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)?

Answer:

The following are the primary components that were found to need revision during the EIR 2000 overhaul, along with pertinent case law and citations that influenced these revisions:   
  
**1. The Regulation's Scope:**

**Revision Needed:**

The EIR 2000's original purview was restricted to insolvency procedures intended for liquidation; pre-insolvency and hybrid procedures were not included which were intended or corporate rescue.   
  
  
**Case Law:**

**Fallimento Interedil Srl and Intesa Gestione Crediti SpA v. Interedil Srl (in liquidation) (C-396/09)**: The necessity of wider scope coverage was brought to light by this instance. The inclusion of pre-insolvency and hybrid processes in the EIR Recast was influenced by the CJEU's ruling that proceedings intended to save firms should be included.

**2. Authority and Center of Main Interests (COMI):**  
**Need for Revision:** An improved definition of COMI was necessary to guard against abusive forum shopping and make sure it accurately reflected the state of the economy.

**Case Law:**

**Eurofood IFSC Ltd C-341/04):** This scenario offered an important use of COMI. According to the CJEU, COMI ought to be the location where the debtor routinely manages its interests and makes itself accessible to outside parties. This ruling highlighted how important it is to use objective standards when calculating COMI.

**3. Coordination between Proceedings:**

**Need for Revision**: To lessen disagreements and inefficiencies, better collaboration and coordination between the primary and secondary proceedings were required.

**Case Law:**

Staubitz-Schreiber (C-1/04): According to the CJEU, primary insolvency proceedings ought to synchronize with secondary proceedings in other Member States as soon as they are initiated. Better coordination procedures were incorporated into the EIR Recast as a result of this instance.   
  
**4. Information and Openness:**

**Need for Revision:**

It was imperative to augment transparency and facilitate access to information on insolvency processes for stakeholders, including creditors.

**Case Law:** C-444/07 MG Probud Gdynia sp. z o.o. The CJEU emphasized how crucial openness is to the insolvency process. The decision to create linked insolvency registers in order to give stakeholders pertinent information was influenced by this case.

**5. Recognition and Implementation:**

**Need for Revision:** It was essential to simplify the acceptance and application of insolvency judgements throughout Member States.

**Case Law:**

**Alice van der Schee v. German Graphics Graphische Maschinen GmbH (C-292/08):** The automatic recognition of insolvency proceedings and verdicts was the subject of this case. The CJEU's ruling made evident the necessity for more precise enforcement guidelines, which had an impact on the EIR Recast's efforts to simplify these procedures.   
  
**6. Synthetic Procedures:** Revision Needed In order to streamline the procedure and prevent the intricacy of initiating several secondary processes, synthetic secondary proceedings had to be introduced.

**Case Law:**

**Bank Handlowy w Warszawie SA v. Christianapol:** The difficulties of managing several secondary processes were demonstrated by this case. The EIR Recast adopted synthetic processes as a result of the CJEU's ruling, enabling a more efficient method of handling cross-border insolvency.  
  
The EIR Recast was adopted as a result of the demands raised by these cases. It addressed the shortcomings by broadening the scope, making COMI more clear, boosting coordination, improving transparency, expediting recognition and enforcement, and introducing synthetic processes.

**Question 3.2 [maximum 5 marks]**

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

Answer:

Here are the praises and shortcomings of the "Centre of Main Interest" (COMI) concept, including relevant judgments:

**Praises:**

**1. Predictability and Legal Certainty:**

**Explanation:** COMI offers precise criteria for establishing the jurisdiction for insolvency proceedings, improving predictability and legal certainty for creditors, debtors, and other stakeholders.

**Case Law:**

**Eurofood IFSC Ltd (C-341/04):** According to the CJEU, COMI should be where the debtor conducts the administration of its interests routinely and is ascertainable by third parties. This case highlight the importance of a predictable and transparent standard for establishing jurisdiction.

**2. Protection Against Forum Shopping:**

**Explanation:** The COMI concept helps in mitigating the risk of forum shopping, where a debtor might relocate to a jurisdiction with more favorable insolvency laws just before filing for bankruptcy.

**Case Law:**

**Interedil Srl (in liquidation) v. Fallimento Interedil Srl and Intesa Gestione Crediti SpA (C-396/09):** The CJEU reinforced that COMI should reflect the genuine economic reality of the debtor's operations, thereby protecting against opportunistic forum shopping.

