



**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.**
- 6.1 If you selected Module 2B as one of your **compulsory modules** (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is **23:00 (11 pm) GMT on 1 March 2024**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2024. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
- 6.2 If you selected Module 2B as one of your **elective modules** (see the e-mail that was sent to you when your place on the course was confirmed), you have a **choice** as to when you may submit this assessment. You may either submit the assessment by **23:00 (11 pm) GMT on 1 March 2024 or by 23:00 (11 pm) BST (GMT +1) on 31 July 2024**. If you elect to submit by 1 March 2024, you **may not** submit the assessment again by 31 July 2024 (for example, in order to achieve a higher mark).
7. Prior to being populated with your answers, this assessment consists of **10 pages**.

### ANSWER ALL THE QUESTIONS

#### **QUESTION 1 (multiple-choice questions) [10 marks in total]**

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in**

**yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

### Question 1.1

The EIR 2000 was the first European initiative to ever attempt to harmonise the insolvency laws of EU Member States.

Select the correct answer from the options below:

- (a) True, before the EIR 2000, the EU has not sought to harmonise the insolvency laws of EU Member States.
- (b) False, there was another EU Regulation regulating insolvency law at EU level before the EIR 2000.
- (c) False, an EU Directive regulating insolvency law at EU level existed before the EIR 2000.
- (d) False, the EU sought to draft Conventions with a view to harmonising the insolvency laws of EU Member States as early as the 1960s, but these initiatives failed.**

### Question 1.2

Article 1(1) of the EIR 2015 relates to the scope of the Regulation. Choose the correct statement from the options below:

- (a) Proceedings will fall under the scope of the EIR 2015 if they are based on laws relating to insolvency for the purpose of rescue, adjustment of debt, reorganisation, or liquidation; are public; and are collective.**
- (b) Proceedings will fall under the scope of the EIR 2015 if they are based on laws relating to insolvency for the purpose of rescue, adjustment of debt, reorganisation, or liquidation; are public; and are collective.
- (c) Proceedings will fall under the scope of the EIR 2015 if they are based on laws relating to insolvency for the purpose of rescue, adjustment of debt, reorganisation, or liquidation; and are public.
- (d) Proceedings will fall under the scope of the EIR 2015 if they are based on laws relating to insolvency for the purpose of rescue, adjustment of debt, reorganisation, or liquidation; and are collective.

### Question 1.3

In 2017, the EIR Recast replaced the EIR 2000. Recasting the EIR 2000 was deemed necessary by various stakeholders. Why?

- (a) Through its case law, the CJEU had gone against the literal meaning of several provisions of the EIR 2000. A new Regulation was needed to codify the new rules created by the CJEU.
- (b) The EIR 2000 was generally regarded as an unsuccessful instrument in the area of European insolvency law by the EU institutions, practitioners and academics.

(c) The fundamental choices and underlying policies of the EIR 2000 lacked support from the major stakeholders (businesses, public authorities, insolvency practitioners, etcetera). A new Regulation was therefore needed to meet their expectations.

(d) The EIR 2000 was generally considered a successful instrument, but areas of improvement had been identified over the years by practitioners and academics.

#### Question 1.4

Why can it be said that the EIR Recast did not overhaul the *status quo*?

(a) The EIR Recast is a copy of the EIR 2000. Its structure and the wording of all articles are similar.

(b) Although the EIR Recast includes relevant and useful innovations, it has stuck with the framework of the EIR 2000 and mostly codified the jurisprudence of the CJEU.

(c) The EIR Recast has not added any new concept to the text of the EIR 2000.

(d) It is incorrect to say that the EIR Recast has not overhauled the *status quo* at all. On the contrary, the EIR Recast has departed from the text of its predecessor and is a completely new instrument which has rejected all existing concepts and rules.

#### Question 1.5

Article 3 of the EIR 2015 deals with jurisdictional matters. Which statement below is accurate in relation to Article 3?

(a) Article 3 states that the courts of the Member State within the territory of which the debtor has an establishment shall have jurisdiction to open main insolvency proceedings.

