



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 6D

ITALY

This is the **summative (formal) assessment** for **Module 6D** of this course and must be submitted by all candidates who **selected this module as one of their elective modules**.

The mark awarded for this assessment will determine your final mark for Module 6D. 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 **Microsoft Word format**, using a standard A4 size page and an 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.assessment6D]**. An example would be something along the following lines: 202122-336.assessment6D. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words "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. The final submission date for this assessment is **31 July 2022**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
7. Prior to being populated with your answers, this assessment consists of **7 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.

Select the CORRECT answer under each of the following questions (1.1 to 1.10).

Question 1.1

Select the **correct answer**:

Under the current law, a consumer cannot be admitted to a consumer's agreement or plan if:

- (a) he assumed obligations without a reasonable prospect of meeting them and he relied on credit in a manner that was not proportionate to their income.
- (b) he is responsible for causing the over-indebtedness with a reckless conduct.

(c) both (a) and (b).

(d) only (b).

Question 1.2

Select the **correct answer**:

When an insolvency petition is filed:

- (a) all connected actions are dealt with by the insolvency court where the proceedings were commenced, irrespective of their value.**
- (b) there is no *vis attractiva* for connected actions.
- (c) the *vis attractiva* is limited to those actions that deal with the status of the creditors, but not those that deal with the legal position of the debtor and its legal representatives.
- (d) all connected actions are dealt with by the insolvency court where the proceedings were commenced, unless they exceed the threshold of EUR 1,000,000, in which case the local Court of Appeal will deal with the action.

Question 1.3

Select the **correct answer**:

The submission of a petition for *concordato in bianco*:

- (a) was introduced in the law to offer a Chapter 11-style procedure to Italian distressed yet viable businesses.**

Commented [EV1]: TOTAL MARK: 40/50.

This is an excellent exam paper, which shows detailed understanding of the Italian corporate insolvency and personal bankruptcy law. Well done! It's a pity you lost some marks in the first section of the paper (Q&As), as I believe that a higher mark would better reflect the effort you put in understanding the law.

EV

Commented [EV2]: MARK for this section: 7/10.

Commented [EV3]: The correct answer is (d)

Commented [EV4]: Correct.

Commented [EV5]: The correct answer is (c).

- (b) gave unrestricted freedom to insolvent debtors, which prompted the legislator to ban the use of this procedure in 2015.
- (c) determines the same effect on creditors as the submission of a traditional pre-insolvency composition petition with reference to actions against the assets of the debtor.
- (d) allows the creditors to continue only existing enforcement actions and, in any case, only up to the point in time when the debtor submits a restructuring plan.

Question 1.4

Commented [EV6]: The correct answer is (d).

Select the **correct answer**:

The director's duty to manage the company in a prudent and reasonable manner is owed to:

- (a) the company's shareholders.
- (b) the company's creditors.
- (c) the company's shareholders and to its creditors on the eve of insolvency.
- (d) the company, irrespective of whether their actions can affect either shareholders or creditors.

Question 1.5

Commented [EV7]: Correct.

Select the **correct answer**:

In order to be eligible for pre-insolvency compositions, companies need to be:

- (a) in a state of crisis rather than in a state of insolvency upon admission to the procedure.
- (b) cash-flow or balance-sheet insolvent.
- (c) in a state of crisis or insolvency upon submission of the petition and at the moment in which the court is asked to approve the agreement.
- (d) in a state of over-indebtedness.

Question 1.6

Commented [EV8]: Correct.

Select the **correct answer**:

In order to be executed, a deed of mortgage over real estate needs to be:

- (a) drafted in writing and signed by at least one of the parties;
- (b) drafted in writing and signed by both parties;
- (c) drafted in writing, signed by both parties and registered with the competent land registry;
- (d) drafted in writing in a notarised form, signed and registered.

Question 1.7

Select the **correct answer**:

In personal bankruptcy procedures:

- (a) creditors do have to prove their claims in these procedures, with the exception of a consumer's liquidation.
- (b) there is no mechanism to challenge an erroneous proof of debt submitted by the debtor or his representative.
- (c) it is not possible to file a late claim in consumer's liquidations.
- (d) there is no provision, under the law, to authorise the late filing of proofs of claims.**

Commented [EV9]: Correct.

Question 1.8

Select the **correct answer**:

Rules on netting and set-off:

- (a) apply only to liquidation procedures.
- (b) restrict the validity of contractually negotiated clauses.
- (c) require claims to be quantified, certain and preferably due.**
- (d) are not codified in the *legge fallimentare*.