**Shortcomings:**

**1. Vagueness and Ambiguity:**

**Explanation:** In spite of efforts to provide a definition, COMI is still a somewhat nebulous and subjective notion. Finding a debtor's precise COMI location might be difficult, particularly for large firms.

**Case Law:**

**Staubitz-Schreiber (C-1/04):** This case is highlighting the ambiguity in determining COMI, as the CJEU had to highlighted the criteria for COMI, illustrating the potential for different interpretations and legal ambiguity.

**Potential for Manipulation:**

Explanation: Debtors may try to manipulate the COMI determination process by moving their COMI to a more advantageous jurisdiction prior to the start of insolvency proceedings.

**Case Law:**

**Bank Handlowy w Warszawie SA v. Christianapol sp. z o.o. (C-116/11):** The risk of manipulation and the requirement for stronger standards were highlighted by this instance, which demonstrated how debtors might influence COMI by altering managerial actions and financial processes.

**Conclusion:**

The COMI idea goal is to standardize and clarify cross-border insolvency procedures; nevertheless, practical use has revealed both advantages and disadvantages. Although it makes things more predictable and prevents forum shopping, it also has the potential to be misleading and deceptive, which might lead to serious legal problems. The aforementioned scenarios illustrate these disagreements and the continuous difficulties in appropriately implementing the COMI idea.

**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.

Answer:

The European Insolvency Regulation (EIR) and the Directive on Preventive Restructuring Frameworks vary significantly. Here are the two key differences:

**1) Scope and Objective:**

**European Insolvency Regulation (EIR):**

**Scope:** The EU member stated jurisdiction enforcement, and acknowledgment for forum selection. of insolvency procedures are the main topics covered by the EIR as a tool. Its main concerns are procedural ones, such figuring out which court has authority to start bankruptcy procedures and making sure that rulings are accepted and recognized throughout the EU.

**Objective:** The main objective is to collaborate with cross-border insolvency proceedings to ensure the successful and efficient administration of bankruptcy cases involving debtors with assets or creditors in various Member States, the primary goal is to cooperate with cross-border insolvency processes It aims to prevent jurisdictional problems and encourage cooperation between courts and bankruptcy specialists.

**Directive on Preventive Restructuring Frameworks:**

**Scope:** By offering a framework for proactive restructuring, debt discharge, and steps to improve the effectiveness of processes related to restructuring, bankruptcy, and debt discharge, the Order of Directive focuses on the substantive components of insolvency legislation. It attempts to harmonize several important aspects of bankruptcy law among the participating nations.

**Objective:** The primary objective of the Directive is to empower financially challenged corporations to assist financially distressed enterprises in their early restructuring efforts, therefore averting insolvency and liquidation and protecting employment and economic value. It encourages the use of preventative restructuring frameworks to give entrepreneurs a second opportunity and to enable viable businesses to continue running.

**2) Nature of Legal Instrument:**

**European Insolvency Regulation (EIR):**

**Nature:** The EU Member States must immediately apply and enforce the entire extent of the EIR law, which is mandatory without the requirement for national implementation. Its regulations, which are applied uniformly throughout the EU, guarantee consistency in standards for international bankruptcy proceedings.

**Implementation:** As a regulation, it offers a unified and logical response to procedural issues pertaining to insolvency laws, and it is effective immediately across all Member States.

**Directive on Preventive Restructuring Frameworks:**

**Nature:** All EU Member States are required to meet the objectives of the Directive, although they are free to choose how to incorporate these goals into their own national laws. As a result, there is some flexibility that allows Member States to modify the requirements to fit their own national legal frameworks and customs.

**Implementation:** Within a certain amount of time, Member States must incorporate the Directive into their national laws. This may result in differing national transposition measures, which could affect how the Directive's requirements are implemented in various nations.

**Conclusion:**

In conclusion, the Directive on Preventive Restructuring Frameworks seeks to harmonize certain substantive aspects of insolvency law, particularly in relation to preventive restructuring and early intervention measures, whereas the European Insolvency Regulation concentrates on procedural harmonization and the coordination of cross-border insolvency proceedings. The EIR is immediately applicable as a regulation, whereas the Directive requires national transposition as a directive. These distinctions in legal instrument type also exist.

