



**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”).

#### 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: 10/10

### 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 is in relation to the material scope of the EIR Recast. Statement 1 can be located at Recital 10 of the recitals to the EIR Recast.

Statement 2 is in relation to an exception to the application of *lex concursus*, specifically pending lawsuits. Statement 2 can be located at Article 18 of the EIR Recast which states that the effects of insolvency proceedings on a pending lawsuit “*shall be governed solely by the law of the Member State in which that lawsuit is pending*”<sup>1</sup>. It should be noted that Article 18 also applies to 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.

Article 7(1) of the EIR Recast provides that “*the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened*”<sup>2</sup>. Even though the universality of proceedings remains the EIR Recast’s objective, there are several exceptions to this vision. Three examples of provisions from the EIR Recast which depart from a universal approach to cross-border insolvency are:

- 1) “Third parties’ rights *in rem* (Article 8) - Article 8(1) provides that when insolvency proceedings are opened, they “*shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immovable assets...belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings*”<sup>3</sup>. As a result, rights *in rem* are “entirely insulated” from the opening of insolvency proceedings and the proprietor of the right *in rem* should, in theory, be able to continue to assert its right to segregate the collateral security<sup>4</sup>. The policy purpose behind this exception is to provide legal and economic certainty as the holder of rights *in rem* are protected against the risk and effects of insolvency proceedings<sup>5</sup>;
- 2) Contracts of employment (Article 13) – Article 7(2)(e) provides that the law of the Member State which opens the insolvency proceedings shall determine the effects of the proceedings on current contracts to which a debtor is party to<sup>6</sup>. Article 13(1) is an exception to Article 7(2)(e). Article 13(1) provides that the “*effects of insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the Member State applicable to the contract of employment.*”<sup>7</sup> The policy reason for this exception is, as stated in Recital 72, “*to protect employees and jobs*”<sup>8</sup>. Employees and labour relations are shielded from the application of foreign law (which would be different from that which governs the contractual relationship between employees and employers)<sup>9</sup>; and

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<sup>1</sup> Article 18, EIR Recast

<sup>2</sup> Article 7(1), EIR Recast

<sup>3</sup> Article 8, EIR Recast

<sup>4</sup> Professor Bob Wessels and Mr Ilya Kokorin, text updated for 2020/2021, 2021/2022, 2022/2023 and 2023/2024 by Dr Emilie Ghio, “INSOL International, Foundation Certificate in International Insolvency Law, Module 2B Guidance Text, The European Insolvency Regulation 2023/2024”, p 27

<sup>5</sup> *Ibid.*, p 74

<sup>6</sup> Article 7(2)(e), EIR Recast

<sup>7</sup> Article 13(1), EIR Recast

<sup>8</sup> Recital 72, EIR Recast

<sup>9</sup> Professor Bob Wessels and Mr Ilya Kokorin, text updated for 2020/2021, 2021/2022, 2022/2023 and 2023/2024 by Dr Emilie Ghio, “INSOL International, Foundation Certificate in International Insolvency Law, Module 2B Guidance Text, The European Insolvency Regulation 2023/2024”, p 74

- 3) Pending lawsuits or arbitral proceedings (Article 18) – Article 18 provides that the effects of insolvency proceedings on a pending lawsuit or arbitral proceedings which involve an assets or right that constitutes part of a debtor’s insolvency estate “*shall be governed solely by the law of the Member State in which that lawsuit is pending or in which the arbitral tribunal has its seat*”<sup>10</sup>. This is the exception to Article 7(2)(f). The policy purpose behind this is because the commencement of insolvency proceedings can have significant procedural consequences to a party to litigation or arbitration proceedings<sup>11</sup>. For example, with such exception, the *lex concursus* may suspend or even terminate all pending lawsuits against an insolvent debtor - Article 18 provides a shield and subjects the effects of the insolvency to the laws of the Member State where the lawsuit is pending or where the seat of arbitration is located.<sup>12</sup>

**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.

Three elements of the EIR Recast that regulate the material scope of the Regulation in relation to national insolvency proceedings in Member States are:

- 1) Recital 9, Article 1 and Annex A – the objective of the EIR Recast is to ensure the efficient and effective conduct of cross-border insolvency proceedings<sup>13</sup>. The EIR Recast does this by regulating the opening and extraterritorial effects of insolvency proceedings in Member States. The key provisions in this respect are Article 1 and Annex A – these provisions determine which national insolvency proceedings are subject to the scope of the Regulation. Article 1 sets out the scope of the Regulation and Annex A lists the proceedings referred to in Article 1. Proceedings which are not listed in Annex A fall outside the scope of the EIR Recast.<sup>14</sup> As stated in Recital 9, the EIR Recast will apply to the insolvency proceedings which are listed exhaustively in Annex A and the national procedures “*should apply without any further examination by the courts of another Member State as to whether the conditions set out in this Regulation are met.*”<sup>15</sup>;
- 2) Recital 25 and Recital 27 – the EIR Recast is legislation that directly applies to all Member States, except Denmark. Recital 25 states that the Regulation “*applies only to proceedings in respect of a debtor whose centre of main interests is located in the Union.*”<sup>16</sup> Before insolvency proceedings are opened, the competent court should examine of its own motion whether the debtor’s centre of main interests (the “**COMI**”) or its establishment is actually located within its jurisdiction<sup>17</sup>. In the case of the COMI being located outside the EU or in Denmark, the EIR Recast will not apply - in such circumstances, “*national conflict of laws rules and insolvency laws of the EU Member States will determine jurisdictional outcome*”<sup>18</sup>. It should be noted that the Court of Justice of the European Union in *Ralph Schmid v Lilly Hertel*<sup>19</sup> extended the scope of

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<sup>10</sup> Article 18, EIR Recast

<sup>11</sup> Professor Bob Wessels and Mr Ilya Kokorin, text updated for 2020/2021, 2021/2022, 2022/2023 and 2023/2024 by Dr Emilie Ghio, “INSOL International, Foundation Certificate in International Insolvency Law, Module 2B Guidance Text, The European Insolvency Regulation 2023/2024”, p 31

<sup>12</sup> Ibid.

<sup>13</sup> Ibid., p 11

<sup>14</sup> Ibid., p 12

<sup>15</sup> Recital 9, EIR Recast

<sup>16</sup> Recital 25, EIR Recast

<sup>17</sup> Recital 27, EIR Recast

<sup>18</sup> Professor Bob Wessels and Mr Ilya Kokorin, text updated for 2020/2021, 2021/2022, 2022/2023 and 2023/2024 by Dr Emilie Ghio, “INSOL International, Foundation Certificate in International Insolvency Law, Module 2B Guidance Text, The European Insolvency Regulation 2023/2024”, p 13

<sup>19</sup> Case C-328/12, ECLI:EU:C:2014:6 (16 January 2014)



the EIR 2000 and EIR Recast to include actions against a person resident in a third country (in this case, Switzerland). The rationale behind this included the universal nature of main insolvency proceedings encompassing all of a debtor's assets<sup>20</sup>; and [This does not relate to the material scope of the Regulation].