Commented [EV10]: Correct.

Question 1.9

Select the **correct answer**:

Following the United Kingdom's (UK) withdrawal from the EU:

- (a) Italian restructuring procedures are no longer enforceable in the UK.
- (b) it may be possible to rely on a simplified recognition procedure under the Cross-Border Insolvency Regulations 2006 if the Italian restructuring procedure is a pre-insolvency composition collective in nature and notified to all potential creditors.**
- (c) recognition of such proceedings would produce effect even for contracts subject to English law (rule in *Gibbs*).
- (d) while in the past it was possible to rely on the Brussels Recast Regulation, it is now possible to rely on the 2007 Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments.

Commented [EV11]: Correct.

Question 1.10

Select the **correct answer**:

Recent reforms based on the preparatory work of the "Rordorf Commission" and enacted by legislative decree 14/2019:

- (a) benchmark international best practices and European recommendations.
- (b) do not introduce significant changes to the current law.
- (c) discourage the strategic use of statutory provisions by both creditors and debtors.
- (d) have not yet been enacted by Parliament.

QUESTION 2 (direct questions) [10 marks]

The principle of equality amongst creditors (*par condicio creditorum*) applies only with reference to classes of creditors. However, the current system of securities, privileges and guarantees under Italian law recognises a wide array of exceptions to the *par condicio creditorum* rule. As a result, the system is rather byzantine and cumbersome, to the extent that many creditors are unlikely to be aware of their privileged status until or unless their debtor files for insolvency.

Discuss this statement with reference to relevant case law and statutes, as well as international recommendations and approaches adopted in other jurisdictions such as the United Kingdom or the United States.

The Italian insolvency system is mainly based on the royal decree 267/1942 (*legge fallimentare*), amended by legislative decrees 35/2005, 5/2006 and 169/2007, regarding corporate insolvency, and law 3/2012, regarding personal and consumer insolvency. These **legal diplomas**, in turn, list a series of procedures, each with its own specific rules, including the possibility or not of creditors with security interest continuing to enforce their rights.

With regard to the preferences and privileges created in favour of certain creditors who are subject to these insolvency proceedings, such preferences and privileges are provided for in sparse laws, such as Italian Civil Code, which end up creating distortions to the principle of parity among creditors because there is **discrimination** according to the origin of their credit.

This system of sparse and disconnected preferences and privileges has become outdated and in conflict with the world economic landscape, in which many companies operate on a global scale, with creditors spread around the world and who are not able to know the details of local laws, which makes it imperative to reform the insolvency **regime**.

To that end are the Commission Recommendation of 12 March 2014 on a new approach to business failure and insolvency, where it was stated that "The debtors should have the right to request a court to grant a temporary stay of individual enforcement actions (hereafter 'stay') lodged by creditors, including secured and preferential creditors, who may otherwise hamper the prospects of a restructuring plan."

Although the Italian government had the opportunity to change this system of privileges and preferences under law 155/2017, such power was not exercised by the Rordorf Commission

QUESTION 3 (essay-type questions) [15 marks in total]

Outline the main changes to the treatment of personal debtors that has occurred since the introduction of law 3/2012.

Commented [EV12]: Correct.

Commented [EV13]: Mark for this question: 7.5/10.
This is a good answer, which shows a general understanding of the law. The answer would have benefited from a more detailed analysis of some of the preferences referred to in the paper. For instance, you state that preferences introduce a discriminatory treatment among creditors. This might apply to some of the preferences recognized under the law, but not to others. Most beneficiaries are not aware of their preferential status until insolvency. It would have been beneficial to highlight this aspect and discuss whether those preferences are still worth being upheld under the law.

Commented [EV14]: I don't think the use of this term is appropriate in this context.

Commented [EV15]: This is a good point. However, simply establishing a preferential treatment does not necessarily result in "bad" discrimination.

Commented [EV16]: The vast majority of companies are SMEs which operate in the domestic market. This point might not apply to them.

Commented [EV17]: Mark for this question: 13.5/15.
This is a good, error-free and comprehensive answer to the essay question. You covered all the topics in the answer, and your analysis is detailed and correct. Well done!

In particular, include references to: the eligibility criteria for these procedures; the differences between consumer's agreements and plans; the conditions to obtain a discharge of pre-bankruptcy debts.