(b) Article 3 states that the courts of the Member State within the territory of which the debtor has its centre of main interest (COMI) shall have jurisdiction to open main insolvency proceedings.

(c) Article 3 states that the courts of the Member State within the territory of which the debtor has its centre of main interest shall have jurisdiction to open secondary insolvency proceedings.

(d) Article 3 states that the courts of the Member State within the territory of which the debtor has an establishment shall have jurisdiction to open territorial insolvency proceedings.

#### Question 1.6

The EIR 2015 does not provide a definition of “insolvency” or “likelihood of insolvency”. What are the consequences hereof?

(a) The ECJ has provided a definition of “insolvency” in recent case law.

(b) The European Commission has provided a definition of “insolvency” in its Recommendation on a “New Approach to Business Failure” published in 2014.

(c) Each Member State will define “insolvency” in national legislation.

(d) Deciding whether a debtor is “insolvent” or not is a matter for the ECJ to determine.

The answer was C.

### Question 1.7

The EIR Recast is an instrument of a predominantly procedural nature (including private international law issues). Nevertheless, it contains a number of substantive provisions. Which one of the following provisions constitutes a harmonised (stand-alone) rule of substantive law?

- (a) Article 18 EIR Recast (entitled “Effects of insolvency proceedings on pending lawsuits or arbitral proceedings”).
- (b) Article 40 EIR Recast (entitled “Advance payment of costs and expenses”).
- (c) Article 7 EIR Recast (entitled “Applicable law”).

(d) Article 31 EIR Recast (entitled “Honouring of an obligation to a debtor”).

### Question 1.8

What are some of the main criticisms which have been voiced against the concept of the “centre of main interest”?

- (a) The concept makes it impossible for companies to move jurisdiction, which ultimately, may jeopardise their chances of rescue.
- (b) The concept does not have any equivalent in international instruments, which makes it difficult for international creditors to understand.
- (c) The concept is too similar to that of an “establishment” which makes it difficult for a court to know whether to open main or secondary proceedings.

(d) The concept is too vague; it may result in higher capital costs; it may lead to manipulation; and it is difficult to assess by creditors.

### Question 1.9

The EIR Recast introduced the concept of “synthetic proceedings”. What are they?

(a) “Synthetic proceedings” means that when an insolvency practitioner in the main insolvency proceedings has given an undertaking in accordance with Article 36, the court asked to open secondary proceedings should not, at the request of the insolvency practitioner, open them if they are satisfied that the undertaking adequately protects the general interests of local creditors.

(b) “Synthetic proceedings” means that for the case at hand, several main proceedings can be opened, in addition to several secondary proceedings.

(c) “Synthetic proceedings” means that when secondary proceedings are opened, these are automatically rescue proceedings, as opposed to liquidation proceedings.

- (d) “Synthetic proceedings” means that insolvency practitioners in all secondary proceedings should treat the proceedings they are dealing with as main proceedings for the purpose of protecting the interests of local creditors.

### Question 1.10

Carala SARL is a French-registered company selling jam jars made out of glass. The company had opened its first store in Strasbourg, France in 2018. It has since opened another 10 stores in France. Its main warehouse is located in Cork, Ireland. 95% of its employees are located in France and 5% are located in Ireland. Most of its customers are located in France, yet some online purchases are coming mainly from the Netherlands.

In 2020, Bella SARL entered into a loan agreement with a Spanish bank because it was hoping to expand its reach onto the Spanish jam market. It opened a bank account with the bank while also negotiating prices with local suppliers. It signed some (non-binding) memoranda of understanding with three Madrid-based suppliers.

Unfortunately for Bella SARL, the timing of this initiative coincided with the Covid-19 pandemic. By the end of 2021, the company was in financial difficulty, yet managed to keep afloat for another few years. On 10 January 2022, it wants to file for insolvency. In which country is Carala’s centre of main interest presumed to be located?

