



**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: 2021122-526.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.**
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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 2022**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2022. 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 2022** or by **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. If you elect to submit by 1 March 2022, you **may not** submit the assessment again by 31 July 2022 (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 substantively harmonised the national insolvency law of the Member States.

- (a) False. The objective of an EU regulation is not legal harmonisation.
- (b) True. Since the entry into force of the EIR 2000, the insolvency laws of the Member States are similar.
- (c) False. The objective of the EIR 2000 was not to harmonise aspects of national insolvency laws but to provide non-binding guidelines only.
- (d) False. While the EIR 2000 attempted to harmonise national insolvency laws, its focus was on procedural aspects of insolvency law, not substantive ones.**

#### **Question 1.2**

The EIR 2000 was the first ever European initiative to attempt to harmonise the insolvency laws of Member States.

- (a) 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.**
- (b) False. There was another EU Regulation regulating insolvency law at EU level before the EIR 2000.
- (c) True. Before the EIR 2000, the EU has not sought to harmonise the insolvency laws of EU Member States.
- (d) False. An EU Directive regulating insolvency law at EU level existed before the EIR 2000.

#### **Question 1.3**

The EIR Recast was urgently needed because the EIR 2000 was considered dysfunctional and ineffective.

- (a) True. The EIR 2000 proved to be inefficient and incapable of supporting the effective resolution of cross-border cases over the years.
- (b) True. As a result, the EIR 2000 lacked the support of major stakeholders such as insolvency practitioners, businesses and public authorities who considered the instrument fruitless.

(c) False. While a number of shortcomings were identified by an evaluation study and a public consultation, the EIR 2000 was generally regarded as a successful instrument by most stakeholders, including practitioners, businesses, the EU institutions and insolvency academics.

(d) False. The EIR 2000 was considered a complete success to support cross-border insolvency cases and, as a result, the wording of the EIR Recast mirrored its 2000 predecessor.

#### 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

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 all domestic rescue procedures fall within its scope.

(b) The EIR Recast is more rescue-oriented because it harmonises all substantive aspects of national insolvency laws.

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

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

#### Question 1.6

During the reform process of the EIR 2000, what main elements were identified as needing to be revised within the framework of the Regulation (whether adopted or not)?

(a) The scope of the Regulation was to be expanded to cover pre-insolvency and hybrid proceedings; the concept of COMI was to be refined; secondary proceedings were to be extended to rescue proceedings; rules on publicity of insolvency proceedings and lodging of claims were to be amended; provisions for group proceedings were to be added.

(b) Rules on co-operation and communication between courts were to be refined; the concept of COMI was to be abandoned and a new jurisdictional concept was to be found; the Recast Regulation was to apply to Denmark.

- (c) The Recast Regulation was to apply to private individuals and self-employed; a common European-wide insolvency proceeding was to be added to the Regulation.
- (d) The Regulation was meant to fully embrace the universalism principle by abandoning the concept of secondary proceedings; the Regulation was meant to mostly promote out-of-court settlement and abandon all intervention of a judicial or administrative authority in cross-border proceedings.

### Question 1.7

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

- (a) “Synthetic proceedings” means that for the case at hand, several main proceedings can be opened, in addition to several secondary proceedings.
- (b) “Synthetic proceedings” means that when secondary proceedings are opened, these are automatically rescue proceedings, as opposed to liquidation proceedings.
- (c) “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.
- (d) “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.

### Question 1.8

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

- (a) 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.
- (b) The judgment, subject to recognition, was passed with incorrect application of the applicable substantive law.
- (c) 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.
- (d) The court, which has opened insolvency proceedings (originating court), most certainly did not have international insolvency jurisdiction to do so under the EIR Recast.

### Question 1.9

In a cross-border dispute, the main proceedings before the Italian court opposes Fema SrL (registered in Italy) and Lacroix SARL (registered in France). The case concerns an action to set aside four contested payments that amount to EUR 850,000. These payments were made pursuant to a sales agreement dated 5 August 2020, governed by German law. The contested payments have been made by Fema SrL to Lacroix SARL before the former went insolvent. The insolvency practitioner of the company claims that under applicable Italian law, the

contested payments shall be set aside because Lacroix SARL must have been aware that Fema Srl was facing insolvency at the time 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 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).
- (b) The contested transactions cannot be avoided if Lacroix SARL 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.
- (c) To defend the contested payments Lacroix SARL 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*.
- (d) The contested payments shall not be avoided if Lacroix SARL proves that such transactions cannot be challenged on the basis of the insolvency provisions of German law (Article 16 EIR Recast).

