



**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] 1/2

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

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

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

[Statement 1 refers to the concept of preventive insolvency proceedings, which is expressed by the EIR Recast's consideration of proceedings that aim to rescue economically viable debtors (Article 6 EIR Recast) **No, this was meant to be Article 1 or Article 3]**

Statement 2 deals with the concept of exclusion of certain lawsuits from the effects of the insolvency proceedings' applicable law - lex concursus (Articles 7 c.c. 18 EIR Recast) ]

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

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

[The European Insolvency Regulation (EIR) Recast aims for universality in insolvency proceedings across the EU. However, it brings several provisions that can represent exceptions (*rectius* depart from) to this universal approach:

1- Article 3(2) EIR Recast c.c. Article 34 - Jurisdiction to open secondary insolvency proceedings: these provisions permit the opening of secondary insolvency proceedings in a Member State other than the one where the main insolvency proceedings were opened. Secondary proceedings can only be opened in the Member State where the debtor has an establishment, and they are limited to the assets located in that State;

2- Article 33 EIR Recast – Public Policy Exception: allows a member State to refuse to recognize insolvency proceedings or refuse to enforce a judgment from another member state if such recognition or enforcement should be manifestly contrary to that state's public policy;

3- Article 36 EIR Recast - Undertakings: this provision introduces the concept of "synthetic" secondary proceedings by allowing the insolvency practitioner in the main proceedings to provide an undertaking to local creditors in another Member State as an alternative to opening secondary proceedings. This can ensure that local creditors receive the same treatment as if secondary proceedings had been opened without opening such proceedings.]

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

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 deal with the material scope:

1- Collective Insolvency Proceedings (Article 1): This article defines the scope of the EIR Recast by listing the types of proceedings that are included. It specifies that the Regulation applies to public collective proceedings, including those aimed at the rescue, adjustment of debt, or rehabilitation of a debtor;

2- Annex A (Article 1): Annex A of the EIR Recast contains an exhaustive list of the insolvency proceedings that fall within the scope of the Regulation as per each Member State's legislation;

3- Pre-Insolvency Proceedings and Hybrid Procedures (Recitals and Article 1)

These elements help to delineate the types of proceedings that the EIR Recast governs, ensuring that there's a clear understanding of which national insolvency-related proceedings fall within the remit of the Regulation, facilitating better cooperation between Member States in cross-border insolvency cases.

**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.

[EIR Recast, in fact, provides for several legal instruments to control the opening, conduct and closure of secondary proceedings, which are those opened in Member States other than where the main insolvency proceedings were opened. Here are two examples:

1- Synthetic Proceedings (Article 36): EIR Recast allows the insolvency practitioner in the main proceedings to provide a *synthetic* guarantee to local creditors in jurisdictions where secondary proceedings might be opened. This means that the practitioner can assure these creditors that they will receive the same treatment as if secondary proceedings are opened. If accepted by local creditors, this can prevent the opening of secondary proceedings;

2- Restriction on Secondary Proceedings (Article 38): EIR Recast allows the insolvency practitioner in the main proceedings to enter into commitments with local creditors in other Member States (where secondary proceedings may be opened) relating to the distribution of income from the debtor's assets located there. This instrument can prevent the opening of secondary proceedings if creditors' rights are sufficiently protected in the main proceedings.]

Total: 9/10

**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)?

[During the reform process of the European Insolvency Regulation (EIR) 2000, which led to the EIR Recast in 2015, the European Commission identified several aspects that needed revision. These elements aimed to address the challenges faced in cross-border insolvency proceedings within the EU and to enhance the efficiency and effectiveness of such proceedings. The main elements identified for revision included:

1- Clarifying the Jurisdiction and COMI: the Commission sought to address the issue of "forum shopping" and to provide clearer guidance on determining the debtor's COMI, which is crucial for deciding jurisdiction over insolvency proceedings;



2- Secondary insolvency Proceedings: reforms were proposed to make secondary proceedings more flexible and to allow for their avoidance where possible to facilitate the rescuing of companies and preserving the value of their assets;

3- Group Insolvency Proceedings: the Commission recognized the need for specific provisions to better coordinate insolvency proceedings within groups of companies operating across borders;

4- Procedural Safeguards and Rights of Creditors: enhancing the rights and involvement of creditors in the proceedings was seen as necessary, including improvements to the lodging of claims and participation in decision-making;

5- Introduction of Pre-Insolvency Proceedings:

The inclusion of pre-insolvency and hybrid proceedings that aim to prevent insolvency and allow for restructuring was considered.