- (a) Its centre of main interest is located in Spain because the loan agreement will lead to a presumption of COMI.
- (b) Its centre of main interest is located in Ireland because the warehouse will lead to a presumption of COMI.
- (c) Its centre of main interest is located in France because its registration, stores, customer-base and majority of employees lead to a presumption of COMI.
- (d) Its centre of main interest is located in the Netherlands because online customers lead to a presumption of COMI.

Total: 9/10

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

#### Question 2.1 [maximum 2 marks] 2/2

The following **two (2) statements** relate to particular provisions / concepts to be found in the EIR Recast. Indicate the name of the provision / concept (as well as the relevant EIR Recast article), addressed in each statement.

Statement 1. Proceedings covered by the scope of the EIR 2015 should include proceedings promoting the rescue of economically viable debtors, especially at a stage where there is a mere likelihood of insolvency.

Statement 2. Pending lawsuits are not covered by the effects of the *lex concursus* in insolvency proceedings.

[Statement 1 refers to Article 1 of the EIR Recast. It expands the scope of the EIR Recast to include not only insolvent situations, but also interim proceedings and rescue proceedings, therefore encompassing the type of proceedings that promote the rescue of economically viable debtors at a stage where there is a mere likelihood of insolvency. Rescue is promoted because the court at this earlier stage may grant a stay of further proceedings and thereby protect the integrity of the rescue plan and the estate. Statement 2 refers to Article 18 of the EIR Recast, which provides that the effects of insolvency proceedings on a pending lawsuit will be determined by and governed under the law of the country where the pending lawsuit was brought.]

**Question 2.2 [maximum 3 marks] 3/3**

The EIR Recast's objective remains, as much as possible, the universality of proceedings. However, several exceptions to this universal vision exist throughout the Regulation. Provide **three (3) examples** of provisions from the EIR Recast which depart from a universal approach to cross-border insolvency.

[First, Article 3(2) of the EIR Recast provides the option of commencing secondary proceedings in a country in which the debtor has an "establishment", which shows that the EIR Recast adopts modified universality. In secondary proceedings, the law of the secondary proceedings applies and the assets that are dealt with is limited to the assets located in the territory of the secondary proceedings. This therefore detracts from the universality of the main proceedings. Second, Article 8 of the EIR Recast excludes rights *in rem* of creditors on assets located outside of the location of the main insolvency proceedings, which shows that the EIR Recast adopts modified universality. The exemption of such rights means that the main insolvency proceedings are not truly universal in encompassing the debtor's assets. Third, Article 13 of the EIR Recast excludes employment contracts and relationships, which are governed only by the law applicable to the employment contract, which shows that the EIR Recast adopts modified universality. This "protects" the rights of employees by ensuring certainty, but departs from universality as different groups of employees may be treated differently depending on their employment contracts and location.]

**Question 2.3 [maximum 3 marks] 1/3**

The EIR Recast regulates the material scope of the Regulation in relation to national insolvency proceedings in Member States. List **three (3) elements** of the EIR Recast that deal with this matter and explain how they relate to this.

[First, the EIR Recast is "opt in" in that the Member States have filled in Annex A a list of national insolvency proceedings which are subject to the provisions of the EIR Recast. If a type of proceeding is not included within Annex A, it is not regulated by the EIR Recast (for example, the UK scheme of arrangement). The EIR Recast therefore regulates the material scope of the Regulation by allowing Member States to autonomously decide to opt in. Second, the material scope of the EIR Recast allows for the opening of secondary proceedings under Article 3(2), subject to some restrictions. **[This is not about the material scope]** This allows national insolvency proceedings to commence and apply national laws rather than the laws of the main proceedings. The EIR Recast therefore regulates the material scope of the Regulation by allowing secondary proceedings to exist. Third, the EIR Recast is very limited in terms of the substantive insolvency law it contains, and rather provides a supranational framework for resolving the procedure of international insolvency. The EIR Recast therefore regulates the material scope of the Regulation by allowing national insolvency proceedings to apply national laws] **[You could have mentioned Article 1 or Article 2].**

