



**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: **there is no difference between a and b.**

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

### Question 1.3

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

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

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

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

#### Question 1.4

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

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

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

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

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

#### Question 1.5

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

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

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

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

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

#### Question 1.6

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

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

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

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

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

### Question 1.7

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

- (a) Article 18 EIR Recast (entitled “Effects of insolvency proceedings on pending lawsuits or arbitral proceedings”).
- (b) Article 40 EIR Recast (entitled “Advance payment of costs and expenses”).
- (c) Article 7 EIR Recast (entitled “Applicable law”).
- (d) Article 31 EIR Recast (entitled “Honouring of an obligation to a debtor”).

The answer was D.

### 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: EIR Recast Article 1 Scope

Statement 2: EIR Recast Article 18 Effects of insolvency proceedings on pending lawsuits or arbitral proceedings

**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.

The following three provisions of EIR Recast are depart from a universal approach to cross-border insolvency:

1. EIR Recast **Article 3(2)**, the provision about the secondary proceeding.
2. EIR Recast **Article 8** Third parties' rights in rem and **Article 18** Effects of insolvency proceedings on pending lawsuits or arbitral proceedings. Both provisions are the exceptions to the rule of applicable law.

**Question 2.3 [maximum 3 marks] 1.5/3**

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

1. The EIR Recast applies to proceedings aiming at rescuing economically viable but financially distressed businesses, not only to the liquidation-oriented procedures. The emphasis on restructuring is a noticeable innovation of the EIR Recast and is in line with a general European trend of promoting effective restructuring tools to maximize value for creditors, increase investment and job opportunities in the single market. **[Article of the Regulation?]**
2. The proceeding should be public and collective. In this case, the national enforcement proceeding in Member States between the debtor and a single creditor is beyond the scope of the EIR Recast. **[Article of the Regulation?]**
3. The assets and affairs of a debtor are subject to control or supervision by a court. The proceedings referred in EIR Recast Article 1 are listed in Annex A, and the proceeding mentioned in Annex A is automatically falls within the material scope of the EIR Recast.

**Question 2.4 [maximum 2 marks] 1.5/2**

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.

The EIR Recast provides a number of options to avoid the opening of secondary insolvency proceedings. For example:

1. The synthetic secondary proceedings. If the IP in the main insolvency proceedings has given an undertaking in respect of the assets located in the Member State in which secondary proceedings could be opened in accordance with Article 36 of the EIR Recast, the court asked to open secondary

proceedings should not open such a proceeding if the undertaking adequately protects the general interests of local creditors.

2. Stay of the opening of secondary insolvency proceedings. The EIR Recast provides for the possibility for the court to temporarily stay the opening of secondary insolvency proceedings, when a temporary stay of individual enforcement proceedings has been granted in the main insolvency proceedings. The stay requires a request from the IP or the DIP and it may be imposed for a period not exceeding 3 months and on condition that suitable measures are in place to protect the interests of local creditors. [Article?]

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)?

After 15 years of implementation, it became clear that some of the provisions of the EIR 2000 needed adjustment, while other developments required totally new rules. During the reform process of the EIR 2000, many issues were identified by the European Commission. For example, the scope of the new EIR. The EIR 2000 only mentioned proceedings entailing partial or total divestment of a debtor and the appointment of a liquidator, which is not in line with the trend of the rescue culture. The narrow scope of the EIR 2000 may frustrate the effective restructuring attempts in the EU. Another example is the rules for cooperation between IP and courts. In cross-border insolvency cases, communication and cooperation are of great importance, including court-to-court, IP-to-IP, and IP-to-court. The new EIR should introduce the obligation between the court and IP to avoid a piecemeal liquidation and suboptimal returns to creditors. In addition, the insolvency of group companies, improvement of creditor information and general modernization of the legal rules also draw much attention. Finally, regard must be had to the jurisprudence of the CJEU when reform the EIR 2000.

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

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

The autonomous meaning of COMI facilitates legal certainty across the EU, as in principle, its application must be uniform in all Member States. Legal certainty and foreseeability for all stakeholders dealing with the debtor, if it goes insolvent, is further encouraged by objectivity and ascertainability of the place of COMI. In addition, the EIR Recast contains a registered office presumption to make COMI more predictable.

