



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: **[student number.assessment2B]**. An example would be something along the following lines: 202021IFU-314.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 “studentnumber” 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 2021**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2021. 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 2021** or by **23:00 (11 pm) BST on 31 July 2021**. If you elect to submit by 1 March 2021, you **may not** submit the assessment again by 31 July 2021 (for example, in order to achieve a higher mark).
7. Prior to being populated with your answers, this assessment consists of **9 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.

- (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

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 altered the literal meaning of several provisions of the EIR 2000. Newly formulated rules, in line with the CJEU interpretation, were therefore needed.
- (b) The EIR 2000 was generally regarded as a successful instrument in the area of European insolvency law by the EU institutions, practitioners and academics. However, a number of its shortcomings were identified by an evaluation study and a public consultation.
- (c) The fundamental choices and underlying policies of the EIR 2000 lacked support from the major stakeholders (businesses, public authorities, insolvency practitioners, etc.). A new Regulation was therefore needed to meet their expectations.
- (d) The EIR 2000 proved to be inefficient and incapable of promoting co-ordination of cross-border insolvency proceedings in the EU.**

B was the correct answer.

Question 1.3

The EIR Recast is an instrument of 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 (“Effects of insolvency proceedings on pending lawsuits or arbitral proceedings”).

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

(c) Article 40 EIR Recast (“Advance payment of costs and expenses”).

(d) Article 7 EIR Recast (“Applicable law”).

Question 1.4

Why can it be said that the EIR Recast is more “rescue-oriented” than the EIR 2000?

(a) The EIR Recast is more rescue-oriented because it harmonises substantive aspects of domestic proceedings.

(b) The EIR Recast is more rescue-oriented because all domestic rescue procedures fall within its scope.

(c) The EIR Recast is more rescue-oriented because its scope was extended to cover pre-insolvency proceedings and secondary proceedings can be rescue proceedings.

(d) It is incorrect to say that the EIR Recast is more rescue-oriented than the EIR 2000, as the latter was already heavily focused on rescue.

Question 1.5

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

(a) Where 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) Where secondary proceedings are opened, synthetic proceedings mean that these secondary proceedings are automatically rescue proceedings, as opposed to liquidation proceedings.

(c) Synthetic proceedings mean 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.

(d) Synthetic proceedings mean that for the case at hand, several main insolvency proceedings can be opened, in addition to several secondary proceedings.

Question 1.6

The EIR Recast kept the concept of the “centre of main interests” (COMI) of the debtor, which already existed in the EIR 2000. What were the amendments adopted in relation to this concept?

- (a) The COMI of the debtor is not presumed to be “at the place of the registered office” anymore and the debtor will need to confirm where his COMI is before the beginning of each case.
- (b) Although the COMI of a debtor is still presumed to be “at the place of the registered office”, it is now possible to rebut this presumption, albeit only by the courts.
- (c) The rule that a company’s COMI conforms to its registered office is now an irrefutable presumption.
- (d) Although the COMI of a debtor is still presumed to be “at the place of the registered office”, it should now be possible to rebut this presumption based on Article 3 EIR Recast and Recital 31.

Question 1.7

Which one of the following claims **does not** fall within the definition of a “related action” under the EIR Recast?

- (a) Claim to hold a director of the insolvent company liable for causing its insolvency.
- (b) Claim of the insolvent company against its contracting party, arising from non-performance of the (pre-insolvent) contractual obligations by the latter.
- (c) *Actio pauliana* claim filed by the insolvency practitioner.
- (d) Claim of the advance payment for the costs of the insolvency proceedings.

Question 1.8

The dispute in the main proceedings, pending before the Spanish court, is between Abogados SA (Spain) and Fema GmbH (Germany), concerning an action to set aside two payments (“contested payments”) in the amount of EUR 800,000, made pursuant to a sales agreement of 10 September 2019, governed by English law. The contested payments had been made by Abogados SA to Fema GmbH before the former went insolvent. The insolvency practitioner of Abogados SA claims that under applicable Spanish law the contested payments shall be set aside. This is due to the fact that Fema GmbH must have been aware that Abogados SA was facing insolvency at the time that the payments were made.

Considering the facts of the case and relevant provisions of the EIR Recast, which one of the following statements is the **most accurate**?

- (a) The contested payments shall not be avoided if Fema GmbH proves that such transactions cannot be challenged on the basis of the insolvency provisions of English law (Article 16 EIR Recast).
- (b) To defend the contested payments Fema GmbH can rely solely, in a purely abstract manner, on the unchallengeable character of the payments at issue on the basis of a provision of the *lex causae*.
- (c) The contested transactions cannot be avoided if Fema GmbH can prove that the *lex causae* (including its general provisions and insolvency rules) does not allow any means of challenging the contested transactions, and provided that the parties did not choose that law for abusive or fraudulent ends.