**Question 2.4 [maximum 2 marks] 2/2**

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

[First, the Insolvency Practitioner of the main insolvency proceedings may give an undertaking in accordance with Article 36 of the EIR Recast, after which the court asked to open secondary proceedings will have regard to Article 38(2) of the EIR Recast, which provides that the court should not allow secondary proceedings to be opened if the undertaking adequately protects the general interests of local creditors. The Insolvency Practitioner can promise to apply the relevant foreign laws that would apply if formal secondary proceedings had been taken out. Allowing for such "virtual" secondary proceedings to exist instead of "real" secondary proceedings meets the needs of creditors, who can enjoy the application of a law they expected, and reduces the costs of actually opening "real" secondary proceedings. Second, under Article 38(3) of the EIR Recast, the Insolvency Practitioner of the main proceedings can make a request for a stay of secondary proceedings when a stay of individual enforcement proceedings has been granted in the main insolvency proceedings. Such an application can be procedurally faster than the recognition of an undertaking. The discretionary stay, if granted, has the effect of temporarily freezing the secondary proceedings for three months.]

Total: 8/10

### **QUESTION 3 (essay-type questions) [15 marks in total]**

*In addition to the correctness, completeness (including references to case law, if applicable) and originality of your answers to the questions below, marks may be awarded or deducted on the basis of your presentation, expression and writing skills.*

#### **Question 3.1 [maximum 5 marks] 5/5**

During the reform process of the EIR 2000, what main elements were identified by the European Commission as needing revision within the framework of the Regulation (whether adopted or not)?

[First, the Commission identified the scope of the Regulation as needing revision. Revision was needed as the advent of new interim, pre-insolvency, and hybrid proceedings meant that the EIR 2000 was not equipped to encompass these new types of proceedings and did not apply to them, which can hamper efforts to rescue companies. Second, the use of COMI was noted to be of great importance but brought about some practical issues as the Courts of the Member States were not always consistently applying presumptions or carrying out comprehensive analysis. Third, the Commission recognized that there existed some uncertainty in relation to the operation of the exceptions to the lex fori principle. Fourth, greater clarity was needed in ascertaining when the opening of insolvency proceedings occurred. Fifth, greater coordination between main and secondary proceedings was required, as in practice the secondary proceedings were not used as a tool for supporting the main proceedings and there was no provision allowing the competent court to refuse to open secondary proceedings if contrary to the interests of creditors. There was also a need to implement less vague duties of cooperation and communication of information. Sixth, the EIR 2000 was not equipped to deal with cross-border insolvencies of groups of companies and was only concerned with single legal entities.

#### **Question 3.2 [maximum 5 marks] 5/5**



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

[According to the Virgos-Schmit Report, the use of COMI as an autonomous concept is praised as it brings practical certainty as the applicable law is that of the country with which the debtor has the most genuine connection. Creditors can therefore more accurately factor in the risk of insolvency and are more likely to be familiar with the relevant law. However, a shortcoming of the COMI concept is that it is unclear and cannot provide basis for fashioning a reliable test in practice. There is no clear definition and guidance must be sought from the CJEU.]

**Question 3.3 [maximum 5 marks] 3/5**

The European Insolvency Regulation is a choice-of-forum instrument, which although aiming at procedural harmonisation, did not harmonise the substantive insolvency laws of the Member States. Because of lingering disparities among the national insolvency regimes across the EU, the European institutions introduced the Directive on Preventive Restructuring Frameworks in 2019, which is meant to dovetail the European Insolvency Regulation. List **two (2)** ways in which the Regulation and the Directive differ.

[First, the Directive is addressed towards preventative restructuring procedures, whereas the EIR Recast is addressed towards both preventative restructuring procedures and other interim proceedings, as well as insolvency proceedings. The Directive is therefore focused more on rescue and providing tools that promotes preventative measures. Second, within the sphere of preventative restructuring procedures, the Directive provides narrow substantive law as opposed to the EIR Recast’s procedural framework (**which means? More comparative explanation needed here**). It establishes minimum standards for mechanisms to be implemented by the Member States.]

