



**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.

### 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: Article 1 is entitled “Scope” and sets out the objective and purpose of the EIR Recast.

Statement 2: Pursuant to Article 7(2)(f) of the EIR Recast, pending lawsuits are exempt from the effects of insolvency proceedings commenced in a Member State. Article 18 sets out when the exception will apply to pending lawsuits. Article 18 sets out that the effects of insolvency proceedings on pending lawsuits or pending arbitral proceedings concerning an asset or a right which forms part of the insolvent estate of a debtor, shall be governed solely by the laws of the Member State in which the lawsuit is pending, or in which the arbitration tribunal has a seat.

**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.

Article 13 of the EIR Recast, entitled “Contracts of Employments” requires employment contracts and relationships to be governed independently of the insolvency proceedings and they be governed solely by the law of the Member State. The impact of this is that the debtor is required to navigate the relevant laws concerning employment contracts in multiple jurisdictions, depending on the operations of the debtor as opposed to one universal law and rule applying.

Article 18 of the EIR Recast exempts pending proceedings and arbitration processes from the insolvency proceedings. The effect of this is that any pending proceedings or arbitration process is governed solely by the Member State and dealt with outside the scope of the insolvency proceedings. The debtor in this scenario does not benefit from the automatic stay and is required to navigate and deal with pending proceedings or arbitration processes in the relevant jurisdiction based upon the Member States laws as opposed to universal rules applied to the insolvency proceedings. The effect of this complicates the insolvency proceedings increasing the time and costs.

Article 8 of the EIR Recast permits a creditor to assert a right over a specific asset, whether tangible or intangible, moveable, or immovable assets. The right permits a creditor to assert rights over the assets and seek to recover the debt. The impact of this is that a creditor can take steps to enforce its rights, including by commencing secondary proceedings in the Member State. The impact of this is that the insolvency proceedings are then not dealing with all assets and seeking to complete a wholistic restructure of the debtor but rather is required to omit certain assets subject to the creditor’s rights or secondary proceedings, which seeks to increase the time and costs associated with the insolvency proceedings.

**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.

Article 1 of the EIR Recast sets out the scope of the EIR Recast, importantly it sets out the laws relevant to the reorganization or liquidation of an entity who commences insolvency proceedings. The following are three key elements that seek to regulate insolvency proceedings in Member States:

- a. A debtor is totally or partially divested of its assets and an insolvency practitioner is appointed. The benefit of this is that the insolvency practitioner is able to take control of all assets, regardless of the location to allow for all assets to be dealt with uniformly.
- b. The assets and affairs of the debtor are subject to the control or supervision by the court. This ensures that a wholesale restructure or reorganization of the debtor can be undertaken, or its affairs considered on a holistic basis by the insolvency practitioner in an insolvency situation to ensure matters are concluded with finality.
- c. A temporary stay of individual enforcement proceedings is granted by a court or by operation of law to allow for negotiations between the debtor and its creditors. This ensures that the principle of universalism is upheld and the debtor's assets are universally dealt with by one insolvency practitioner in one insolvency proceeding, being the Member State where the entities center of main interest is located.

[These do not all relate to the material scope of the Regulation. You could have discussed Article 2, Annex A, Recital 9].

**Question 2.4 [maximum 2 marks] 1/2**

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.

If a creditor seeks to commence secondary proceedings, pursuant to Article 28(2) of the EIR Recast, an insolvency practitioner in the main proceedings can provide the court with an undertaking in accordance with Article 36 in order to seek a stay of the secondary proceedings. If the court is satisfied the undertaking adequately protects the interests of the local creditors, then the court should not open the secondary proceedings. The purpose of this is to prevent individual creditors enforcing their own rights, complicating matters and increasing costs for the insolvency practitioner seeking to undertake a restructure or liquidation.

An underlying principle of the EIR Recast is the implementation of an automatic stay on any future proceedings against a debtor. Although there are exemptions to this principle. The commencement of secondary proceedings can go against the principle and basis upon which the automatic stay is implemented. To prevent this from occurring, the EIR Recast provides the court with discretion to stay the secondary enforcement proceedings. [Reference?]

Total: 7.5/10

**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)?



Pursuant to Article 46 of the EIR 2000, the European Commission was required to present a report on the EIR 2000, the application of the insolvency regime and a proposal for any adaptation, if necessary. Ultimately, as a result of the report the EIR Recast was adopted. The key provisions of the EIR 2000 which were reformed in the EIR Recast primarily focused on broadening the scope of the insolvency proceedings and in particular proceedings where a debtor was restructured, creating stronger rules for co-operation between insolvency practitioners appointed in the main proceedings and courts, the possibility of proceedings of debtors of the same group of companies, improvement of the provision of information to creditors, including via insolvency registers and a general modernism of the legal rules surrounding data protection.