These proposed revisions were debated, and some were incorporated into the EIR Recast to address the evolving landscape of cross-border insolvency within the EU. Since this is an INSOL course, it is important to notice that INSOL has formulated proposals from a practitioner's point of view on the basis of a legal analysis of the Regulation and the European Commission has in fact adopted some of them<sup>1</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.

[The concept of the "centre of main interests" (COMI) is a central feature of the European Insolvency Regulation and is used to determine jurisdiction for insolvency proceedings within the EU. It has been subject to both praise and criticism for various reasons:

Praises:

1- Predictability and Certainty: COMI provides a single point of reference for determining the main insolvency proceedings, which can offer predictability and legal certainty for debtors and creditors. By having a clear criterion, businesses can structure their affairs with some understanding of where insolvency proceedings are likely to be opened;

2- Protection of Local Creditors: the concept of COMI allows for the opening of secondary proceedings in the Member State where the debtor has an establishment. This protects local creditors by ensuring that they have access to a forum that is familiar to them and governed by local laws to which they are accustomed.

Shortcomings:

1- Vagueness/uncertainty: the COMI concept has been criticized for its lack of a precise legal definition, which can lead to unpredictability and litigation over its determination. This vagueness can lead to forum shopping as companies may try to move their COMI to more favorable jurisdictions;

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<sup>1</sup> Revision of the European Insolvency Regulation - INSOL Europe - <https://www.insol-europe.org> › documents

2-Complexity in Multinational Enterprises: In the case of complex multinational enterprises with operations spread across various jurisdictions, determining the COMI can be particularly challenging. The decentralized structure of such businesses does not lend itself well to the COMI concept.]

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

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

[The European Insolvency Regulation (EIR) and the Directive on Preventive Restructuring Frameworks, adopted in 2019, have different objectives and scopes that address various aspects of insolvency within the EU:

1- Objective and Scope:

- Regulation: The EIR is focused on procedural harmonization, specifically the recognition of insolvency proceedings and decisions across Member States. It sets out rules on jurisdiction, recognition, and enforcement of insolvency proceedings but does not harmonize the substantive insolvency laws of the Member States.
- Directive: The Directive on Preventive Restructuring Frameworks aims to harmonize certain aspects of substantive insolvency law across the EU, particularly regarding preventive restructuring, to enable debtors in financial difficulty to restructure early to prevent insolvency and ensure the viability of the business. It also introduces rules on discharge periods and a framework for restructuring plans.

2- Binding Nature and Implementation:

- Regulation: The EIR, as a regulation, is directly applicable and binding across all Member States without the need for national implementation. It has direct effect from the date it becomes applicable.
- Directive: The Directive, on the other hand, is binding as to the result to be achieved but leaves national authorities the choice of form and methods. Member States have a duty to transpose the Directive into national law within a certain deadline, adapting their domestic legal frameworks to meet the objectives set out in the Directive.

While the EIR provides the procedural framework for cross-border insolvency within the EU, the Directive seeks to standardize substantive preventive restructuring measures to reduce the likelihood of insolvency and promote the rescue of economically viable businesses. Together, they represent a comprehensive approach to addressing insolvency issues within the EU's internal market.]

**Total: 15/15**

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

**Scenario**

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

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

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

**Question 4.1 [maximum 5 marks] 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.

[The European Insolvency Regulation (EIR) 2000 applies to collective insolvency proceedings involving the partial or total disposal of a debtor and the appointment of a liquidator and is applicable to cases where the COMI is within a Member State of the European Union.

In determining whether the EIR 2000 would apply to Dinosaurus SARL, the key factor is the location of the company's COMI.

The scenario provided indicates:

- Incorporation and main operations in France: the company is incorporated in France, has its first store and the majority of its operations in France, including 80% of its employees, which strongly indicates that the COMI is in France;
- Presence in other member states: despite the presence of an office and stores in Ireland and a warehouse in Spain, these do not necessarily shift the COMI away from France unless they are the center of the company's main activities, which we cannot assume to be the case);
- Economic activities and customers: most customers are in France, and there is significant economic activity there, supporting once again the COMI being in France;
- Online purchases from the UK: the location of customers doing online purchases does not necessarily affect the determination of COMI;
- Loan agreement with Spanish Bank: entering into a loan agreement with a Spanish bank and the negotiations with suppliers in Spain do not constitute a shift in COMI, especially if the memoranda of understanding are non-binding type.

Given this information, the COMI is in France, so the EIR 2000 would apply to the opening of safeguard proceedings by Dinosaurus SARL in France. The Commercial Court in Le Mans has jurisdiction since the company's main activities and central administration are situated in France.