However, the COMI concept was criticized as vague and the interpretations of it did not provide enough guidance to provide a reliable practical test. This could jeopardize legal certainty and predictability, contrary to its objectives. Creditors may price in risk and uncertainty when dealing with insolvency, resulting in higher capital costs. In addition, critics of the concept contend that the COMI



concept is open to arbitrage and manipulation. More generally, it has been contended that the COMI may be different to assess and to determine by creditors.

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

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

The EIR contains uniform rules on international jurisdictions, recognition of insolvency judgments, applicable law in insolvency matters and cooperation between IPs. The objective of the Regulation is to harmonize regulations of cross-border insolvencies, improve the efficiency and effectiveness of insolvency proceedings having cross-border effects, ensure equal treatment of creditors, and protect legitimate expectations and the certainty of transactions. In contrast, the Directive is aimed at creating harmonized restructuring frameworks and the national insolvency laws throughout the Member States, and promoting the development of a new culture of preventive restructuring with viable companies. Besides, the Regulation is an instrument of a predominantly procedural nature, while the Directive is the first instrument that substantively harmonizes insolvency law across the EU, although it addresses only a narrow aspect of the insolvency law-preventive restructuring.

**Total: 15/15**

**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.

In this case, the EIR 2000 does not apply. According to Article 1 of the EIR 2000, this regulation shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator, which means the proceedings for the purpose of rescue are excluded by the Regulation. In this specific case, Dinosaurus SARL filed a petition for the safeguard proceeding, rather than a liquidation proceeding. Meanwhile, according to ANNEX A, there are only two proceedings in France included in this list- Liquidation judiciaire and Redressement judiciaire avec nomination d'un administrateur. The safeguard proceeding is not listed in ANNEX A, thus it does not trigger the application of the EIR 2000.

**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.

To answer this question, four types of scopes should be taken into account: temporal scope, personal scope, material scope, and geographical scope.

1. The debtor has COMI in France, which is a Member State of the EU.

The EIR Recast offered several presumptions to indicate the location of COMI. One of the main presumptions is the registered office presumption. In the case of a company or a legal person, the place of the registered office shall be presumed to be the place of COMI (Article 31(1) of the EIR Recast). In this case, the debtor is incorporated in France and the registered office has not been moved to another Member State within 3 months prior to the request for the opening of insolvency proceedings. So in this case, France is the place of COMI.

2. The debtor in this case is a company selling children stuffed animals, rather than a bank, insurance company or another excluded undertaking.

3. The proceeding opened against the debtor in this case is a safeguard proceeding, which is listed in Annex A to the EIR Recast.

4. The safeguard proceeding in this case is opened on 23 June 2023, which is after 26 June 2017.

In summary, the EIR Recast is applicable to the proceedings.

**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?***

***(I assume the location in this question should be Spain, rather than Italy.)***

Article 3(2) of the EIR Recast is about the secondary proceeding. According to this Article, where the centre of the debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if it possesses an establishment within the territory of that other Member State. The effects of those

proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State. Regarding the definition of establishment, Article 2 provides that ‘establishment’ means 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. The concept of establishment is essential to the opening of secondary proceedings. In *Interedil* case, the CJEU examined the concept and concluded that the fact that the definition connects the pursuit of an economic activity to the presence of human resources, shows that a minimum level of organization and a degree of stability are required. It follows that, conversely, the presence alone of goods in isolation or bank accounts does not satisfy the requirements for classification as an establishment. The presence of human means and assets is another criterion for determining the establishment. It shows that the debtor shall conduct its activities with the involvement of human resources and assets, which together demonstrate the organizational presence in the forum. In this case, the debtor only has a main warehouse and a bank account in Spain. There is no minimum level of organization and a degree of stability. The debtor has no employees in Spain at the same time, which means there is no presence of human resources. In summary, the secondary insolvency proceeding cannot be opened in Spain due to the lack of establishment in Spain.

**Total: 15/15**

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

**Total: 47/50**