



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.**
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 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.

D was the correct answer.

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: 7 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.”

Statement 1 refers to the right to give an undertaking provided by article 36 of the EIR Recast in order to avoid the opening of the secondary insolvency proceeding with a unilateral promise of the main insolvency practitioner that assets and guarantees in the Member State where the secondary insolvency proceeding could have been opened will be treated as if it was opened.

Statement 2 refers to cooperation and communication between courts provided by article 42 of the EIR Recast, which states that courts before which a request to open insolvency proceeding is pending or which has opened such proceedings, shall communicate with each other to facilitate coordination of the proceedings concerning the same debtor.

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.

The concept of debtor’s COMI (centre of main interests) provided by Article 3(1) of the EIR Recast represents a security for all member states of the application of a common autonomous concept that will define the place of opening of a main insolvency proceeding.

The possibility of opening one or more secondary insolvency proceedings in any Member State subject to the law of such Member State provided by Article 3(2) of the EIR Recast, with the intention to protect local interests and creditors also limits the universality of the main proceeding.

The definition of establishment provided by Article 2(10) of the EIR Recast is also a good example of the modified universalism adopted by the EIR Recast, since such definition directly impacts whether or not a secondary insolvency proceeding can be opened, as a secondary insolvency proceeding can only be opened in a Member State where debtor has an establishment.

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 41 of the EIR Recast provides for cooperation and communication between insolvency practitioners in the main insolvency proceedings and in the secondary insolvency proceedings.

Article 42 of the EIR Recast provides for cooperation and communication between courts to make the conduct of main, territorial, and secondary insolvency proceedings more effective.

Article 43 of the EIR Recast provides for cooperation and communication between insolvency practitioners and courts to facilitate the coordination of main, territorial, and secondary insolvency proceedings.

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 of the EIR Recast provides for the right of the insolvency practitioner in the main insolvency proceeding to give a unilateral undertaking concerning the assets located in the Member State in which a secondary insolvency proceeding could be opened to avoid the opening of such secondary insolvency proceedings. Such undertaking shall be made in writing, in the language of the Member State where the secondary insolvency proceeding could be opened, and must be approved by local creditors, becoming binding on the estate. In the undertaking, the insolvency practitioner in the main insolvency proceeding commits to comply with local laws regarding distribution and priority rights regarding the assets of the debtor located in the Member State where the secondary insolvency proceeding could be opened.

Article 38(3) of the EIR Recast provides for the possibility of stay of the opening of secondary insolvency proceedings for up to three months upon request of the insolvency practitioner. This stay shall be granted whenever a temporary stay of individual enforcement proceedings is in effect, to allow negotiations between creditors and debtor.

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.

On December 2012, the European Commission issued the *Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings*.

The Commission concluded that the EIR 2000 rules made it difficult to recognize which State Member had jurisdiction to open insolvency proceedings. The EIR Recast resolved the impasse by clearly establishing the concepts of COMI and establishment for the purposes of opening main and secondary insolvency proceedings.

With regard to secondary insolvency proceedings, the Commission also concluded that there was friction with the main proceedings in that the property affected by the secondary proceedings was beyond the control of the liquidator. The EIR Recast provides a series of measures to avoid the opening of secondary insolvency proceedings with the right to give an undertaking and the possibility of stay of the opening of secondary insolvency proceedings.

The Commission also raised concern regarding the lack of publicity of insolvency proceedings and the lodging of claims, which was addressed by the EIR Recast by requiring the publication of the opening of insolvency proceedings, whether main or secondary, at the place of the debtor's establishment, in accordance with the rules of the Member State, as provided in Article 28(2) of the EIR Recast, and the obligation of courts to give notice to known foreign creditors regarding the opening of the proceeding (Article 54 of the EIR Recast).

Finally, the concern issued by the Commission that the EIR 2000 did not address the proceedings set up by State Members to deal with pre-insolvency situations or proceedings that leave the existing management in place was addressed by EIR Recast in Article 1, which establishes the scope of application of the EIR Recast and even lists the specific insolvency proceedings of each State Member that are subject to its rules.

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.

Although EIR 2000 had a concept of COMI in Recital 13, such Recital was not enforceable but only a recommendation for interpretation of local courts. EIR Recast included the concept of COMI in Article 3(1) and, therefore, guaranteed the need for the parameters to be observed by all Member States.

The EIR Recast also provides more detailed and clearer rules regarding cooperation between courts and insolvency practitioners, which is essential which is essential in a scenario where it is possible to have several simultaneous proceedings in different jurisdictions concerning the same debtor.

Finally, the EIR Recast also broadened the material scope of proceedings related to insolvency, regulating not only procedures focused on liquidation, as was the case in the EIR 2000, but also procedures whose aim is to restore an economically viable business that is experiencing a momentary difficulty.

Question 3.3 [maximum 5 marks] 2.5

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 scope of the EIR Recast is based on its Annex A, which makes its application exhaustive for the listed proceedings and hinders the dynamics of its extension to eventual new proceedings that the State Members may create. A more efficient approach would be to provide a general rule that all insolvency-related proceedings that may be filed in State Members are subject to the EIR Recast.

The EIR Recast lacks rules concerning its geographical application, with mere recommendations provided for in Recitals 25 and 27. Specific geographical application rules should be created to determine whether the EIR Recast applies only to State Members or whether it will also regulate the relationship with insolvency proceedings filed in third countries, mitigating legal uncertainty. **How do you envision this? The EU does not have the competence to legislate for non-EU member states.**

Total marks: 12.5 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] 3

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.

Yes, the Dublin High Court has international jurisdiction to open a main insolvency proceeding pursuant to Article 3(1) of the EIR 2000, because the proceeding must be opened in Cardinal Home’s COMI. According to Recital 13 EIR 2000, the COMI is the place where debtor conducts the administration of its interests on a regular basis and is known by third parties, which, in the case of Cardinal Home, is Ireland, where it is registered and opened its first store. This definition is in line with what has been settled by the CJEU in *Eurofood IFSC Ltd*.

What about examinership being (or not) listed under Annex A?

Question 4.2 [maximum 5 marks] 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.

First, it is necessary to verify if the time scope. As provided by Articles 84(1) of the EIR Recast, the EIR Recast applies to insolvency proceedings opened from 26 June 2017, which is the case of Cardinal Home's proceeding.

As for the personal scope, considering that Cardinal Home is not a bank, insurance company or any other entity listed in Article 1(2) of the EIR Recast, there is no restriction from the personal scope of the EIR Recast to Cardinal Home.

Moreover, the Examinership proceedings is listed in Annex A of the EIR Recast and, therefore, the material and territorial scope are also fulfilled.

Question 4.3 [maximum 5 marks] 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.

No, it is not possible to open secondary insolvency proceedings in Italy, because Cardinal Home does not have an establishment in Milan, pursuant to Article 3(2) of the EIR Recast. The concept of establishment is provided by Article 2(10) of the EIR Recast as "*any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets*", which is not the case of Cardinal Home, that only has a warehouse in Italy. According to the CJEU conclusions in *Interedil*, the mere existence of isolated goods (as in a warehouse) with no human resources or economic activity does not cannot be classified as an establishment.

Total marks: 13 out of 15.

*** End of Assessment ***

Total marks: 42.5 out of 50.