Researching I could find CJEU jurisprudence that would likely apply such as:

Eurofood IFSC Ltd (C-341/04)<sup>2</sup>, which clarified that the presumption of the registered office being the COMI can be refuted if it is proven that the actual center of the company's operations is elsewhere; Interedil Srl (C-396/09)<sup>3</sup>, which confirmed that the COMI should be identified by actions observable by third parties and emphasized the importance of the location where the debtor conducts its regular business.]

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.

#### Question 4.2 [maximum 5 marks] 1.5/5

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.

[To verify if EIR Recast is applicable to the safeguard proceedings, these steps should be followed:

1- Identifying the type of proceedings (the EIR Recast applies to collective insolvency proceedings that involve the partial or total sale of a debtor and the appointment of a liquidator, so it must first be established whether the safeguard proceedings are a type of insolvency proceeding covered by the EIR Recast;

2- Check the location of the COMI, since the EIR Recast applies when the debtor's COMI is within an EU Member State;

3- Examine the annexes of the EIR Recast as they list the types of proceedings in each member state that fall under the Regulation;

<sup>2</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62004CJ0341>, date of access 29.02.24

<sup>3</sup> [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62009CJ0396\\_SUM&from=FR](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62009CJ0396_SUM&from=FR), date of access 29.02.24.

#### 4- Verify exclusions.

Analyzing this scenario, we can say EIR Recast would be applicable to the proceedings, since i. the company has its COMI in France, as explained above, ii. the safeguard proceedings have been filed in France and iii. the French High Court has opened the safeguard proceedings, they ought to be recognized under French law (and, therefore, should be included in the EIR Recast scope as in its annexes) and iv. there seem to have no exclusions applicable.]

This was not the focus of this question. The EIR Recast will be applicable. The logical order of the steps to be taken is the following:

- Article 3(1) EIR Recast. COMI of Dinosaurus SARL is in the EU (and not in Denmark), i.e. in France (as stated in the answer to Question 4.1.). YES
- Article 1(2) EIR Recast. Dinosaurus SARL is not a credit institution, insurance undertaking or any other 'excluded' entity. YES
- Article 2(4), Recital 9, Annex A EIR Recast. The opened proceeding 'Safeguard' is listed in Annex A to the EIR Recast. YES
- Article 2(7), 84(1), 92 EIR Recast. The proceedings in question were opened on 23 June 2023, i.e. after the EIR Recast has entered into force. The filing date is not determinative for the temporal scope. YES

#### Question 4.3 [maximum 5 marks] 4/5

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.

[To determine if secondary insolvency proceedings can be opened under the European Insolvency Regulation (EIR) Recast, given the case of Dinosaurus SARL, we must consider several legal aspects as outlined in the EIR Recast and relevant CJEU jurisprudence:

- Location of assets (Article 3(2) of EIR Recast): secondary proceedings can be opened in the Member State where the debtor has an establishment. The term "establishment" implies the presence of a place of operations where the debtor carries out a non-transitory economic activity with human means and goods. Dinosaurus SARL's main warehouse is in Spain, which may qualify as an establishment;

- Jurisdiction for opening secondary proceedings: according to the EIR Recast, secondary insolvency proceedings can only be opened in a Member State where the debtor has an establishment. The Spanish bank's petition in Spain would likely be admissible if the main warehouse constitutes an establishment according to the Regulation's definition, but not in Italy, which has nothing to do with the given scenario;

- Purpose of secondary proceedings (Article 34 of EIR Recast): the purpose of the secondary proceedings is to protect the interests of local creditors. If the Spanish bank aims to secure a Spanish insolvency distribution ranking, this falls within the intent of the EIR Recast.

The CJEU has provided guidance on the interpretation of the EIR, including the location of the COMI and the conditions under which secondary proceedings can be opened. Cases such as *Interedil Srl* (C-396/09)<sup>4</sup> and *Bank Handlowy w Warszawie SA and Adamiak* (C-116/11)<sup>5</sup> may be applicable.

Given the case facts, secondary proceedings can be opened in Spain if the conditions mentioned above are met. However, the question apparently refers to Italy by mistake, since no connection to Italy is mentioned in the provided scenario. If the question indeed intended to ask about Spain, and the company has an establishment there, then under the EIR Recast, it would be possible for the Spanish bank to file for secondary insolvency proceedings in Spain, but not in Italy.]

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: 5.5/15

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

**Total: 39.5/50**

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<sup>4</sup> [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62009CJ0396\\_SUM&from=FR](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62009CJ0396_SUM&from=FR), last access 29.02.24

<sup>5</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62011CJ0116>, last access 29.02.24.