Law 3/2012, as amended by law 221/2012, introduced three formal insolvency procedures to individual and entities subject to personal and consumer rules that are not entitled to corporate insolvency procedures: (i) Consumer's Agreement (*Accordo del consumatore*), (ii) Consumer's Plan (Piano del consumatore), and (iii) Consumer's Liquidation (Procedura di liquidazione del patrimonio).

Pursuant to articles 6(1) and 7(2) of law 3/2012, these personal procedures can be filed by debtors that have not entered into bankruptcy in the previous five years and do not meet the criteria to file for the insolvency procedures provided by Royal decree 267/1942 (*legge fallimentare*), which, pursuant to article 1 of *legge fallimentare*, are public entities, non-commercial entrepreneurs and small commercial entrepreneurs who do not reach the thresholds provided by article 1 of *legge fallimentare*.

The eligible debtors must also be in a situation of over-indebtedness, which, pursuant to article 6(2)(a) of law 3/2012 is a situation in which debtor is temporarily or permanent incapable of fulfilling existing obligations.

In case of consumer's agreements and plans, article 12-bis of law 3/2012, also provides limits on the eligibility for these procedures: if the over-indebtedness is caused by gross misconduct (as changed by the new insolvency code), or consumer entered into agreements knowing that he would probably not be able to honour his obligations or borrowed more than it could afford, consumer will not be entitled to personal procedures. Although the two later scenarios were removed by law 176/2020, they are occasionally used by courts to decide whether a consumer is entitled to personal procedures or not.

Among all their particularities, the main difference between the Consumer's Agreement and the Consumer's Plan is that in the latter there is no need to obtain creditors approval and the proposal is subject only to court confirmation.

In the case of the Consumer's Plan, creditors may participate in the court hearing that will evaluate the plan and, if they disagree with its approval, they can file an appeal to the same court, which will be ruled by a group of three judges.

Proposals under the Consumer's Agreement procedure, on the other hand, are subject to creditors approval and must be approved by creditors representing at least 60% of the debt. If approved, the proposal is binding to all creditors, including those that did not reply. In this case, they are assumed to be in favour of the proposal.

In terms of procedure, both the Consumer's Plan and the Consumer's Agreement initiate with a proposal prepared by debtor along with a panel of experts known as *organismo di composizione della crisi (organismo)*, which may provide for a division of creditors among certain classes and must be accompanied by a list of all the debtor's assets.

Once the plan is approved pursuant to article 13 of law 3/2012, its execution is conducted by the organismo, which supervise the comply with obligations assumed by debtor and can eventually appoint a liquidator if the proposal encompasses the sale of assets.

As for Consumer's liquidation, it is a procedure that is binding to all creditors, can only be initiated by debtor and whose main purpose is to liquidate all the debtor's assets. It must be closed no earlier than four years after it was opened, pursuant to article 14-novies(5) of law 3/2012. To fulfil such task, court can appoint a liquidator or even the organismo to administer the assets and represent the debtor in civil proceeding in which is involved. The liquidator is also responsible to draw up the list of creditors to be paid from the debtor's assets. To participate in the procedure, creditors must submit their claims to the liquidator within the designated time limit.

The procedure to obtain a discharge of pre-bankruptcy debts within a liquidation procedure is provided by article 14-terdecies of law 3/2012 and applies only to debtors who have demonstrated a legitimate interest in overcoming the momentary crisis through acts such as cooperation with the liquidator and the efficient course of the procedure and payment of

Commented [EV18]: Eligibility criteria.

Commented [EV19]: Comparison.

Commented [EV20]: Procedure.

Commented [EV21]: Discharge.

unsecured creditors. In this case, within one year after the court has closed the liquidation procedure, debtor can apply to court for the discharge order.

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

Buonapizza Srl (the debtor) is a company registered in Milan, Italy. Its main factory is in Modena, Italy, which is also the place where the board of directors transferred the registered office to on 15 April 2020. The company has assets in other jurisdictions, including the United Kingdom. The debtor's main line of business consists of producing locally-sourced pizzas and selling them to large foreign grocery shops, such as Tesco in the UK. The contract with *Tesco* is subject to English law, but there is no choice of forum for any dispute arising from it.

In December 2020, *Buonapizza Srl* ceased its operations due to industrial action and later that month filed for corporate liquidation (*fallimento*). In a judgment dated 12 January 2021, the local court in Modena opened a corporate liquidation proceeding against *Buonapizza Srl*.