- 3) Recital 23 and Article 3 – Article 3(1) of the EIR Recast provides that the courts of Member States, except Denmark<sup>21</sup>, within the territory where the COMI is located shall have jurisdiction to open insolvency proceedings ("main insolvency proceedings")<sup>22</sup>. In line with the objective of modified universalism, proceedings under Article 3 are universal in scope and are designed to encompass all of the debtor's assets. As stated in Recital 23, the EIR Recast does permit the opening of secondary insolvency proceedings (to be ran in parallel with the main insolvency proceedings)<sup>23</sup>. The purpose of secondary insolvency proceedings are to protect the diversity of interests and may be opened in any Member State where the debtor has an establishment.<sup>24</sup> It should be noted that secondary proceedings in any Member State have limited scope as they are limited to just the assets located in that Member State. [This does not relate to the material scope of the Regulation. You could have discussed Recital 9, Article 2 or Annex A].

**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.

Two examples of instruments introduced by the EIR Recast to avoid or control the opening, conduct or closure of secondary proceedings are:

- 1) Right to give an undertaking (Articles 36 and 38) – To avoid the commencement of secondary insolvency proceedings, Article 36 of the EIR Recast provides that an insolvency practitioner in the main insolvency proceedings has a right to give a unilateral undertaking in respect of assets located in the Member State in which secondary insolvency proceedings could be opened - on distribution, the assets or proceeds of realisation are to comply with the national law on distribution and priority rules that creditors would have had had secondary insolvency proceedings been opened in that Member State<sup>25</sup>. Article 38(2) states that where an undertaking is given under Article 36<sup>26</sup>, the court requested to open secondary insolvency proceedings shall not open such proceedings if is satisfied that the general interests of local creditors are adequately protected by the undertaking<sup>27</sup>. The undertaking is required to comply with both substantive and procedural requirements, including being in the official language

<sup>20</sup> Professor Bob Wessels and Mr Ilya Kokorin, text updated for 2020/2021, 2021/2022, 2022/2023 and 2023/2024 by Dr Emilie Ghio, "INSOL International, Foundation Certificate in International Insolvency Law, Module 2B Guidance Text, The European Insolvency Regulation 2023/2024", p 14

<sup>21</sup> Recital 88, EIR Recast

<sup>22</sup> Article 3(1), EIR Recast

<sup>23</sup> Recital 23, EIR Recast

<sup>24</sup> Ibid.

<sup>25</sup> Article 36, EIR Recast

<sup>26</sup> See James Bell, Douglas Hawthorn and Jeremy Walsh, Travers Smith LLP, "The recast EU Insolvency Regulation and its impact on distressed investing", published 25 November 2016, p 284 where it was mentioned that Article 36 follows *Collins & Aikman* [2007] 1 BCLC 182 and *Nortel* [2009] BCC 343. In these cases, in order to avoid multiple secondary insolvency proceedings being opened, the administrator in United Kingdom (then still a Member State of the European Union) insolvency proceedings undertook to respect local priorities of distribution.

<sup>27</sup> Article 38(2), EIR Recast

(or one of the official languages) of the Member State where secondary proceedings could be opened<sup>28</sup>; and

- 2) Stay of the opening of secondary insolvency proceedings (Recital 45 and Article 38(3)) – Recital 45 of the EIR Recast provides for the possibility that the court temporarily stays the opening of secondary insolvency proceedings in the situation where there is a temporary stay of individual enforcement proceedings in the main insolvency proceedings. This is designed “to preserve the efficiency of the stay granted in the main insolvency proceedings”<sup>29</sup>. Such a stay to the opening of secondary insolvency proceedings is not automatic. Under Article 38(3), it requires a request from an insolvency practitioner or the debtor in possession. The stay shall not exceed 3 months, provided there are suitable safeguards in place to protect the interests of local creditors.<sup>30</sup> To protect the interests of local creditors, Article 38(3) further prescribes that the court may order protective measures by, for example, requiring the main insolvency practitioner to “not to remove or dispose of any assets which are located in the Member State where its establishment is located unless this is done in the ordinary course of business.”<sup>31</sup>

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)?

Article 46 of the EIR 2000 mandated that by no later than 1 June 2012, the European Commission (the “**Commission**”) “shall present to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Regulation. The report shall be accompanied if need be by a proposal for adaptation of this Regulation.”<sup>32</sup> Even though the EIR 2000 was generally considered successful in facilitating cross-border insolvency proceedings within European Union (the “**EU**”) Member States, the consultation commissioned by the Commission had “revealed a range of problems”.<sup>33</sup> Five main shortcomings were identified in the Commission’s “Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings” (the “**Proposal**”):

- 1) Pre-insolvency proceedings – the EIR 2000’s scope did not cover national procedures in relation to a company’s restructuring at a pre-insolvency stage (“**pre-insolvency proceedings**”) or those where the existing management maintain their positions in the company (“**hybrid proceedings**”). Such proceedings had been introduced into many Member States’ national laws during the early years of the EIR 2000. The rationale for

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<sup>28</sup> Article 36(3), EIR Recast

<sup>29</sup> Recital 45, EIR Recast

<sup>30</sup> Article 38(3), EIR Recast

<sup>31</sup> Ibid.

<sup>32</sup> Article 46, EIR 2000

<sup>33</sup> European Commission, “Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings”, (COM(2012)744 final), p 2

this was to promote the rescue of companies that were economically viable but distressed<sup>34</sup>.

The EIR Recast has reflected the changing legal culture of EU Member States. It has done so by broadening the scope of its predecessor - it now includes provisions for pre-insolvency proceedings and hybrid proceedings. Annex 1 of EIR Recast sets out the scope of the Regulation. Annex A of the EIR Recast lists the proceedings referred to in Article 1. The shift away from purely “traditional” forms of insolvency to now having an emphasis on restructuring is a “noticeable innovation of the EIR Recast”<sup>35</sup>.

- 2) Clarification of the concept of debtor’s centre of main interest (“COMI”) – under the EIR 2000, there were difficulties determining which EU Member State was competent to open insolvency proceedings as well as the practical application of the concept of COMI. The EIR 2000 had, in the Commission’s own words, allowed “forum shopping by companies and natural persons through abusive COMI-relocation”<sup>36</sup>. This was identified as an area that needed addressing in the reforms.

COMI has been maintained in the EIR Recast as the relevant connecting factor for the opening of universal proceedings, although as Garcimartín acknowledges, this “is a sensitive option”.<sup>37</sup> Notwithstanding this, the Court of Justice of the European Union (the “CJEU”) clarified COMI’s meaning and provided guidance for its application in practice. The seminal case is *Eurofood IFSC Ltd*<sup>38</sup> which, inter alia, emphasised that COMI had an autonomous meaning and was to be interpreted in a uniform way which was independent of what a similar term in national legislation stated.<sup>39</sup> The EIR Recast largely codifies the CJEU jurisprudence – it provides an autonomous definition of COMI (which is influenced by Recital 13 of the EIR 2000 and the CJEU). Two distinct elements of Article 3(1) of the EIR Recast’s definition of COMI can be seen - an internal element and an external element. The internal element is to consider the centre of administration and the interest of the debtor. The external element is that the location of the centre of administration must be objective and ascertainable by third parties.

