



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).
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- 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.

D was the correct answer.

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).

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] 1.5

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: Main Insolvency Proceedings and COMI, Recital 29

Statement 2: Secondary Insolvency Proceedings and establishment, Article 3(2)] – also articles 36 and 38 and the concept of synthetic proceedings.

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 - Cooperation and communication between insolvency practitioners
Article 42 EIR Recast - between courts, and
Article 43 EIR Recast – between insolvency practitioners and courts.]

Question 2.3 [maximum 3 marks] 1.5

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 1 – Scope. The scope has been extended to include certain pre-insolvency rescue and restructuring proceedings.

Article 38 - Decision to open secondary insolvency proceedings

Article 72(1) (b) - propose a group coordination plan]

You fail to explain how the decision to open secondary proceedings leads to the EIR Recast being more rescue-oriented.

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.

[1. Right to give an undertaking

- a. According to Article 38(2) Insolvency practitioner in the main insolvency proceedings can give unilateral undertaking
- b. Once assets are realised, Insolvency Practitioner in the main insolvency proceedings will comply with the distribution and priority rights under national law that creditors would have if secondary insolvency proceedings were opened in that member state
- c. It simply removes the hurdle of secondary proceedings and promotes efficiently and effectiveness

2. Stay of the opening of Insolvency proceedings

- a. When an Insolvency Practitioner of main insolvency proceedings requests for the stay on opening of secondary proceedings, stay may be granted for not more than 3(three) months. (Article 38(3) EIR Recast)
- b. Court may order necessary measures to protect interests of local creditors in these 3 months and stay can be lifted under three circumstances
- c. These three months may serve as breathing space to debtor to negotiate a restructuring deal with its creditors]

Marks awarded: 5 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] 4

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

[Initially EIR 2000 was successful to great extent and has addressed majority of issues at that time. But as the time passes new issues have cropped up and EIR 2000 is not able to address those. As a result, EIR 2000 has to be modified which can address current issues and then it became EIR Recast.

Reasons for recommendation by European commission

- EIR 2000 has mentioned only about proceeding entailing partial or total divestment of debtor and the appointment of Liquidator. It has not focussed on restructuring of business. There was a need to promote effective restructuring tools to maximise the value for creditors, to increase investment and job opportunities
- There was a rule that secondary proceedings must be winding up as per Article 3(3) 2000 which significantly hinders the attempt of restructuring businesses spanned across Europe with multiple establishments in multiple member states
- EIR 2000 has no proper rules for cooperation between insolvency practitioners and courts. There was only one article (Article 31) in EIR 2000 which mandates insolvency practitioners in main and secondary proceedings to communicate with each other

- No proper provisions with respect to proceedings with regard to members of the same group companies i.e insolvency of multinational enterprise groups. Due to this, it was seen as major weakness of EIR 2000
- There is no established mechanism with regard to improvement of creditor information i.e interconnectivity of insolvency registers. Due to this, there is no information available at single place and became a hurdle to file claims. EIR 2000 does not oblige liquidator to publish information on insolvency proceedings in member states where as EIR Recast has provisions to tackle this.
- No rules in EIR 2000 with regard to data protection.]

A reference to policy documents of the EU, especially the report by INSOL Europe and the EU parliament would have been welcomed here.

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.

[The first major legal instrument dealing with cross-border insolvencies in the European Union (EU) has been the European Insolvency Regulation (EIR 2000). Despite initial doubts, the EIR 2000 turned out to be an effective tool in dealing with cross-border insolvencies within the EU. Nevertheless, as more than ten years had passed since the EIR 2000 took effect, it became clear that further improvements were necessary to better suit current business and technological trends. This led to the adoption of a new European Insolvency Regulation (EIR Recast), which has been in effect since 26 June 2017.

Although the EIR Recast does not change the fundamentals of the EIR 2000 (i.e. COMI, *lex concursus*, main and secondary proceedings), it elaborates some of the existing rules and introduces new ones. The EIR Recast has a wider scope and extends to restructuring and insolvency proceedings which promote the rescue of economically viable but distressed businesses and which give a second chance to entrepreneurs.

Three major innovations

1. Centre of main interests (COMI)

The method for ascertaining a debtor's COMI has been codified within the Recast EIR. It was previously set out in a number of key European Court of Justice judgments.

The concept of COMI is central to cross border insolvency in the EU. It determines the jurisdiction in which main insolvency proceedings can be commenced. Rebuttable presumptions as to the location of a debtor's COMI are now set out in Article 3 of the Recast EIR.

Insolvency Practitioners are obliged to examine whether or not COMI is in the jurisdiction in which they are appointed. While the definition has not changed, the clarification and guidance given in the Recast EIR is helpful for practitioners taking appointments in EU member states.

2. "Synthetic" or "virtual" secondary proceedings

Secondary proceedings are those opened in an EU member state where the debtor does not have their COMI but does have an economic presence known as an establishment.

Secondary proceedings could originally only be opened if they were winding up proceedings. The Recast EIR now expands the scope to include all rescue and pre-insolvency proceedings governed by the regulation.