Total: 13/15

**QUESTION 4 (fact-based application-type question) [15 marks in total]**

**Scenario**

Dinosaurus SARL is a company selling children stuffed animals. It is incorporated in France and has opened its first store in La Flèche in 2015 and another 10 stores across France since. 80% of its employees work in France. It also has an office in Cork, Ireland, as well as three stores around Ireland. 20% of its employees are located in Ireland. Its main warehouse is in Spain. Most of its customers come from France, and some online purchases are coming mainly from the United Kingdom.

In 2020, Dinosaurus SARL entered into a loan agreement with a Spanish bank because it was hoping to expand its reach onto the Spanish children toys market. It opened a bank account with the bank while also negotiating prices with local suppliers. It signed some (non-binding) memoranda of understanding with three Madrid-based suppliers.

Unfortunately for Dinosaurus SARL, the timing of this initiative coincided with the Covid-19 pandemic which hit the world in 2020. By 2021, the company was in financial difficulty, yet managed to keep afloat for another two years. On 20 June 2023, it filed a petition to open safeguard proceedings in the Commercial Court in Le Mans, France.

**Question 4.1 [maximum 5 marks] 5/5**

Assume that the timeline is slightly different and, therefore, assume that it is not the EIR 2015 that applies but the EIR 2000.

***Does the EIR 2000 apply to this case and to the opening of safeguard proceedings?***

You must justify your answer when explaining why it does or does not have jurisdiction. Your answer should contain references to the applicable law and the relevant CJEU jurisprudence.

[The EIR 2000 does not apply to the case. Unlike the EIR Recast, which has an expanded scope of application to interim proceedings, the EIR 2000 mentions only insolvency proceedings which entail partial or total divestment of a debtor and the appointment of a liquidator under Article 1. The French sauvegarde financière accélérée was not included in Annex A.]

**Question 4.2 [maximum 5 marks] 5/5**

Assume that the timeline is as explained in the original scenario above and that the French High Court opens safeguard proceedings on 23 June 2023.

***Will the EIR Recast be applicable to the proceedings?***

Your answer should address the EIR Recast's scope and contain all steps taken to answer the question.

[The EIR Recast is applicable to the proceedings. The French safeguard proceedings are listed under Annex A of the EIR Recast. It therefore falls within the material scope under Articles 1 and 2 of the EIR Recast. It is a public collective interim proceeding. The application was made in 20 June 2023, and the decision to open was made on 23 June 2023. The proceedings were therefore opened after the indicated date of 26 June 2017 (Article 92 of the EIR Recast). Dinosaurus SARL does not fall under any of the excluded categories of debtors (for example, it is not an insurance undertaking or bank). The COMI, which is presumed to be France, is a Member State that is not Denmark. The EIR Recast therefore applies.]

**Question 4.3 [maximum 5 marks] 5/5**

A Spanish bank files a petition to open secondary insolvency proceedings in Spain with the purpose of securing a Spanish insolvency distribution ranking.

***Given the facts of the case, can such proceedings be opened in Italy under the EIR Recast?***

Your answer should contain references to the applicable law and the relevant CJEU jurisprudence.

[Secondary proceedings cannot be opened in **Italy** because Dinosaurus SARL has no link whatsoever with Italy. Pursuant to Article 3(2), secondary proceedings can only be commenced in a Member State other than the Member State of the main proceedings where the debtor, Dinosaurus SARL, possesses an establishment within the territory of the other Member State. Under Article 2(10), an "establishment" is "any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets". Per the CJEU in *Interedil*, there needs to be the pursuit of an economic activity and the presence of human resources, for a minimum level of organization and a degree of stability. Mere presence of goods or bank accounts is insufficient to show that there is an

“establishment”. As there is no link whatsoever with Italy, secondary proceedings cannot be opened under the EIR Recast. In the case of **Spain**, the existence of a warehouse and the opening of bank accounts does not alone show “establishment”.]

Total: 15/15

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

**Total: 45/50**