- 3) Secondary proceedings – the Commission’s Proposal identified that if secondary proceedings were opened, this could “hamper the efficient administration of the debtor’s estate”<sup>40</sup>. In the event that secondary proceedings were opened, the theory was that the liquidator who was appointed in the main insolvency proceedings would no longer have control of the debtor’s assets located in the EU Member State where secondary proceedings were opened. This would make it more difficult to deal with the assets located in that EU Member State. Further, under the EIR 2000, if secondary proceedings were opened, they had to be winding-up proceedings which would make it more difficult to restructure the debtor’s affairs<sup>41</sup>.

The EIR Recast (similar to the EIR 2000) enables secondary proceedings to be opened (which will run parallel to the main insolvency proceedings). These secondary

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<sup>34</sup> Francisco Garcimartín, “The EU Insolvency Regulation Recast: Scope and Rules on Jurisdiction”, 2016, pp 2-3

<sup>35</sup> Professor Bob Wessels and Mr Ilya Kokorin, text updated for 2020/2021, 2021/2022, 2022/2023 and 2023/2024 by Dr Emilie Ghio, “INSOL International, Foundation Certificate in International Insolvency Law, Module 2B Guidance Text, The European Insolvency Regulation 2023/2024”, p 11

<sup>36</sup> European Commission, “Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings” (COM(2012)744 final), p 3

<sup>37</sup> Francisco Garcimartín, “The EU Insolvency Regulation Recast: Scope and Rules on Jurisdiction”, 2016, p 12

<sup>38</sup> Case C-341/04, ECLI:EU:C:2006:281 (2 May 2006)

<sup>39</sup> Professor Bob Wessels and Mr Ilya Kokorin, text updated for 2020/2021, 2021/2022, 2022/2023 and 2023/2024 by Dr Emilie Ghio, “INSOL International, Foundation Certificate in International Insolvency Law, Module 2B Guidance Text, The European Insolvency Regulation 2023/2024”, p 16

<sup>40</sup> European Commission, “Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings” (COM(2012)744 final), p 3

<sup>41</sup> Ibid.

proceedings can be opened where the debtor has an establishment<sup>42</sup> and therefore there can be multiple secondary proceedings when dealing with the estate of an insolvent debtor. This can be contrasted to the main insolvency proceedings - the opening of main insolvency proceedings is inextricably linked to the COMI of the debtor and there can only be one COMI per an insolvency (and therefore only one set of main insolvency proceedings).<sup>43</sup> The EIR Recast has a number of provisions which can avoid or otherwise control the opening, conduct and closure of secondary proceedings. These include a stay of the opening of secondary proceedings, as per Recital 45 and Article 38(3) of the EIR Recast.

- 4) Publicity of insolvency proceeding and the lodging of claims – the Commission’s Proposal also acknowledged there were flaws in the publicity of insolvency proceedings and the lodging of claims. Under the EIR 2000, there were no mandatory requirements for the publication or registration of the decisions in the EU Member State where proceedings had been opened, nor in the EU Member State(s) where the debtor had an establishment. There was also no European Insolvency Register under the EIR 2000 which would enable searches of national registers.<sup>44</sup> The Commission’s Proposal stated (rightly) that a well-functioning cross-border insolvency regime relies on the publicity of the relevant decisions relating to an insolvency procedure. The rationale is that judges need to be aware of proceedings having been opened in another EU Member State and creditor(s) (or potential creditor(s)) needing to have knowledge that proceedings have commenced.<sup>45</sup>

The EIR 2000 only stated that a liquidator “*may request*” notice of his appointment be published in any EU Member State<sup>46</sup> and the registration of the opening of insolvency proceedings<sup>47</sup>. This discretion of the liquidator has, as McCormack states, meant that it “*is not therefore surprising that there have been...cases where main insolvency proceedings have been opened in an EU State even though main insolvency proceedings have already been opened in a different State.*”<sup>48</sup> An example of this was *Re Eurodis PLC*<sup>49</sup> (a pre-EIR Recast case). In short, it was held that whilst the winding up order by the Belgian court ought not have been made as the UK (then still a Member State of the EU) was where the main proceedings were, the winding up order was still valid unless it was set aside in Belgium. Therefore, under EIR 2000, the courts of the EU Member State in which the first proceedings had been opened were not entitled to disregard any second set of proceedings.

Unlike the EIR 2000, the EIR Recast now places an obligation on the insolvency practitioner or debtor in possession to publish the notice on the opening of insolvency proceedings (whether main or secondary) at the place of the debtor’s establishment in accordance with the publication requirements of that EU Member State.<sup>50</sup> Further, Article 54 of the EIR Recast mandates the court which opened the insolvency proceedings or the insolvency practitioner appointed by the court to inform immediately the known foreign creditors as soon as the insolvency proceedings are commenced<sup>51</sup>.

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<sup>42</sup> Article 3(2), EIR Recast

<sup>43</sup> Professor Bob Wessels and Mr Ilya Kokorin, text updated for 2020/2021, 2021/2022, 2022/2023 and 2023/2024 by Dr Emilie Ghio, “INSOL International, Foundation Certificate in International Insolvency Law, Module 2B Guidance Text, The European Insolvency Regulation 2023/2024”, p 15

<sup>44</sup> European Commission, “Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings” (COM(2012)744 final), p 3

<sup>45</sup> Ibid.

<sup>46</sup> Article 21, EIR 2000

<sup>47</sup> Article 22, EIR 2000

<sup>48</sup> Gerard McCormack, ‘Reforming the European Insolvency Regulation: A Legal and Policy Perspective’ (2014) *Journal of Private International Law* 33

<sup>49</sup> [2011] EWHC 1025; [2012] BCC 57

<sup>50</sup> Article 28(1), EIR Recast

<sup>51</sup> Article 54, EIR Recast

- 5) Multinational enterprise groups – the last main shortcoming identified by the Commission was the absence of rules in relation to the insolvency of multinational enterprise groups (even though a large number of cross-border insolvencies involve such group of companies).<sup>52</sup> The EIR 2000 was based on separate proceedings needing to be opened for each individual member of the group and that each proceeding would be independent of each other. It was noted by the Commission that the lack of tailored provisions dealing with group insolvencies would reduce the prospect of successfully restructuring of the group as a whole.<sup>53</sup> As Professor Mevorach stated, the conundrum for policymakers is whether to treat separate entities operating as an integrated business as a whole group, or to adhere by the legal principle that such separate entities were to be treated separately<sup>54</sup>.

This weakness of the previous regime under the EIR 2000 was addressed in the EIR Recast. The EIR Recast introduced a whole chapter (Chapter V) dealing with group insolvencies. In addition, there was a new Recital 53 which provides a new regime for dealing with group insolvencies – it is possible to open insolvency proceedings for several companies belonging to the same corporate group in a single jurisdiction if the court finds that the COMI of these companies is located within a single EU Member State. It is further stated in Recital 53 that the court should also be able to appoint (where appropriate) the same insolvency practitioner in all proceedings concerned (as long as it is not incompatible with the rules applicable to them)<sup>55</sup>.