Secondary proceedings are limited to the debtor's assets in the member state where they are opened. They can cause difficulties for the office-holder in the main proceedings. To avoid this, the office-holder may now give an undertaking to treat claims of foreign creditors in the same way as they would be treated in the local jurisdiction. If the court which is being asked to open secondary proceedings considers that this undertaking adequately protects creditors, it may refuse to open secondary proceedings.

This is an approach that has been approved by the English courts for some time, and is now set out in Article 36 of the Recast EIR.

3. Multinational group insolvencies

The Recast EIR introduces an entirely new framework for cooperation and coordination where insolvency proceedings relating to different members of a corporate group are opened in more than one member state.

Insolvency Practitioners appointed in these circumstances are under an obligation to communicate and cooperate with office-holders in other member states. This obligation does not apply if there is any conflict of interest or with national rules. The relevant courts are similarly obliged to communicate and cooperate with one another.

The Recast EIR now sets out a new voluntary process overseen by the courts for coordinating some elements of the proceedings. This process is referred to as group coordination proceedings.]

Question 3.3 [maximum 5 marks] 3

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.

[Two major deficiencies

1. **EIR Recast does not have concept of group or enterprise COMI, or it does not indicate the main court which is decisive in tasks of coordination**

When a group of enterprise COMI is not specified, it is always a difficult task to make and take decisions to restructure the business in an efficient manner. This also impacts on restructuring of other companies in same group

2. **EIR Recast does not provide definition of “right in rem”**

The Virgós-Schmit Report contends that the characterisation of a right as a right in rem must be sought in the national law which, according to the normal preinsolvency conflict of law rules, governs rights in rem. Most often the attributes of a right in rem will follow the law of the location of the property which effectively stretches the insolvency proceedings.]

Yes but you fail to address the second part of the question, i.e. 'how they can be corrected or remedied.'

Marks awarded: 12 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] 4.5

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.

[Information provided in case study and question:-

- EIR 2000 applies (as Insolvency proceedings opened before 26th June,2017)
- PAJ is registered in France
- Opened first store in 2011
- Line of credit – 2013 (Binding although memoranda is non-binding)
- Suspense of Payments – applied on 23rd June,2017

Whether Strasbourg district have international jurisdiction?

- a. France is part of European Union
- b. Matter is related to Insolvency
- c. France qualifies to be governed by EU EIR

Deciding COMI

- EIR 2000 did not contain definition of a COMI
- Registered office was situated in Netherlands (**The scenario does not make any reference to the Netherlands...**)
- With reference to judgement given in Eurofood IFSC Ltd, the presumption laid down in the second sentence of Article 3(1) of Regulation No 1346/2000, whereby the Centre of main interests of that subsidiary is situated in the Member State where its registered office is situated, can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which location at that registered office.
- From the perusal of above and the fact that PAJ has business operation in France, I can come to a conclusion that COMI is in France

Conclusion

- No forum shopping
- COMI is in France

- Though France [spelling] have international jurisdiction, it is Insolvency law of Member state which specifies the competent court which qualifies to open insolvency proceedings
- In particular, assuming Strasbourg District court is empowered to open insolvency proceedings under France Bankruptcy act, it can conclusively be inferred that Strasbourg District court has international jurisdiction to open insolvency proceedings against PAJ.]

Yes but you fail to mention Annex A.

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.

[A step-by-step plan can be schematically drawn as follows:

- The debtor has COMI in a Member State of the EU, except Denmark – YES, PAJ is established and does business in France.
- The debtor is not a bank, insurance company or another “excluded” undertaking – YES, it is a toy company
- The proceeding opened against the debtor is listed in Annex A to the EIR Recast – YES, it is related to insolvency
- The proceeding is opened after 26 June 2017 – YES, it is 27 June 2017

If all four steps have led to a “YES,” the EIR Recast should be applicable to the opened insolvency proceeding.

The given circumstances satisfies all points mentioned above, we can conclude that EIR Recast will apply to the factual matrix of this case.]

Question 4.3 [maximum 5 marks] 4

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.

[As per Article 3(2) EIR Recast, opening of one or more secondary insolvency proceedings against a debtor in any Member State where it possesses an establishment is allowed.

Points to be considered before opening of secondary insolvency proceedings

- Establishment is essential to open secondary insolvency proceedings in a member state
- In general, Main Insolvency proceedings are opened prior to Secondary Insolvency proceedings except under provisions as per Article 3(4) Recast
- MoU's are non-binding.

The facts of the case do not support the finding of an establishment of PAJ 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 is evidently missing. Therefore, under the EIR Recast, secondary insolvency proceedings cannot be opened in Italy. Further, since MoU's are non-binding in nature, Italian bank has not secured any rights as per MoU. So, bank has no claim and proceedings cannot be opened in Italy under EIR Recast.]

Good but a reference to Interedil is missing.

Marks awarded: 13.5 out of 15.

*** End of Assessment ***

Marks awarded: 39.5 out of 50.