During the proceeding, it emerged that since January 2019 one of the three executive directors withheld relevant information about the company's state of affairs. This director devised a complex scheme with the company's accountant to divert funds to offshore accounts and to alter the company's balance sheet. It was also established that the local court of Modena was aware of the potential insolvency of the company since June 2020, when this emerged during an executory action by one of the company's creditors.

Finally, as part of the liquidation procedure the receiver organised an auction for the sale of the company's assets, including a plot of land crossed by a river that was given as collateral to *Tesco*.

The legal representative from *Tesco*, one of *Buonapizza Srl*'s creditors, comes to your offices and raises the issues below with you.

Using the facts above, answer the questions that follow. (When answering the questions, please refer to the relevant provisions under national law as well as to relevant case law.)

Question 4.1 [maximum 6 marks]

Was the local court in Modena entitled to open a corporate liquidation proceeding against *Buonapizza Srl*, considering that the company's registered office only moved to Modena shortly before the filing? Would the situation be different under the new framework introduced by law no 155/2017? Can the judgment (and the insolvency-related judgments arising from it) be enforced in the UK?

Although article 9(2) of the legge fallimentare provides that changes in the registered office within one year prior to the filing of corporate liquidation does not affect court's jurisdiction, the court in Modena was entitled to open *Buonapizza Srl*'s corporate liquidation, because the proceeding must be filed in the main place of business, pursuant to article 217(1)(4). Considering what has been ruled by the European Court of Justice in case C-396/09 *Interdil*, although *Buonapizza Srl*'s board of directors only transferred its registered office to Modena eight months before the filing for corporate liquidation, *Buonapizza Srl*'s main factory has always been in Modena, which can be considered its main place of business.

Commented [EV22]: Mark for this part of the question: 6/6.
Excellent, comprehensive and error-free answer.

The situation would be different under law 155/2017, because the jurisdiction to deal with corporate insolvency proceedings, including corporate liquidation, was moved to specialised sections of the enterprise court (*tribunale delle imprese*). Although in general foreign judgments can be enforced in the UK pursuant to article 15(1), Schedule 1, of the Cross-Border Insolvency Regulations 2006 (CBIR 2006), with an application submitted to the English court, such foreign judgments cannot go against the Gibbs rule, which prevents debts arising from contracts governed by English law being discharged by foreign insolvency proceedings. In this case, considering that the contract with Tesco is subject to English law, the Gibbs rule applies and, therefore, the judgment cannot be enforced in the UK.

Question 4.2 [maximum 4 marks]

Were the debtor, its directors or the local court under any obligation to file for insolvency at an earlier stage? Are there any compensatory or punitive remedies for the parties' failure to act promptly?

Yes, directors of Buonapizza Srl had the duty to act in a prudent and reasonable manner, which, in this case, means that the filing for insolvency at an earlier stage, since the filing was made in December 2020, but there is evidence that they knew since January 2019 that the company was experiencing financial difficulties. Such behaviour is considered simple bankruptcy (*bancarotta semplice*) and falls under articles 217 and 224 of *legge fallimentare*. In this case, directors can be sentenced from six months to two years in jail and can also be liable for failing to meet with their fiduciary duty.

Question 4.3 [maximum 5 marks]

Could *Buonapizza Srl* grant collateral over the plot of land described in the example? Are there any assets that, under Italian law, cannot be obtained as collateral?

Yes. Although the river that crosses the plot of land belongs to the state, pursuant to article 822(1) of Italian Civil Code, there is no impediment to grant collateral over the plot of land itself. Under Italian law, state-owned assets listed in article 822(1) and (2) of Italian Civil Code, as well as assets constituting an endowment fund (article 167 of Italian Civil Code), those not subject to foreclosure (article 545 of Italian Civil Procedure Code) and the ones listed in article 514 of Italian Civil Procedure Code

*** End of Assessment ***

Commented [EV23]: Mark for this part of the question: 2/4. You identified that directors are liable – under criminal and civil law – for failure to act promptly. However, you should have highlighted that the civil remedies are for the benefit of the company, and the proceedings are against all directors. As for the first part of the question, your answer is incorrect. While directors are criminally liable for failure to act promptly, there is no civil obligation to file for insolvency under Italian law.

Commented [EV24]: Mark for this part of the question: 4/5. This is a good answer, but you could have expanded your reasoning a bit.