### 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.

Article 3(1) of the EIR Recast provides that the courts of European Union (“EU”) Member States, except Denmark<sup>56</sup>, within the territory where the centre of a debtor's main interests (“COMI”) is located shall have jurisdiction to open insolvency proceedings (“main insolvency proceedings”). COMI therefore determines which EU Member State's domestic laws will apply to a cross-border insolvency<sup>57</sup>. Such proceedings have universal coverage and are designed to encompass all of a debtor's assets.<sup>58</sup> A debtor's COMI, as defined by Article 3(1), “*shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.*”<sup>59</sup>

Two praises for the concept of COMI are:

- 1) COMI provides legal certainty to all stakeholders, including creditors. COMI assists in resolving a conflict of laws problem. Since COMI is the foundation for the jurisdiction of an EU court to open main insolvency proceedings, “*it is crucial to define, properly understand and correctly apply the concept of COMI.*”<sup>60</sup> The EIR Recast does this.

<sup>52</sup> European Commission, “Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings” (COM(2012)744 final), p 3

<sup>53</sup> Ibid., p 3

<sup>54</sup> Irit Mevorach, *The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps* (Oxford University Press, 2018), p 227

<sup>55</sup> Article 53, EIR Recast

<sup>56</sup> Recital 88, EIR Recast

<sup>57</sup> Roger Lawrence, International Corporate Rescue, Article Preview, “Centre of Main Interests (COMI): A Creditor's Perspective”, <https://www.chasecambria.com/site/journal/article.php?id=987>, accessed on 3 February 2024

<sup>58</sup> Professor Bob Wessels and Mr Ilya Kokorin, text updated for 2020/2021, 2021/2022, 2022/2023 and 2023/2024 by Dr Emilie Ghio, “INSOL International, Foundation Certificate in International Insolvency Law, Module 2B Guidance Text, The European Insolvency Regulation 2023/2024”, p 15

<sup>59</sup> Article 3(1), EIR Recast

<sup>60</sup> Michael Scott and Patrick Ries, Loyens & Loeff, “COMI – Luxembourg technical analysis & case law critique”, <https://www.loyensloeff.com/insights/news--events/news/comi--luxembourg-technical-analysis--case-law-critique-/>, published on 31 May 2021, accessed on 3 February 2024

Unlike the EIR 2000, the EIR Recast provides a definition of COMI in the Articles to the Regulation (and not merely in the Recitals which are for guidance and not enforceable).

The definition of COMI adopted in the EIR Recast is backed by Court of Justice of the European Union (“CJEU”) case law<sup>61</sup>. The seminal case is *Eurofood IFSC Ltd*<sup>62</sup> (which is a pre-EIR Recast case). At paragraph 31 of the *Eurofood* judgment, it was held that the concept of COMI was peculiar to the EIR 2000 and therefore it had “*an autonomous meaning and must therefore be interpreted in a uniform way, independently of national legislation.*”<sup>63</sup> It was further stated that the criteria to be used for the identification of a debtor’s COMI must be “*both objective and ascertainable by third parties.*”<sup>64</sup> Article 3(1) of the EIR Recast codifies this aspect of the *Eurofood* judgment. The objective, impartial way for determining the COMI (as defined by Article 3(1)) is one of the key praises of COMI - this objectivity and predictability in determining such a fundamental concept is needed for the full functioning of a supranational insolvency regime such as that of the EIR Recast.

By having COMI defined legally in the way that it has been under the EIR Recast, it also mirrors social expectations. As stated by the EU Commission, COMI ensures that insolvency matters are adjudicated by a jurisdiction where the debtor “*has a genuine connection rather than in the one chosen by the incorporators*”<sup>65</sup>. The advantage of this is that the jurisdiction and applicable law should coincide with what most creditors (one of the most important stakeholder groups in any insolvency) expect or are familiar with, and therefore enables such creditors to assess risk<sup>66</sup>. Given that COMI signifies a debtor’s involvement in an EU Member State, weaker types of creditors, such as employees, could also benefit from the COMI approach taken in the EIR Recast. This is because they are likely to reside in the same EU Member State as that of the debtor’s COMI and therefore will be more familiar with the legal system<sup>67</sup> (as opposed to the legal system of another EU Member State).

- 2) Another praise for the concept of COMI is that it prevents forum shopping. The cornerstone of the European Single Market is the four fundamental freedoms which are legally guaranteed - that is, the free movement of goods, capital, services and people. These “Four Freedoms” ensures the fluidity of the European Single Market. However, such fluidity can potentially frustrate an insolvency matter if a debtor were to transfer its COMI to another EU Member State in order to, for example, benefit from more favourable rules which can better protect the interested assets (which will be to be detriment of the creditors)<sup>68</sup>. The concept of COMI, as defined by the EIR Recast, prevents forum shopping.

In addition to the definition of COMI set out in Article 3(1) (as set out above), Article 3(1) further states that, in the absence of proof to the contrary, a company or legal

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<sup>61</sup> Professor Bob Wessels and Mr Ilya Kokorin, text updated for 2020/2021, 2021/2022, 2022/2023 and 2023/2024 by Dr Emilie Ghio, “INSOL International, Foundation Certificate in International Insolvency Law, Module 2B Guidance Text, The European Insolvency Regulation 2023/2024”, p 16

<sup>62</sup> Case C-341/04, ECLI:EU:C:2006:281 (2 May 2006)

<sup>63</sup> Case C-341/04, paragraph 31

<sup>64</sup> Case C-341/04, paragraph 33

<sup>65</sup> European Commission, “Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings” (COM(2012)744 final), p 6

<sup>66</sup> Virgos-Schmit Report, paragraph 75

<sup>67</sup> Professor Bob Wessels and Mr Ilya Kokorin, text updated for 2020/2021, 2021/2022, 2022/2023 and 2023/2024 by Dr Emilie Ghio, “INSOL International, Foundation Certificate in International Insolvency Law, Module 2B Guidance Text, The European Insolvency Regulation 2023/2024”, p 19

<sup>68</sup> Silvia Marino, Lisa Stivanello and Omar Vanin, Aldricus The EJNita Project Portal, “The Center of the Debtor’s Main Interests (COMI) in the European framework for cross-border insolvency” (translated from Italian to English by the Aldricus Editorial Board), <https://aldricus.giustizia.it/the-center-of-the-debtors-main-interests-comi-in-the-european-framework-for-cross-border-insolvency/?lang=en>, accessed on 3 February 2024

person's place of registered office shall be presumed to be its COMI in the event of an insolvency.<sup>69</sup> This presumption can only be rebutted if there are objective factors which would indicate to a third party that the administration of the debtor's estate occurs in a different EU Member State from the one where the registered office is located<sup>70</sup>. It should be noted that such a presumption shall only apply where the registered office has not moved to another EU Member State within the three-month period prior to the request to open the insolvency proceedings<sup>71</sup>. The three-month period is a "suspect" period<sup>72</sup> and it "*creates a safeguard against fraudulent manipulation of the insolvency forum (and "forum shopping") shortly before the actual insolvency filing*"<sup>73</sup>. The result of this is that if the registered office has been moved within the suspect period, the court will, in determining the COMI, disregard the change of registered office as if no change had ever occurred. The case of *Susanne Staubitz-Schreiber*<sup>74</sup> demonstrates this – the question was whether the court in Germany still had jurisdiction to open insolvency proceedings when the applicant (debtor) moved her COMI to a different EU Member State (being Spain) after a request to open insolvency proceedings was made but before they were opened. The CJEU concluded that the German court (where the COMI was located at the time the request to open insolvency proceedings was made), retained jurisdiction.<sup>75</sup> The rationale was set out in paragraphs 25 and 26 of the judgment where it was stated that such a transfer of jurisdiction would be contrary to:

- a) The intention of the EU insolvency regime to avoid providing incentives to parties to transfer assets or judicial proceedings to another EU Member State in order to obtain a more advantageous legal position<sup>76</sup>; and
- b) The overriding objective of the EU insolvency regime to have cross-border proceedings which are efficient and effective, as such judicial transfers "*would oblige creditors to be in continual pursuit of the debtor wherever he chose to establish himself...and would often mean in practice that the proceedings would be prolonged.*"<sup>77</sup>

*Susanne Staubitz-Schreiber* resulted in the registered office safeguard which was codified in Article 3(1) of the EIR Recast. Article 3(1) prevents a debtor from frustrating the insolvency process via forum shopping.