(d) The insolvency practitioner will always succeed in his claim if he can clearly prove that under the *lex concursus*, the contested payments can be avoided (Article 7(2)(m) EIR Recast).

C was the correct answer/

Question 1.9

In which of the following scenarios may the recognition of a foreign insolvency proceeding be denied under the EIR Recast?

- (a) Where the decision to open the insolvency proceedings was taken in flagrant breach of the right to be heard, which a person concerned by such proceedings enjoys.
- (b) The judgment, subject to recognition, was passed with incorrect application of the applicable substantive law.
- (c) The court, which has opened insolvency proceedings (originating court), most certainly did not have international insolvency jurisdiction to do so under the EIR Recast.
- (d) The rule applied by the court, which has opened insolvency proceedings (originating court), is unknown or does not have an analogue in the law of the jurisdiction, in which recognition is sought.

Question 1.10

The French tax authority asserts to have a tax claim against a Spanish, LPZ Corp (debtor). The debtor is subject to the main insolvency proceeding (*Concurso*) in Spain. In addition, a secondary insolvency proceeding (Examinership) relating to LPZ Corp has been opened in Ireland.

Assume that:

- Under French law, creditors (except employees) must file proof of their claim within two (2) months from the publication in the French legal gazette of a notice of the judgment opening the insolvency proceedings.
- Under Irish law, the period within which creditors must file their claims is 15 days, as set in the order opening secondary insolvency proceedings against LPZ Corp.

The French tax authority intends to file its claim in the Irish proceedings. Within which time period can the French tax authority do so?

- (a) Within two (2) months following the publication date, as guaranteed by the French law (law applicable to the creditor).
- (b) Within 15 days, as stipulated in the applicable *lex concursus secundarii* (law of the insolvency proceeding at issue).
- (c) Within 30 days following the publication of the opening of insolvency proceedings in the insolvency register of Ireland.
- (d) Within the time limit prescribed by the *lex concursus* of the main insolvency proceeding (Spanish law).

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks] 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. “The possibility for companies to move their COMI is a legitimate exercise of the freedom of establishment.”

Statement 2. “This concept provides an instrument which makes allowance for special, domestic privileges while maintaining the procedural integrity of the main proceeding, thus preserving the principle of unity.”

Statement 1 relates to the autonomous concept of COMI as set out in Article 3(1) EIR Recast, and the fact that the EIR Recast does not address insolvency forum shopping but only its harmful or abusive forms as set out in Recital 29 EIR Recast.

Statement 2 relates to the stay of the opening of secondary proceedings which preserves the efficiency of the stay granted in the main insolvency proceedings as set out in Recital 45 EIR Recast.

Question 2.2 [maximum 3 marks] 3

Where several insolvency proceedings have been opened against the same company, there should be proper co-operation between the actors involved in these proceedings. The EIR Recast has introduced co-operation and communication obligations. List **three (3) provisions** (articles) of the EIR Recast, which mandate co-operation and communication in the context of main and secondary insolvency proceedings.

Article 41(c) EIR Recast – mandates for co-operation and communication between insolvency practitioners in secondary proceedings to provide the main insolvency practitioner with an early opportunity to submit proposals on the realisation or use of assets in the secondary proceedings.

Article 42 EIR Recast – mandates for co-operation and communication between courts

Article 43 EIR Recast – mandates for co-operation and communication between insolvency practitioners and courts

Question 2.3 [maximum 3 marks] 3

The EIR Recast is more rescue-oriented than its predecessor the EIR 2000. Name **three (3) provisions** (articles) of the EIR Recast which explain why this statement is true.

Article 41 EIR Recast references the need to communicate information on measures relating to the debtor’s rescue and restructuring. This information was not included in the predecessor, Article 31 EIR 2000.

Article 47(1) EIR Recast provides an insolvency practitioner in the main insolvency proceedings the power to propose a restructuring plan, a composition or comparable measure in secondary proceedings.

Article 1 EIR Recast and Annex A include reference to legal mechanisms developed for the purposes of rescue – e.g a temporary stay of individual enforcement proceedings in order to allow for negotiations between the debtor and its creditors.

Question 2.4 [maximum 2 marks] 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 1 to 3 sentences) explain how they operate.

Article 38(2) EIR Recast provides that where an insolvency practitioner in main proceedings has given an undertaking in accordance with Article 36, the court asked to open secondary proceedings should not open secondary proceedings at the request of the insolvency practitioner should not open them if the court is satisfied that the undertaking adequately protects the interests of local creditors. According to Article 36 EUR Recast, in order to avoid the opening of secondary proceedings, the insolvency practitioner in the main insolvency proceedings may give a unilateral undertaking in respect of the assets located in the Member State where secondary proceedings could be opened, that when distributing those assets received from realisation, the insolvency practitioner will comply with the distribution and priority rights under national law that creditors would have if secondary insolvency proceedings had been opened in that member state.