B was the correct answer.

#### Question 1.10

The French Social Security authority asserts to have a social security contribution claim against an Irish company, Cupcake Cottage Ltd. Cupcake Cottage is subject to the main insolvency proceeding (Examinership) in Ireland. In addition, a secondary insolvency proceeding (*Concurso*) relating to the same company has been opened in Spain.

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 Spanish law, the period within which creditors must file their claims is one month, as set in the order opening secondary insolvency proceedings against Cupcake Cottage.

The French tax authority intends to file its claim in the Spanish 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 one month, 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 Spain.
- (d) Within the time limit prescribed by the *lex concursus* of the main insolvency proceeding (Irish law).

C was the correct answer.

**Total marks: 8 out of 10.**

## **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. “This article introduces a legal regime for the avoidance of secondary insolvency proceedings, based on the unilateral promise given by the main insolvency practitioner to local creditors that they will receive treatment ‘as if’ secondary proceedings had in fact been open.’

Statement 2. “The proper functioning of the internal market requires that cross-border insolvency proceedings should operate effectively. This requires judicial cooperation.”

1. Right to give an undertaking to avoid secondary insolvency proceedings – article 36 EIR Recast
2. Preamble to the regulation – recital 3 EIR Recast, and, Article 41

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

The EIR Recast is built upon the concept of modified universalism, as pure universalism has been deemed idealistic and impractical for the time being. Provide **three (3) examples** of provisions from the EIR Recast, which highlight this modified universalism approach.

1. Article 8 EIR Recast provides an exception to the general application of lex concursus (i.e. universalism). Under this exception the opening of insolvency proceedings does not effect the rights in rem of creditors or third parties in respect of tangible or intangible movable or immovable assets belonging to the debtor situated within another member state at the time of opening of proceedings. The right must be established pre the opening of proceedings.
2. Article 16 EIR Recast provides that the lex concursus relating to voidness, voidability or unenforceability of legal acts detrimental to creditors does not apply where the person who benefitted from an act detrimental to all creditors provides proof that the act is subject to the law of another member state other than the state of the opening of the proceedings and the law of that other member state does not allow any means to challenge the detrimental act. The transaction must have concluded pre the opening of proceedings.
3. Article 13 EIR Recast provides further evidence of the concept of modified universalism which provides that employment contracts are governed by the law of the member state applicable to the contract of employment not the lex concursus.

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

Cross-border co-operation and communication between courts is now an obligation under the EIR Recast. This was not the case under the EIR 2000. List **three (3) provisions** (recitals and / or articles) of the EIR Recast that deal with this newly introduced obligation.

Article 42 deals with co-operation between courts and sets out a framework. Court to court co-operation can take place in many forms. Article 42(3) EIR Recast states that the courts are empowered to co-ordinate the administration and supervision of the debtors assets and affairs. They can synchronise hearings for example. The courts are given flexibility on how they achieve co-operation by such means as they deem appropriate with the framework mentioned above set out in Article 42(3).

Recital 48 points out that proper co-operation between all actors involved in the debtors estate (which includes the court) is important to the efficient realisation of the debtors assets and administration of its estate.

Article 42(1) extends co-operation to the time before proceedings are opened.

Taken together, Articles 56-60 and Articles 61-77 EIR Recast prescribe cooperation and communication duties on courts and practitioners, including the figure of a group co-ordinator when it comes to insolvency of groups of companies.

#### **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 36 provides the insolvency practitioner in the main insolvency proceedings with the ability to furnish an undertaking to the effect that when distributing assets he will have regard to local national law and comply with the distribution rights that creditors would have if secondary insolvency proceedings were opened in that member state. Creditors may rely on this undertaking with such reliance removing the need to take action in the form of secondary proceedings against the debtors estate in that jurisdiction.