### Question 3.3 [maximum 5 marks] 4/5

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.

<sup>69</sup> Article 3(1), EIR Recast

<sup>70</sup> Professor Bob Wessels and Mr Ilya Kokorin, text updated for 2020/2021, 2021/2022, 2022/2023 and 2023/2024 by Dr Emilie Ghio, "INSOL International, Foundation Certificate in International Insolvency Law, Module 2B Guidance Text, The European Insolvency Regulation 2023/2024", p 16

<sup>71</sup> Article 3(1), EIR Recast

<sup>72</sup> Professor Bob Wessels and Mr Ilya Kokorin, text updated for 2020/2021, 2021/2022, 2022/2023 and 2023/2024 by Dr Emilie Ghio, "INSOL International, Foundation Certificate in International Insolvency Law, Module 2B Guidance Text, The European Insolvency Regulation 2023/2024", p 17

<sup>73</sup> Ibid.

<sup>74</sup> Case C-1/04, ECLI:EU:C:2006:39 (17 January 2006)

<sup>75</sup> Professor Bob Wessels and Mr Ilya Kokorin, text updated for 2020/2021, 2021/2022, 2022/2023 and 2023/2024 by Dr Emilie Ghio, "INSOL International, Foundation Certificate in International Insolvency Law, Module 2B Guidance Text, The European Insolvency Regulation 2023/2024", p 17

<sup>76</sup> Case C-1/04, ECLI:EU:C:2006:39 (17 January 2006), paragraph 25

<sup>77</sup> Ibid., paragraph 26

The Directive on Preventive Restructuring Frameworks (the “**Directive**”) applies to all European Union (“**EU**”) Member States and its purpose is the creation of “a uniform system...to address financial distress, avoid the build-up of non-performing loans, and address distress prior to default, ultimately aimed at reducing the likelihood of formal insolvency proceedings.”<sup>78</sup> It was acknowledged by the European Commission (the “**Commission**”) that an insolvency framework which is well-functioning is conducive to a good business environment and a greater level of harmonisation is essential to the European Single Market functioning properly.<sup>79</sup> Whilst the intention of the Directive is to dovetail the European Insolvency Regulation, the two regimes differ in several ways. Two ways they differ are:

- 1) The degree and extent of harmonisation in the European Insolvency Regulation compared to the Directive - the EIR 2000 was the first legally binding instrument which dealt with cross-border insolvencies within the EU. For the first time, EU Member States agreed to harmonise regulation of cross-border insolvencies via, for example, the adoption of unified rules on matters such as international insolvency jurisdiction and applicable law. This approach is modified universalism<sup>80</sup>. The EIR Recast builds on the EIR 2000. The EIR Recast is a regulatory system that resolves insolvencies within the EU. Even though EU Member States retain considerable power (such as to decide the rules on directors’ liability), matters such as applicable law as well as the co-operation and communication between office-holders and courts “are largely harmonised through the mandatory EU law, laid down in the EIR Recast.”<sup>81</sup> The EIR Recast attempts to achieve modified universalism in practice.<sup>82</sup>

The degree and extent of harmonisation under the EIR Recast can be contrasted to that of the Directive. The Directive is not a centralised regulatory system as the EIR Recast is. The Commission acknowledges that harmonisation of core aspects of insolvency (such as the requirements to open insolvency proceedings) can achieve legal certainty across the EU. However, the diversity of the legal systems over insolvency proceedings within the EU, at present, “seems too large to bridge...Prescriptive harmonisation could require far-reaching changes to commercial law, civil law and company law”<sup>83</sup>. In light of this, the Directive addresses only the most important issues that can “be feasibly addressed by harmonisation. Insolvency procedures need to be adapted to enable debtors in financial difficulties to restructure early.”<sup>84</sup> Although the Directive is the EU’s “first big step in the direction of a material harmonization of restructuring”,<sup>85</sup> the Directive only substantively harmonises a narrow aspect of insolvency law, i.e. preventative restructuring. The Directive’s “harmonisation method is minimum standards for preventative restructuring mechanisms”<sup>86</sup>. The negotiations for the final text of the Directive led to considerable compromise which

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<sup>78</sup> Stephen D Lerner, Squire Patton Boggs, Restructuring GlobalView, “How does the EU Restructuring Directive compare to Chapter 11?”, <https://www.restructuring-globalview.com/2019/11/how-does-the-eu-restructuring-directive-compare-to-chapter-11/>, published on 6 November 2019, accessed on 3 February 2024

<sup>79</sup> European Commission, “Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU” (COM(2016) 723 final), p 2

<sup>80</sup> Professor Bob Wessels and Mr Ilya Kokorin, text updated for 2020/2021, 2021/2022, 2022/2023 and 2023/2024 by Dr Emilie Ghio, “INSOL International, Foundation Certificate in International Insolvency Law, Module 2B Guidance Text, The European Insolvency Regulation 2023/2024”, p 9

<sup>81</sup> *Ibid.*, p 14-15

<sup>82</sup> *Ibid.*, p 15

<sup>83</sup> European Commission, “Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU” (COM(2016) 723 final), p 6

<sup>84</sup> *Ibid.*

<sup>85</sup> Baker McKenzie, Global Restructuring and Insolvency Guide, “European Union”, <https://resourcehub.bakermckenzie.com/en/resources/global-restructuring-and-insolvency-guide/subpages/european-union>, accessed on 3 February 2024

<sup>86</sup> Professor Bob Wessels and Mr Ilya Kokorin, text updated for 2020/2021, 2021/2022, 2022/2023 and 2023/2024 by Dr Emilie Ghio, “INSOL International, Foundation Certificate in International Insolvency Law, Module 2B Guidance Text, The European Insolvency Regulation 2023/2024”, p 66



has had the effect of watering down the harmonisation effect of the Directive<sup>87</sup>. The Directive's harmonisation of policy is therefore limited in scope – the Directive does not harmonise central aspects of insolvency law, including a common definition of insolvency and the requirements for opening insolvency proceedings<sup>88</sup>. It is perhaps apt to describe the Directive as offering not a harmonised framework for insolvency, but merely a menu of well-worked practices across all EU Member States.<sup>89</sup>

An example of how the Directive is “anti-harmonisation”, or at least potentially working against the harmonisation objective of the European insolvency regime is the fact that under the Directive, a debtor can request a stay of individual enforcement actions to support the negotiations of a restructuring plan in a preventive restructuring framework<sup>90</sup> and to present such restructuring plans to all affected parties.<sup>91</sup> The affected parties are divided into classes<sup>92</sup> and any restructuring plan is adopted by the affected parties “*provided that a majority in the amount of their claims or interests is obtained in each class. Member States may, in addition, require that a majority in the number of affected parties is obtained in each class.*”<sup>93</sup> **This does not make the Directive an “anti-harmonisation” instrument.** EU Member States may choose between the “absolute priority rule”<sup>94</sup> or derogate from this<sup>95</sup> and opt for a less rigid “relative priority rule”<sup>96</sup>. This would mean that dissenting voting classes will be treated at least “as favourably” as any other class of the same rank and “more favourably” than any junior class.<sup>97</sup> Ironically, this less rigid “relative priority rule”<sup>98</sup> could lead to forum shopping within the EU<sup>99</sup>, which is contrary to the harmonisation objective of the Directive, EIR Recast and the EU insolvency regime as a whole.