Another method of controlling the conduct of secondary proceeding is the provision of a temporary stay on the opening of secondary insolvency proceedings when a temporary stay of individual enforcement proceedings has been granted in the main proceedings. Recital 45 EIR Recast provides that the stay of the opening of secondary proceedings preserves the efficiency of the stay granted in the main insolvency proceedings,.

Marks awarded: 10 out of 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] 3.5

Explain why the adoption of the new European regulation was needed and recommended by the European Commission in 2012.

In accordance with Article 26 EIR 2000, by 1 June 2012, the European Commission had to present a report on the application of the EIR 2000 with a proposal for its adaptation.

Although the EIR 2000 had been successful, after 15 years it was clear that some of the provisions required adjustment, and other new developments meant that new rules had to be created.

The EIR Recast was needed in order to respond to the broadening scope of restructuring proceedings, the need for stronger rules for cooperation between insolvency practitioners and courts and the possibility of proceedings with regard to members of the same group of companies. Over time, creditor information had also improved due to the interconnectivity of insolvency registers which needed to be reflected in EIR Recast. Finally, the EIR was needed in order to reflect the general modernization of legal rules including provisions relating to data protection.

Yes but your answer would have been stronger had you made reference to the policy documents produced before the drafting of the EIR Recast, including the Heidelberg Report, which pinpointed at 5 specific elements that needed to be amended.

Question 3.2 [maximum 5 marks] 5

Compare the EIR Recast with the EIR 2000: choose **three (3)** major improvements and / or innovations of the EIR Recast. Explain how these improvements and / or innovations should stimulate a more efficient administration of insolvency proceedings spanning across several EU Member States.

1. Abolition of the requirement that secondary proceedings must be winding up proceedings, as previously contained in Article 3(3) EIR 2000. The limitation included in the EIR 2000 significantly hindered attempts to rescue and restructure businesses spanned across Europe with multiple establishments located across different Member States.
2. EIR Recast improved the publicity of insolvency proceedings. Article 25 EIR Recast prescribed the creation of a decentralized system for insolvency registers to be interconnected. As a result of this system, it would be possible to search for information on insolvency proceedings opened in any EU Member State by using a single search platform rather than going through each individual state's insolvency register.
3. EIR Recast includes a stronger emphasis on restructuring. This is an important innovation as the EIR mentioned only proceedings relating to the partial or total divestment of a debtor and the appointment of a liquidator. By contrast, the EIR Recast refers to traditional liquidation processes and extends to proceedings aimed as the rescue of companies and businesses, including financially distressed businesses. This extended coverage brought about by the EIR Recast is a reflection of the European trend of promoting effective restructuring tools and processes to maximize value for creditors and job opportunities across the single market in the EU.

Question 3.3 [maximum 5 marks] 5

Select **two (2)** major flaws and / or omissions of the EIR Recast. Explain why you consider them to be flaws and / or omissions and how they can be corrected or remedied.

National Insolvency Procedures

Annex A provides a list of names of insolvency proceedings for all 27 countries covered by the EIR Recast. National insolvency procedures are not listed in Annex A and are therefore not covered by the EIR Recast. This means that national insolvency procedures do not automatically fall within the material scope of the EIR Recast. A well-known example (during the period when the UK was a member of the EU) is that the UK's scheme of arrangement under Part 26 of the Companies Act is deliberately left outside the scope of the EIR Recast and is missing from Annex A. This means that it did not enjoy the benefits of automatic recognition when the UK was a member state based on Article 19 EUR Recast. This could be corrected by extending the list of procedures included in Annex A.

Territorial Scope

The EIR does not apply when the debtor's COMI is located outside the EU. In such cases, the jurisdictional outcomes will be determined by the national conflict of laws rules and insolvency rules of the EU Member States. As such, the EIR Recast has a limited territorial scope. This scope can be corrected or remedied through the development of case law to extend the scope of the EIR Recast in order to enable actions against debtors who are resident or have their COMI located in a third country.

Marks awarded: 13.5 out of 15.

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

Prêt A Jouer (PAJ) is a France-registered toy shop company. The company opened its first store in Strasbourg in 2011. One of PAJ's warehouses is in Madrid (Spain) and PAJ rents out this warehouse to other toy companies. In 2013, PAJ concluded a line of credit agreement with a Spanish bank where it maintains a bank account. During the same year, PAJ announced that it had plans to expand to the Spanish adult gaming market, as the latter was expected to grow annually by over 10%. As a result, PAJ started negotiations with local distributors and some (non-binding) memoranda of understanding have been signed.