Secondly, the insolvency practitioner may apply to court in the main insolvency proceedings for a stay on the opening of secondary insolvency proceedings thereby preserving the efficiency of the stay granted in the main proceedings – Article 38(3) EIR Recast. The stay may be imposed for a period not exceeding 3 months.

**Total marks: 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] 5**

In 2012, the European Commission recommended that the European Insolvency Regulation be amended by focusing on specific aspects of the instrument. Explain what these aspects were and how they have been introduced in the EIR Recast.



The European Insolvency Regulation (EIR) did not cover the restructuring of a company at the pre-insolvency stage. Further, there were difficulties in applying the concept of COMI in practice. The COMI rules under the EIR were criticized as facilitating forum shopping and so called 'bankruptcy tourism' with debtors engaging in COMI relocation in order to avail of more favourable jurisdictions within which to enter an insolvency proceeding.

In addition, secondary proceedings under the EIR must be winding up proceedings. Insolvency practitioners in the main proceedings would lose control over the assets located in other member states.

There was no mandatory provision for the publication of insolvency proceedings under the EIR with the effect being that judges and creditors were largely unaware if insolvency proceedings had been opened in another member state – there was no publicly accessible register that could be searched. The smooth functioning of a European insolvency system requires the availability or readily accessible information. Judges and creditors need to be able to find out if proceedings have opened in another jurisdiction.

The EIR did not provide specific rules for dealing with insolvency of group companies operating across multiple jurisdictions reducing the prospect of a successful group restructuring as a whole which would potentially harm creditor value and return.

Taken together these issues highlighted by the Commission negatively impact on the smooth functioning of the internal market and its resilience to economic crises.

In response, the EIR Recast:

- Extended the scope of the Regulation by revising the definition of insolvency proceedings to include pre-insolvency proceedings and debt discharge proceedings. The EIR Recast was made applicable to natural persons.
- It clarified the rules on jurisdiction including the circumstances in which the presumption that the COMI is where the registered office is located may be rebutted. It provided for a 3 month minimum time period for the establishment of a COMI before proceedings are opened.
- It removed the requirement that secondary proceedings must be winding up proceedings; introduced an obligation to co-operate between courts and between insolvency practitioners. It introduced the 'synthetic proceedings/undertaking procedure.
- It established the requirement to publish insolvency proceedings in a publicly accessible electronic register and the interconnection of national registers.

### **Question 3.2 [maximum 5 marks] 5**

While the EIR 2000 was considered to work well overall, several innovative concepts and rules were introduced in the EIR Recast to improve the manner in which the Regulation supports the administration of a cross-border case in an efficient manner. Describe **three (3)** improvements / innovations that made their way into the EIR Recast.

Undoubtedly the introduction of the concept of 'synthetic secondary proceedings' is an innovation. The opening of secondary proceedings is not necessary, where the liquidator of the main proceedings promises to the local creditors that they would be treated in the main proceedings as if secondary proceedings had been opened and that the rights they would have had in such a case with respect to the determination and ranking of their claims would

be respected in the distribution of the assets. Articles 36 and 38 of the EIR Recast refer. Where such an undertaking is given the court should refuse to commence secondary proceedings provided that it is satisfied that creditor interests are adequately protected.

As alluded to above, a large improvement is the establishment of a publicly searchable electronic register of insolvency proceedings. The efficient flow of information between stakeholders assists in the efficient functioning of insolvency proceedings and in turn the efficient allocation of capital within the single market.

Under EIR Recast, creditors are free to file claims in as many jurisdictions as they wish (Article 45). This could potentially give rise to creditors collecting payment on the same claim in multiple jurisdictions which would result in that creditor obtaining more favourable treatment than other creditors of the same class. In an effort to safeguard equal treatment between creditors, Article 23(2) provides that a creditor claiming in more than one proceeding should not receive more than the proportion of payment that is obtained by other creditors of the same ranking or category. While the ranking and priority of creditors is not harmonized across the EU, Article 23 is a step in the right direction.

In addition, Article 1 extends the EIR Recast to proceedings aimed at rescuing viable but financially distressed businesses. The emphasis on restructuring is an innovation compared to EIR 2000 which only dealt with liquidation proceedings.