**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.

Answer:

**Applicability of the EIR 2000 to Dinosaurus SARL's Safeguard Proceedings**

We must look at the meaning of "insolvency proceedings," the scope of the EIR 2000, and pertinent CJEU case law to decide whether the EIR 2000 applies to the Dinosaurus SARL case and the start of safeguard procedures in France.

**Scope and Definition of Insolvency Proceedings under EIR 2000**

**Scope of the EIR 2000:**

Article 1(1) of the EIR 2000 states that the EIR 2000 is applicable to collective bankruptcy procedures that involve the appointment of a liquidator and the partial or complete disposal of a debtor.

Proceedings must be included in Annex A of the Regulation in order to fall under the purview of the EIR 2000.

**Safeguard Proceedings:**

**French Safeguard Proceedings:** The French procedure of "procédure de sauvegarde" is intended to help financially troubled enterprises restructure and carry on with their operations. The goals of these procedures are to keep the debtor's business operating, keep their jobs, and pay off their debts.

**Inclusion in Annex A:** Annex A of the EIR 2000 does, in fact, contain the safeguard proceedings. As a result, they are regarded as insolvency procedures for the purposes of EIR 2000.

**Jurisdiction under the EIR 2000**

The next stage is to ascertain whether Dinosaurus SARL's insolvency can be filed with the Commercial Court in Le Mans, France.

**Centre of Main Interests (COMI):**

According to Article 3(1) of the EIR 2000, the courts of the Member State where the debtor's COMI is located have jurisdiction to begin main insolvency proceedings.

The COMI is deemed to be the location of the debtor's registered office in the absence of proof to the unparallel. However, this presumption can be rebutted if the COMI is located somewhere and is accessible to outside parties.

**CJEU Jurisprudence:**

**Eurofood IFSC Ltd (C-341/04):** This case discovered that the COMI should be where the debtor proceeds the administration of its interests on a continuous basis and that is verifiable by third parties. The court emphasized the significance of third-party perception in establishing COMI.

**Interedil Srl (in liquidation) v. Fallimento Interedil Srl and Intesa Gestione Crediti SpA (C-396/09):** This case highlighted that the COMI is where the debtor's central administration be ascertainable by third parties. The court highlighted factors such as the location of the debtor's headquarters, management choices, and main business operations were among the elements that the court emphasized.

**Application to Dinosaurus SARL**

**Given the facts:**

**Registered Office and Main Operations:** Dinosaurus SARL is incorporated in France, with its main administrative operations, the bulk of its stores, and 80% of its workforce located in France.

**Additional Operations**: It also has an office in Ireland and a warehouse in Spain, but it takes precedence over those of its office.

**Customers:** The majority of clients are from France, with some online sales to the UK.

Based on these indications, the COMI of Dinosaurus SARL is surely in France. The company manages the administration of its interests primarily in France, and this is ascertainable by third parties, involving its creditors and employees.

**Conclusion**

The EIR 2000 does apply to this case and the start of safeguard proceedings. The Commercial Court in Le Mans, France, has jurisdiction to begin these proceedings because France is where the COMI of Dinosaurus SARL is located. This conclusion is supported by the provisions of the EIR 2000 and relevant CJEU jurisprudence, particularly the Eurofood (C-341/04) and Interedil (C-396/09) cases, which clears that the COMI should be where the debtor conducts the administration of its interests on a regular basis and which is determined by third parties.

**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 allsteps taken to answer the question.

Answer:

**Applicability of the EIR Recast to Dinosaurus SARL's Safeguard Proceedings**

To determine whether the EIR Recast applies to the safeguard proceedings of Dinosaurus SARL, we need to analyze the scope of the Regulation, the definition of "insolvency proceedings," and pertinent case law from the CJEU.

**Scope and Definition of Insolvency Proceedings under the EIR Recast**

**Scope of the EIR Recast:**

Article 1(1) of the EIR Recast (Regulation (EU) 2015/848) applies to collective insolvency proceedings which lead to the partial or total divestment of a debtor and involve the appointment of a liquidator.

The proceedings must be covered in Annex A of the Regulation to fall within its scope.

**French Safeguard Proceedings:**

The French safeguard proceedings ("procédure de sauvegarde") are formed to assist companies in financial difficulties to restructure and continue their business, putting emphasis on the continuation of the debtor's business, preservation of employment, and discharge of liabilities.

Inclusion in Annex A: The safeguard proceedings are involved in Annex A of the EIR Recast, thus categorizing them as insolvency proceedings under the Regulation.