- 2) Debtor's role under the Directive compared to the EIR Recast – a debtor has arguably a more active role under the Directive (compared to under the EIR Recast) as it is a (relatively) more debtor-driven, debtor-focused instrument. The Directive states that access to up-to-date information regarding available preventive restructuring procedures as well as one or more early warning tools should be put in place to provide debtors with an incentive to take action early if they experience financial difficulties.<sup>100</sup> This is designed to alert debtors to act quickly to avoid a formal insolvency.

In terms of access to effective national preventative restructuring frameworks which will enable viable but distressed companies to continue operating, the Directive is designed to establish an EU-wide system that ensures effective restructuring processes at both national and cross-border levels (without interfering with what

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<sup>87</sup> Jose M Garrido, Chanda M DeLong, Amira Rasekh and Anjum Rosha, IMF eLibrary, “Restructuring and Insolvency in Europe: Policy Options in the Implementation of the EU Directive”, <https://www.elibrary.imf.org/view/journals/001/2021/152/article-A001-en.xml>, 27 May 2021, accessed on 3 February 2024

<sup>88</sup> Professor Bob Wessels and Mr Ilya Kokorin, text updated for 2020/2021, 2021/2022, 2022/2023 and 2023/2024 by Dr Emilie Ghio, “INSOL International, Foundation Certificate in International Insolvency Law, Module 2B Guidance Text, The European Insolvency Regulation 2023/2024”, p 66

<sup>89</sup> Emilie Ghio, Gert-Jan Boon, David Ehmke, Jennifer Gant, Line Langkjaer and Eugenio Vaccari, Wiley Online Library, “Harmonising insolvency law in the EU: New thoughts on old ideas in the wake of the COVID-19 pandemic”, <https://onlinelibrary.wiley.com/doi/10.1002/iir.1432>, published on 15 September 2021, accessed on 3 February 2024

<sup>90</sup> Article 6(1), Directive

<sup>91</sup> Article 9(1), Directive

<sup>92</sup> Article 9(4), Directive

<sup>93</sup> Article 9(6), Directive

<sup>94</sup> Recital 55, Directive

<sup>95</sup> Recital 56, Directive

<sup>96</sup> Stephen D Lerner, Squire Patton Boggs, Restructuring GlobalView, “How does the EU Restructuring Directive compare to Chapter 11?”, <https://www.restructuring-globalview.com/2019/11/how-does-the-eu-restructuring-directive-compare-to-chapter-11/>, published on 6 November 2019, accessed on 3 February 2024

<sup>97</sup> Ibid.

<sup>98</sup> Ibid.

<sup>99</sup> Ibid.

<sup>100</sup> Recital 22, Directive

already works in an EU Member State)<sup>101</sup>. As stated under Article 5(1) of the Directive, debtors accessing preventive restructuring procedures shall “*remain totally, or at least partially, in control of their assets and the day-to-day operation of their business.* [emphasis added]”<sup>102</sup> Article 5(1) is significant as it gives the debtor (more) control of the process under the Directive vis-à-vis under the EIR Recast.

In comparison, debtors have a (less) significant role under the EIR Recast. Article 5(1) of the Directive (as stated above) can be contrasted to Article 1(1) of the EIR Recast. Article 1(1) states that the Regulation shall be applicable to public collective proceedings and “*for the purpose of rescue, adjustment of debt, reorganisation or liquidation:*

- a) *a debtor is totally or partially divested of its assets and an insolvency practitioner is appointed;*
- b) *the assets and affairs of a debtor are subject to control or supervision by a court...* [emphasis added]”.<sup>103</sup>

As can be seen from the wording of Article 5(1) of the Directive and Article 1(1) of the EIR Recast, a significant difference between the two provisions (and instruments in generally) is the control (or lack of) that a debtor has during the restructuring process. A debtor intending to stay in control (as much as the process allows) would most likely prefer the Directive route.

**Total: 14/15**

#### **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**

<sup>101</sup> Republic of Ireland Department of Enterprise, Trade and Employment, “European Union (Preventive Restructuring) Regulations 2022 – Information Note”, 2022, p 3

<sup>102</sup> Article 5(1), Directive

<sup>103</sup> Article 1(1), EIR Recast

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 entered into force on 31 May 2002. The EIR Recast, which repealed and replaced the EIR 2000, applied from 26 June 2017 (with some minor exceptions). The EIR 2000 was binding in its entirety and directly applicable in all European Union (“EU”) Member States<sup>104</sup>, apart from Denmark<sup>105</sup>. All four countries involved in Dinosaurus SARL’s (“Dinosaurus”) scenario were members of the EU during the 15 years that the EIR 2000 was effective<sup>106</sup>. Assuming the opening of safeguard proceedings were filed before 26 June 2017, Dinosaurus’ scenario and the opening of safeguard proceedings are (subject to below) within the temporal scope of the EIR 2000.

However, notwithstanding the fact that the scenario falls within the temporal scope of the EIR 2000, the EIR 2000 does not have jurisdiction in Dinosaurus’ scenario and to the opening of safeguard proceedings. Safeguard proceedings are proceedings opened at the request of a debtor who has difficulties that it cannot overcome but is not cash insolvent. Such proceedings are designed to reorganise the company to enable it to continue its business, preserve jobs at the company and repay creditors<sup>107</sup>. Safeguard proceedings are therefore a type of restructuring process (and not a “traditional” form of insolvency). Dinosaurus’ scenario does not satisfy the material scope, territorial scope or personal scope of the EIR 2000 for the following reasons:

- 1) Material scope – The wording of the EIR 2000 only mentions “traditional” liquidation focused insolvency procedures. Article 1(1) states that the EIR 2000 “*shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator*.” [emphasis added]<sup>108</sup> Further, Article 2(a) and Recital 9 of the EIR 2000 state respectively that such “insolvency proceedings” are those listed in Annex A<sup>109</sup> and the Regulation only applies to those listed in the Annexes.<sup>110</sup>

The wording of Article 1(1), Article 2(a) and Recital 9 of the EIR 2000 makes clear that the “insolvency proceedings” have to be listed in Annex A to comply with the material scope requirement of the EIR 2000. The EIR 2000 focuses on “traditional” liquidation orientated procedures (i.e. the appointment of a liquidator) and not to restructuring processes such as safeguard proceedings. The safeguard proceedings opened by Dinosaurus, *sauvegarde*, is not listed in Annex A to the EIR 2000. In light of the above, the safeguard proceedings opened by Dinosaurus do not satisfy the “insolvency proceedings” requirement as set out in the EIR 2000 and therefore do not fall within the material scope of the EIR 2000.