### **Question 3.3 [maximum 5 marks] 1.5**

While the EIR Recast was welcomed by most stakeholders, it was also criticised by some as a “missed opportunity” and “modest”. List **two (2) flaws** or shortcomings of the EIR Recast and explain how you consider they could be corrected.

The EIR Recast is a missed opportunity in aligning creditor rights across the single market. Rules such as the ‘hotchpotch’ rule assists but the proper functioning of the single market requires the certainty that a uniform approach to creditor rights and priority of payments would bring. It is a difficult question to resolve, yes, but one that must be tackled by the Commission in the near future (as per recital 22 of the EIR Recast).

You were required to list **two** flaws.

**Total marks: 11.5 out of 15.**

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

Cardinal Home is an Ireland-registered furniture company. The company opened its first store in Cork, Ireland in 2009 and has warehouses across Europe, including in Milan, Italy. In 2010, Cardinal Home entered into a credit agreement with an Italian bank since it was planning to expand its reach to the Spanish luxury furniture market, expected to grow by over 8% annually. It opened a bank account with the bank and started negotiating with local distributors, thus signing some (non-binding) memoranda of understanding with them.

Cardinal Home grew and performed well for several years. However, the impact of the economic and financial crisis of the late 2000s eventually hit the company who suffered financial difficulties from 2016. On 22 June 2017, it filed a petition to open examinership proceedings in the High Court in Dublin, Ireland.

### **Question 4.1 [maximum 5 marks] 2**

Assume that the EIR 2000 applies. Does the Dublin High 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.

The Irish High Court has jurisdiction. The centre of main interest is presumed to be in Ireland – registered office is in Ireland (Article 3(1)) – in the absence of proof to the contrary. No such proof is evidenced in the facts as presented. Examinership is an insolvency proceeding listed in Annex A to the EIR 2000.

You did not provide any reference to CJEU jurisprudence.

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

Assume that the Dublin High Court opens the respective proceeding on 30 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.

The EIR Recast commenced 26 June 2017, 4 days prior to the opening of the proceedings before the Irish High Court on 30 June 2017. From a temporal perspective, the EIR Recast applies since the proceedings opened after 26 June 2017.

Examinership is listed in Annex A to the EIR Recast and as such it automatically falls with the scope of the EIR Recast. As per the decision of the CJEU in *Bank Handlowy* "...inclusion in the list has the direct, binding effect attaching to the provisions of a regulation".

Cardinal Home's COMI is located in Ireland, a member state within the EU since its registered office is in Ireland. Furthermore, Cardinal Home is a furniture business and is not an 'excluded' undertaking.

Based on the foregoing, the EIR Recast is applicable.

This is incomplete.

- 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 Cardinal Home is in the EU (and not in Denmark), i.e. in Ireland (as stated in the answer to Question 4.1.). YES
- Article 1(2) EIR Recast. Cardinal Home 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 'Examinership' is listed in Annex A to the EIR Recast. YES
- Article 2(7), 84(1), 92 EIR Recast. The proceeding in question was opened on 30 June 2017, i.e. after the EIR Recast has entered into force. The filing date (22 June 2017) is not determinative for the temporal scope. YES

#### **Question 4.3 [maximum 5 marks] 1.5**

An Italian bank files a petition to open secondary insolvency proceedings in Italy with the purpose of securing an Italian 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.

Cardinal Home appears to have an establishment in Italy. It has a warehouse within that jurisdiction and a bank account. It therefore appears from the facts as presented that Cardinal Home carries out a *non-transitory economic activity with human means and assets* in Italy (Article 2(10) EIR Recast). The activity has been carried out for a number of years and well in excess of the relevant 3 month time period. The Italian bank may open secondary proceedings in Italy subject to the Irish insolvency practitioner not taking steps to have such proceedings stayed.

The answer is incorrect because the facts of the case do not support the finding of an establishment of Cardinal Home in Italy. The presence of assets (leased-out warehouse) in isolation, contractual relations with a local bank (including maintenance of a bank account) and *occasional* negotiations 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 missing.

**Total marks: 5 out of 15.**

**\* End of Assessment \***

**Total marks: 34.5 out of 50.**