**Jurisdiction under the EIR Recast**

To establish jurisdiction, we must determine the Centre of Main Interests (COMI):

**Centre of Main Interests (COMI):**

The courts of the Member State where the debtor's COMI is situated have jurisdiction to persue main insolvency proceedings, as stated in Article 3(1) of the EIR Recast. Until shown in a different way, the location of the debtor's registered office is presumed to be the COMI, as long as it can be independently verified.

**Relevant CJEU Jurisprudence:**

**Staubitz-Schreiber (C-1/04):** This case made it clear that the COMI ought to be ascertained at the outset of the insolvency process. It underlined that, absent circumstances that can be independently verified by third parties, a company's registered office usually represents its COMI.

**MG Probud Gdynia (C-444/07):** This case emphasized how important it is for creditors in particular to be able to determine the COMI. The point was emphasized that the debtor routinely manages its interests through the COMI.

**Cornelius de Visser (C-341/04):** This case highlighted that the location of the debtor's primary interests must be objectively assessed in order to determine COMI, and that third parties should be able to determine this location.

**Application to Dinosaurus SARL**

These hints demonstrate that the COMI of Dinosaurus SARL is definitely in France. Its employees and creditors, for example, are able to confirm that the company primarily oversees its interests in France.

**Conclusion**

Regarding the start of Dinosaurus SARL's safeguard proceedings, the EIR Recast is applicable. The COMI of Dinosaurus SARL is based in France, hence the French Commercial Court in Le Mans has jurisdiction over the matter. The EIR Recast's provisions and pertinent CJEU case law—most notably Staubitz-Schreiber (C-1/04), MG Probud Gdynia (C-444/07), and Cornelius de Visser (C-341/04)—support this finding. As a result, the French court has a valid reason to begin Dinosaurus SARL's safeguard actions under the EIR Recast.

**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.

Answer:

**Analysis of Opening Secondary Proceedings in Spain under the EIR Recast**

We must examine the Regulation's provisions, paying close attention to the definition of "secondary proceedings" and the relevant case law, in order to decide whether secondary insolvency proceedings may be initiated in Spain under the EIR Recast.

**Primary Legal Framework**

**Main and Secondary Proceedings under the EIR Recast:**

The courts of the Member State where the debtor's Center of primary Interests (COMI) is based have competence to begin primary insolvency proceedings, according to Article 3(1) of the EIR Recast.

In a Member State where the debtor maintains an establishment, secondary insolvency procedures may be initiated under to Article 3(2) of the EIR Recast. Any location where the debtor uses products and labor to conduct a non-transitory economic activity is considered an establishment.

**Definition of Establishment:**

Article 2(10) of the EIR Recast defines a "establishment" as any location where the debtor uses goods and labor to conduct a non-transitory economic activity.

**Application to Dinosaurus SARL**

**Primary Proceedings in France:**

In France, Dinosaurus SARL initiated safeguard proceedings. Since Dinosaurus SARL's COMI is in France, where the majority of its business operations and personnel are headquartered, the French court has jurisdiction to begin main proceedings.

**Secondary Proceedings in Spain:**

The Spanish bank wants to start the country's secondary bankruptcy process. Dinosaurus SARL needs to establish a presence in Spain in order for this to be feasible under the terms of the EIR Recast.

**Warehouse in Spain:** Spain is the location of Dinosaurus SARL's principal warehouse. If a warehouse engages in economic activity involving goods and human resources, it is considered an establishment.

**Spanish Court and Legal Framework**

**Spanish Court Jurisdiction:**

**The Spanish court will apply Spanish insolvency law and procedural rules in secondary proceedings opened in Spain.**

The laws governing insolvency in Spain set up processes for allocating assets among creditors during insolvency proceedings and safeguard the rights of creditors.

**Relevant Spanish Legislation:**

**The Spanish Insolvency Act (Ley Concursal) governs insolvency proceedings in Spain and outlines the rights and obligations of debtors and creditors.**

It lays out the requirements for the start of the bankruptcy process, the selection of administrators, and the handling of claims from creditors.

**Conclusion**

A secondary insolvency procedure may be initiated in Spain by the Spanish court due to the presence of Dinosaurus SARL's warehouse, which is known as an establishment under the EIR Recast. The Spanish court will ensure to secure the creditors' rights and equitable distribution of assets among creditors by applying Spanish insolvency law and procedural standards in these processes.

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