However, like many other toy businesses, PAJ has faced the challenges of increased fixed costs and it has underestimated competition with web-based companies and an increasing preference for video games. For a few years now, PAJ has been beset by financial difficulties and, having witnessed the ongoing demise in revenue and fall in profits, it decided to file a petition to open safeguard proceedings (*procédure de sauvegarde*) in France. The petition was filed with the Strasbourg Court on 23 June 2017.

Question 4.1 [maximum 5 marks] 2.5

Assume that the EIR 2000 applies. Does the Strasbourg Court have international jurisdiction to open the requested insolvency proceeding? (Explain why it does or does not have jurisdiction.) Your answer should contain references to the applicable law and the relevant CJEU jurisprudence.

Article 3(1) EIR Recast states that the courts of the Member State within the territory of which the centre of the debtor's main interests is situated, shall have jurisdiction to open insolvency proceedings. A debtor can only have one COMI and thus only one main insolvency proceedings can be opened. PAJ is registered in France. As per the case of Eurofood, as PAJ's registered office is in France it can be determined that PAJ's COMI is based in France. In addition, the EIR Recast contains a registered office presumption (Article 3(1)). This can be rebutted where objective factors indicate the administration of the debtor's corporation happens in a different state. This is unlikely to be the case with PAJ as the Company runs a store in Strasbourg, France. In the case of Interedil Srl, the CJEU ruled that when the bodies responsible for the management and supervision of the debtor company are in the same place as the registered office and the management decisions are taken in the same place in a manner ascertainable by third parties, the registered office presumption is irrefutable. We are not aware of the management decisions in respect of PAJ or where they are taken to determine this point.

You fail to answer the question of whether the court in Strasbourg will have jurisdiction.

Question 4.2 [maximum 5 marks] 5

Assume that the Strasbourg Court opens the respective proceeding on 29 June 2017. Will the EIR Recast be applicable? Your answer should address the EIR Recast's scope and contain **all** steps taken to answer the question.

Yes, the EIR Recast will be applicable to the respective proceedings opened on 29 June 2017.

In order to determine the scope of the EIR Recast, the following questions must be answered:

1. COMI: What are its geographical limitations?

Article 1(1) EIR Recast states that the debtor's COMI must first be identified. The EIR Recast only applies when the debtor's COMI is located within the EU (excluding Denmark). PAJ must have a COMI based in a Member State of the EU. As set out in the previous question, it is clear that PAJ's COMI is located in France, which is a Member of the EU. As such, the geographical scope is satisfied and the EIR Recast applies.

2. Personal scope: To whom does it apply?

PAJ is not a bank, insurance company or any other excluded undertaking under EIR Recast. PAJ is a toy company, and as it is not excluded, the personal scope of the EIR recast is complied with and the EIR Recast Applies.

3. Which proceedings are covered?

PAJ has initiated safeguard proceedings. According to Article 1 EIR Recast, the regulation applies to proceedings that allow for a temporary stay in order to allow for negotiations between a debtor and its creditors. Such proceedings are listed in Annex A, which means that they fall within the material scope of the EIR Recast. Safeguard proceedings are akin to such proceedings and as such, PAJ's proceedings are covered by EIR Recast.

4. When does it apply?

EIR Recast came into force on 26 June 2017. The proceedings have been opened after 26 June 2017, on 29 June 2017, as such, the EIR applies.

Based on the facts and analysis outlined above, we can conclude that the EIR Recast is applicable to the insolvency proceedings opened by PAJ.

Question 4.3 [maximum 5 marks] 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 Spain under the EIR Recast? Your answer should contain references to the applicable law and the relevant CJEU jurisprudence.

Secondary proceedings can be opened where the debtor has an establishment in a Member State (Article 3(2) EIR Recast). An establishment is defined under Article 2(10) EIR Recast as the "place of operations where a debtor carries out or has carried out in the three month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets". PAJ leases a warehouse in Spain, has a Spanish bank account and entered into a credit agreement in 2013. In the case of Interedilm the CJEU concluded that the concept of establishment requires more than the mere presence of goods in isolation of bank accounts. We are not aware of any human management activity or other business ongoing in Spain in addition to the warehouse and the bank account. In paragraph 71 of the Virgos-Schmit Report, it was stated that a key factor in determining whether or not

an establishment exists relates to how it is perceived to third parties. We do not have any reports from third parties but on the facts presented, it is concluded that there is not any establishment present. As such, secondary proceedings cannot be opened in Spain under EIR Recast.

Marks awarded: 12.5 out of 15.

*** End of Assessment ***

Marks awarded: 44 out of 50.