**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.

Main insolvency proceedings under the EIR Recast may only be commenced in the jurisdiction of the debtor’s center of main interests (**COMI**). Pursuant to Article 3(1) of the EIR Recast, the COMI is the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties. In *Eurofood IFSC Ltd*, the court determined that the COMI is to have an autonomous meaning and interpreted uniformly regardless of what domestic legislation may state. The jurisprudence developed since this determination by the European Court of Justice has seen an attempt to create a uniform definition which is easily ascertainable and objectively determined by third parties, in particular creditors. Further the EIR Recast has adopted a presumption that the registered office of the debtor is presumed to be the relevant jurisdiction for any insolvency proceedings. The adoption of a uniform definition as opposed to specific definitions adopted by Member States creates certainty and foreseeability for creditors or stakeholders dealing with a debtor in the event, they become insolvent.

The difficulty with ascertaining a debtor’s COMI is that many large organizations have interests and operations spreading across several jurisdictions, including territories which are not parties to the EIR Recast. The EIR Recast does not address or provide a mechanism to address forum shopping on behalf debtors where they may move significant assets, personnel or its registered office to a different jurisdiction in order to conduct a liquidation or restructure in a jurisdiction which offers more favourable treatment to the debtor, to the detriment of creditors. The only limitation to forum shopping is if the registered office is moved three months before the commencement of the insolvency proceeding.

Further as the presumption can be rebutted depending on the circumstances, it ultimately creates uncertainty for creditors as they are not able to contract with debtors with certainty. Creditors may be able to ascertain where a registered office is, however will not be able to fully ascertain where all of a debtor’s assets are located, the full extent and location of all operations and the location of personnel.

**Question 3.3 [maximum 5 marks] 1/5/5**

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 Directive on Preventive Restructuring Frameworks (**Directive**) although is intended to create a harmonized framework, consistent with the European Insolvency Regulation, it does not achieve this objective as it:

1. Fails to harmonize core aspects of insolvency law such as implementing a common definition of insolvency, the conditions on the commencement of insolvency proceedings, the ranking of creditor claims, avoidance actions and tracing of assets; and
2. Outlines common principles for Member States to follow, however provides flexibility for Member States to adopt or apply the rules as appropriate for the specific national context.

The European Insolvency Regulation by comparison outlines the core aspects of insolvency proceedings providing creditors certainty as to the process to be adopted. Further, unless secondary proceedings are undertaken the universal laws are applied by the courts and insolvency practitioner in dealing with the insolvent debtor as opposed to differing laws of various Member States that the debtor may have assets or interests in. This ensures a wholesale restructure or liquidation of an entity is achieved and creditors are equally treated, in accordance with the relevant priority rules, without any steps been taken to defeat creditor interests.

Further, the European Insolvency Regulation operates a mechanism that ensures that the insolvency practitioner and court apply uniform rules and principles to the insolvency proceedings. Different rules and principles are not adopted and applied depending on which Member State assets are located in. Further, given there has been almost uniform adoption of the European Insolvency Regulation, the provisions apply uniformly providing certainty to third parties transacting with the debtor.

**This is not specific enough. You could have discussed the following differences:**

- A Directive needs to be implemented by Member States whereas a Regulation is directly applicable
- The Directive is a minimum standards harmonization (i.e. substantive harmonization) instrument whereas the Regulation is a conflict-of-law/choice-of-forum instrument (i.e. procedural harmonization)
- The Directive promoted the introduction of pre-insolvency rescue mechanisms into the national regimes of Member States whereas the Regulation attempts to regulate the effects of cross-border insolvencies.

**Total: 11.5/15**

#### **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] 0/5**

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.

On 29 May 2000, the European Council adopted the EIR 2000, which came into force on 1 May 2002 and was binding on all EU Member States, except for Denmark who elected to opt out from the EIR 2000. As such, pursuant to Article 3(1) of the EIR 2000, insolvency proceedings could be initiated in the territory of the debtor's center of main interest. Pursuant to Article 3 of the EIR 2000, the law of the Member State in which the insolvency proceedings were commenced, dictates the legal principles, beyond the EIR 2000 to be applied. Given the interests of Dinosaurus SARL extends across multiple jurisdiction the determination of what Member State is the debtor's center of main interest will be key. However, under the EIR 2000, subject to what Member State the main proceedings are commenced in, there is flexibility and latitude for secondary proceedings to be commenced in other States given the assets and financial interests extend across a number of jurisdictions.

Determination of which Member State is the debtor's center of main interest under the EIR 2000 is largely established based on the jurisprudence established in *Eurofood IFSC Ltd*.

This was not the focus of this question.

The Commercial Court in France does not have international insolvency jurisdiction to open insolvency proceedings.

According to Article 3 EIR Recast, COMI shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties. The place of the registered office shall be presumed to be the COMI in the absence of proof to the contrary = France.