- 2) Territorial scope – Recital 12 and Recital 14 of the EIR 2000 state respectively that the “*Regulation enables the main insolvency proceedings to be opened...where the debtor*”

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<sup>104</sup> Article 47, EIR 2000

<sup>105</sup> Recital 33, EIR 2000

<sup>106</sup> The United Kingdom left the EU on 31 January 2020

<sup>107</sup> Céline Domenget Morin and Loris Julia, Goodwin Procter LLP, “Restructuring mechanisms in France and recent developments”, <https://globalrestructuringreview.com/review/europe-middle-east-and-africa-restructuring-review/2023/article/restructuring-mechanisms-in-france-and-recent-developments>, published on 24 March 2023, accessed on 3 February 2024

<sup>108</sup> Article 1(1), EIR 2000

<sup>109</sup> Article 2(a), EIR 2000

<sup>110</sup> Recital 9, EIR 2000

*has the centre of his main interests [emphasis added]*<sup>111</sup> and that it will apply “*only to proceedings where the centre of the debtor’s main interests is located in the Community.*”<sup>112</sup>

Dinosaurus’ centre of main interest (“**COMI**”) is located within an EU Member State (France) and therefore satisfies the requirement in Recital 14 of the EIR 2000. Therefore, theoretically, proceedings could be opened by Dinosaurus under the EIR 2000 if they were “traditional” liquidation-based insolvency proceedings. However, Dinosaurus has not sought to open “main insolvency proceedings” (as per point 1 above). It has sought to open safeguard proceedings which is a different type of procedure to insolvency proceedings. Therefore, notwithstanding the COMI of Dinosaurus being located within the EU, the safeguard proceedings do not satisfy the requirement of opening “main insolvency proceedings” as set out in Recital 12 (and Article 1(1), Article 2(a) and Recital 9). The opening of safeguard proceedings do not fall within the territorial scope of the EIR 2000.

- 3) Personal scope – Recital 9 of the EIR 2000 states that it applies “*to insolvency proceedings, whether the debtor is a natural person or a legal person [emphasis added]*”<sup>113</sup>. Recital 9 further lists entities that are excluded from the scope of the EIR 2000.

Dinosaurus partially satisfies the personal scope of the EIR 2000 (subject to below). This is because Dinosaurus is a legal person (company) and is not an excluded entity (such as a credit institution) within the meaning of Recital 9. However, for the reasons set out in point 1 above, the EIR 2000 does not apply to Dinosaurus’ scenario. Dinosaurus has not applied to open “traditional” insolvency proceedings – it has applied to open safeguard proceedings which is outside the scope of the EIR 2000. Recital 9 makes it clear that the Regulation applies to legal persons (such as Dinosaurus) in insolvency proceedings. Even though Dinosaurus is a legal person within the meaning of the EIR 2000, the safeguard proceedings commenced are not insolvency proceedings and therefore does not fall within the personal scope of the EIR 2000.

In conclusion, the EIR 2000 does not apply in Dinosaurus’ scenario and to the opening of safeguard proceedings. Despite the COMI being within an EU Member State and Dinosaurus being a legal person (and not an excluded entity<sup>114</sup>), the type of proceedings Dinosaurus has initiated are the “wrong” type of proceedings for the EIR 2000 - safeguard proceedings are not proceedings referred to in the Annexes of the EIR 2000. They are outside the jurisdiction of the EIR 2000 and therefore the fact pattern does not fall within the scope 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.

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<sup>111</sup> Recital 12, EIR 2000

<sup>112</sup> Recital 14, EIR 2000

<sup>113</sup> Recital 9, EIR 2000

<sup>114</sup> Ibid.

The objective of safeguard proceedings such as those opened by Dinosaurus SARL (“Dinosaurus”) “is to provide for negotiation with each of the company’s creditors and to ensure that the company continues to operate and maintain employment.”<sup>115</sup> This rescue procedure is in line with the EIR Recast’s Recital 10 which states that the Regulation should extend to promoting the rescuing of distressed but economically viable businesses, in particular the “restructuring of a debtor at a stage where there is only a likelihood of insolvency”<sup>116</sup>. The EIR Recast will be applicable to the opening of safeguard proceedings on 23 June 2023 by the French High Court (as explained in the original fact pattern). This is because Dinosaurus’ scenario falls within the scope of the EIR Recast for the following reasons:

- 1) Territorial scope – to assess whether the territorial scope of the EIR Recast is satisfied, the debtor’s centre of main interest (“COMI”) needs to be identified. The seminal Court of Justice of the European Union case of *Eurofood IFSC Ltd*<sup>117</sup> stated that the criteria to be used for the identification of a debtor’s COMI must “both objective and ascertainable by third parties.”<sup>118</sup> Article 3(1) of the EIR Recast codifies this part of the *Eurofood* judgment. Article 3(1) states that the courts of the European Union (“EU”) Member State within the territory of which the COMI is located “shall have jurisdiction to open insolvency proceedings”<sup>119</sup>. Article 3(1) further states that the COMI is where a “debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.”<sup>120</sup>.

There is an internal element and an external element to the definition of COMI in Article 3(1). The internal element is to consider the centre of administration and the interest of the debtor. From the fact pattern, most of Dinosaurus’ stores (11 stores out of 14 stores) and employees (80%) are located in France. There is also no information to suggest that Dinosaurus’ centre of administration is not in France. The external element to the definition of COMI is that the location of the centre of administration must be objective and ascertainable by third parties. From the fact pattern, there is also no information to suggest that a third party would consider the location of the centre of administration to be elsewhere other than France.

COMI is made even more predictable<sup>121</sup> by the EIR Recast containing a registered office presumption<sup>122</sup>. For a company such as Dinosaurus, the place of its registered office is presumed to be the COMI (in the absence of proof to the contrary)<sup>123</sup>. From the wording of Article 3(1), the EIR Recast / courts of EU Member States will only have jurisdiction to open insolvency proceedings if the debtor’s COMI is located within the EU. Dinosaurus was incorporated in France. France is a Member State of the EU (indeed it was one of the founding members). As stated above, Article 3(1) presumes that the COMI is where the debtor company’s place of registered office is. Therefore, France is presumed to be where Dinosaurus’ COMI is. From the fact pattern, there is insufficient evidence to rebut the presumption that Dinosaurus’ COMI is in France. We are informed that Dinosaurus “has an office in Cork, Ireland.” However, there is insufficient detail in the fact pattern as to the function of the office - for example, whether it is where Dinosaurus would conduct the administration of its interests on a regular basis (in accordance with Article 3(1)) or whether the office is merely for, say,

<sup>115</sup> Allen & Overy, “Restructuring Across Borders. France: Corporate restructuring and insolvency procedures: March 2020”, 2020, p 4

<sup>116</sup> Recital 10, EIR Recast

<sup>117</sup> Case C-341/04, ECLI:EU:C:2006:281 (2 May 2006)

<sup>118</sup> *Ibid.*, paragraph 33

<sup>119</sup> Article 3(1), EIR Recast

<sup>120</sup> *Ibid.*

<sup>121</sup> Professor Bob Wessels and Mr Ilya Kokorin, text updated for 2020/2021, 2021/2022, 2022/2023 and 2023/2024 by Dr Emilie Ghio, “INSOL International, Foundation Certificate in International Insolvency Law, Module 2B Guidance Text, The European Insolvency Regulation 2023/2024”, p 16

<sup>122</sup> Article 3(1), EIR Recast

<sup>123</sup> *Ibid.*

marketing or recruitment purposes. Given the lack of information as to the function of this office, Dinosaurus' COMI is presumed to be in France. Even in the unlikely event that Dinosaurus' COMI is adjudged to be in Ireland, Ireland is a Member State of the EU (having joined in 1973) and therefore would still satisfy the territorial scope of the EIR Recast in any event.

- 2) Personal scope – The EIR Recast applies to insolvency proceedings which meet the conditions set out in the EIR Recast, including where the debtor is a legal person<sup>124</sup>. Dinosaurus is a SARL which is a form of private company in France. Dinosaurus is not an entity such as a credit institution that is explicitly excluded<sup>125</sup> from the personal scope of the EIR Recast. In light of this, the fact pattern falls within the personal scope of the EIR Recast.
- 3) Material scope – Both Recital 9 and Article 2(4) of the EIR Recast state that for the EIR Recast to apply, the insolvency proceedings in question have to be the proceedings which are listed in Annex A of the EIR Recast<sup>126</sup>. The safeguard proceedings opened by Dinosaurus, *sauegarde*, is listed in Annex A of the EIR Recast<sup>127</sup>. The material scope of the EIR Recast has therefore been satisfied.
- 4) Temporal scope – The transitional provisions of the EIR Recast states that the EIR Recast shall only apply to insolvency proceedings which are opened after 26 June 2017<sup>128</sup>. From the fact pattern, it is stated that Dinosaurus experienced financial difficulty in 2021 and that the safeguard proceedings were opened by Dinosaurus on 23 June 2023. This is after the commencement date of the EIR Recast (26 June 2017) and therefore these proceedings fall within the temporal scope of the EIR Recast.

In conclusion, all four steps, namely, the territorial scope, personal scope, material scope and temporal scope, are satisfied in the scenario and therefore the EIR Recast applies to the opening of safeguard proceedings by Dinosaurus on 23 June 2023.

#### **Question 4.3 [maximum 5 marks] 3/5**

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.

Article 3(2) of the EIR Recast provides that if the debtor's centre of main interest ("**COMI**") is located within the European Union ("**EU**"), the courts of another EU 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.* [Emphasis added]"<sup>129</sup> These secondary insolvency proceedings run parallel to main insolvency proceedings, the effect of which "*are limited to the assets located in that State.*"<sup>130</sup> The reasons for the possibility of secondary insolvency proceedings being opened are set out in Recital 40 of the EIR and

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<sup>124</sup> Recital 9, EIR Recast

<sup>125</sup> Article 1(2), EIR Recast

<sup>126</sup> Recital 9 and Article 2(4), EIR Recast

<sup>127</sup> Annex A, EIR Recast

<sup>128</sup> Article 84(1), EIR Recast

<sup>129</sup> Article 3(2), EIR Recast

<sup>130</sup> Recital 23, EIR Recast

include protecting local interests and promoting the efficient administration of an insolvent estate.<sup>131</sup>

Secondary insolvency proceedings allow for the possibility of local proceedings to be opened which are governed primarily by the *lex fori concursus* - this plays an important role in protecting creditor interests in an EU Member State where the debtor has an establishment.<sup>132</sup> The opening of secondary insolvency proceedings is dependent on the concept of "establishment". Article 2(10) of the EIR Recast states that a debtor's "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*" [Emphasis added].<sup>133</sup>

At paragraph 62 of the CJEU's judgment in *Interedil Srl v Fallimento Interedil Srl*<sup>134</sup>, the court explained that because the definition of "establishment" "*links the pursuit of an economic activity to the presence of human resources shows that a minimum level of organisation and a degree of stability are required. It follows that, conversely, the presence alone of goods in isolation or bank accounts does not, in principle, satisfy the requirements for classification as an 'establishment'*".<sup>135</sup>

In light of Article 2(10) and the CJEU jurisprudence, the requirements for an "establishment" are therefore:

- 1) "*non-transitory economic activity*" – this indicates the need for a certain degree of continuity and stability. An establishment cannot be a purely occasional operational place<sup>136</sup>; and
- 2) "*human means and assets*", i.e. for the debtor to conduct its affairs with the involvement of people and assets (which represent the organisational presence within the Member State).<sup>137</sup>

Secondary insolvency proceedings cannot be opened in Italy under the EIR Recast. Applying Article 2(10) and the CJEU jurisprudence to Dinosaurus' situation, there is nothing to suggest that Dinosaurus, as debtor, has an establishment in Italy (or indeed any links to Italy). Indeed, the fact pattern does not even mention Italy. There is nothing in the fact pattern that links Dinosaurus to the pursue of non-transitory economic activity with human means and assets in Italy.

Notwithstanding the fact that secondary insolvency proceedings cannot be opened in Italy, they can be opened by the Spanish bank in Spain under the EIR Recast. The reason for this is because Dinosaurus has an "establishment" in Spain. Applying the EIR Recast and *Interedil* to Dinosaurus' situation, Dinosaurus has carried out non-transitory economic activity with human means and assets and there is a minimum level of organization in Spain. It has operational activities in Spain, which is a Member State of the EU (other than the Member State where Dinosaurus' COMI is located). We are informed that Dinosaurus has entered into a loan agreement with a Spanish bank, opened a bank account with the bank and negotiated prices with local suppliers (as well as sign non-binding memoranda of understanding with three Madrid-based suppliers).

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<sup>131</sup> Recital 40, EIR Recast

<sup>132</sup> Professor Bob Wessels and Mr Ilya Kokorin, text updated for 2020/2021, 2021/2022, 2022/2023 and 2023/2024 by Dr Emilie Ghio, "INSOL International, Foundation Certificate in International Insolvency Law, Module 2B Guidance Text, The European Insolvency Regulation 2023/2024", p 20

<sup>133</sup> Article 2(10), EIR Recast

<sup>134</sup> Case C-396/09, ECLI:EU:C:2011:671 (20 October 2011)

<sup>135</sup> *Ibid.*, paragraph 62

<sup>136</sup> Professor Bob Wessels and Mr Ilya Kokorin, text updated for 2020/2021, 2021/2022, 2022/2023 and 2023/2024 by Dr Emilie Ghio, "INSOL International, Foundation Certificate in International Insolvency Law, Module 2B Guidance Text, The European Insolvency Regulation 2023/2024", p 21

<sup>137</sup> *Ibid.*

Viewed externally by a third party, Dinosaurus has carried out non-transitory economic activities. It has entered into a loan agreement and even opened a bank account with the Spanish bank. There is a degree of permanency in Dinosaurus' activities. Further, Dinosaurus has carried out non-transitory economic activities with human means and assets. For example, it has negotiated prices with local suppliers which requires human means to do so. The non-transitory economic activities of Dinosaurus are objective factors which can be ascertained by a third party, the Spanish bank. In light of the fact pattern, the Spanish bank can file a petition to open secondary insolvency proceedings in Spain under the EIR Recast.

While some of your reasoning is correct, your answer is not.

- 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: 13/15

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

**Total: 45/50**