**However**, Article 1 of the EIR 2000 states that 'this Regulation shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator. Article 2 EIR 2000 states that "insolvency proceedings" shall mean the collective proceedings referred to in Article 1(1). These proceedings are listed in Annex A. Annex A of the EIR 2000 only listed two French insolvency proceedings which came under the scope of the EIR 2000: (i) liquidation; (ii) *redressement judiciaire* (rehabilitation).

Therefore, the EIR 2000 **would not** apply to safeguard proceedings.

The Commercial Court in France does not have international insolvency jurisdiction to open insolvency proceedings.

According to Article 3 EIR Recast, COMI shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties. The place of the registered office shall be presumed to be the COMI in the absence of proof to the contrary = France.

**However**, Article 1 of the EIR 2000 states that ‘this Regulation shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator. Article 2 EIR 2000 states that “insolvency proceedings” shall mean the collective proceedings referred to in Article 1(1). These proceedings are listed in Annex A. Annex A of the EIR 2000 only listed two French insolvency proceedings which came under the scope of the EIR 2000: (i) liquidation; (ii) *redressement judiciaire* (rehabilitation).

Therefore, the EIR 2000 **would not** apply to safeguard proceedings.

#### **Question 4.2 [maximum 5 marks] 4/5**

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 intended to operate as a legislative instrument which governs the jurisdiction in which insolvency proceedings, or actions arising from an insolvent estate are governed. The EIR Recast is aimed at providing an efficient and effective insolvency proceedings for debtors with interests and assets across multiple jurisdictions. Article 1 of the EIR Recast sets out and dictates when an insolvency proceeding will be governed by the EIR Recast. Determination of the EIR Recast scope requires an assessment of when the insolvency proceedings apply (temporal scope), whom it applies to (personal scope), which proceedings are covered by it (material scope) and what its geographical limitations are (geographical scope).

To determine the application of the EIR Recast to the French High Court proceedings is as follows:

1. Is the COMI of the debtor in a Member State of the EU, except Denmark → yes, the COMI of the debtor is France, which is a Member State of the EU.
2. Is the debtor a bank, insurance company or another ‘excluded’ undertaking → No, the debtor is an entity that sells children toys.
3. Is the proceeding opened by the debtor listed in Annex A to the EIR Recast → yes, the French safeguard proceedings are included within Annex A to the EIR Recast.
4. Was the proceeding opened after 26 June 2017 → yes, the proceedings were commenced on 23 June 2023.

So, does the EIR Recast apply?

#### **Question 4.3 [maximum 5 marks] 2.5/5**

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.

No, pursuant to Article 3(2) of the EIR Recast, secondary proceedings may be opened in a Member State if it is established that the debtor has an “establishment” in the Member State, as opposed to the COMI. Pursuant to Article 2(1) of the EIR Recast, “establishment” is any place of operations where a debtor carries out or has carried out in the three-month period prior to the request to open the main insolvency proceeding non-transitory economic activity with human means and assets. As Dinosaurus SARL only opened a Spanish bank account for the purposes of negotiating with suppliers in Spain and signed three non-binding memorandums of understanding with supplies, it appears that there is no economic activity involving employees of the debtor such that it satisfy the court that it has an establishment in Spain to commence secondary proceedings. It is evident minimal activities occurred in Spain prior to the opening of the main proceedings and the only operations and link to Spain is via a bank account held. Based on the facts, it is not clear whether there are any funds held in that account. However, based on the facts available, the operations and activities in Spain of the debtor never commenced such that there is an insufficient basis to establish a degree of continuity and stability of operations in Spain to establish a basis to commence secondary proceedings.

You were meant to provide references to the Regulation’s provisions and jurisprudence.

- According to Article 3(2) EIR Recast, where the debtor’s COMI 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.
- Under Article 2(10) EIR Recast, ‘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.
- Relevant case law: *Interedil Srl, in liquidation v Fallimento Interedil Srl*, Case C-396/09, ECLI:EU:C:2011:671 (Oct. 20, 2011), *Burgo Group SpA v Illochroma SA*, Case C-327/13, ECLI:EU:C:2014:2158 (Sep. 4, 2014).
- The facts of the case do not support the finding of an establishment of Dinosaurus SARL in Spain. The presence alone of assets (leased-out warehouse) in isolation, contractual relations with a local bank (including maintenance of a bank account) and occasional negotiations (whether individual or collective) with local distributors do not qualify as ‘non-transitory economic activity with human means and assets’. The requisite minimum level of organisation and a degree of stability (see para. 64 in *Interedil*) is evidently missing.
- Therefore, under the EIR Recast, secondary insolvency proceedings cannot be opened in Spain.

Total: 6.5/15

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

**Total: 34.5/50**