



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 2023. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2023. 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 2023 or by 23:00 (11 pm) BST (GMT +1) on 31 July 2023. If you elect to submit by 1 March 2023, you may not***

submit the assessment again by 31 July 2023 (for example, in order to achieve a higher mark).

- 7. Prior to being populated with your answers, this assessment consists of 10 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.

Select the correct answer from the options below:

- (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

According to Article 1(1) of the EIR 2015, proceedings fall within the scope of the EIR if:

- (a) they are based on laws relating to insolvency for the purpose of rescue, adjustment of debt, reorganisation, or liquidation; are public; are collective.**
- (b) they are based on laws relating to insolvency for the purpose of liquidation; are public; are collective.**
- (c) they are based on laws relating to insolvency for the purpose of rescue, adjustment of debt, reorganisation, or liquidation; are public.**

(d) they are based on laws relating to insolvency for the purpose of rescue, adjustment of debt, reorganisation, or liquidation; are collective.

Question 1.3

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.**

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

The EIR Recast is an instrument of a 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 40 EIR Recast ("Advance payment of costs and expenses").**
- (c) Article 7 EIR Recast ("Applicable law").**
- (d) Article 31 EIR Recast ("Honouring of an obligation to a debtor").**

Question 1.6

The EIR 2015 does not provide a definition of "insolvency" or "likelihood of insolvency". What are the consequences of this?

- (a) The ECJ has provided a definition of "insolvency" in recent case law.**
- (b) The European Commission has provided a definition of "insolvency" in its Recommendation on a "New Approach to Business Failure" published in 2014.**
- (c) Each Member State will define "insolvency" in national legislation.**
- (d) Deciding whether a debtor is "insolvent" or not is a matter for the ECJ to determine.**

Question 1.7

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

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

(d) "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.

Question 1.8

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

(a) The COMI of the debtor is not presumed to be "at the place of the registered office" anymore and the debtor will need to confirm where his COMI is before the beginning of each case.

(b) Although the COMI of a debtor is still presumed to be "at the place of the registered office", it is now possible to rebut this presumption, albeit only by the courts.

(c) The rule that a company's COMI conforms to its registered office is now an irrefutable presumption.

(d) Although the COMI of a debtor is still presumed to be "at the place of the registered office", it should now be possible to rebut this presumption based on Article 3 EIR Recast and Recital 31.

Question 1.9

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 equivalent in the law of the jurisdiction in which recognition is sought.

The correct answer was A.

Question 1.10

In a cross-border dispute, the main proceedings before the German court concerns Schatz GmbH (registered in Germany) and Canetier SARL (registered in France). The case deals with an action to set aside four contested payments that amount to EUR 900,000. These payments were made pursuant to a sales agreement dated 29 December 2021, governed by Italian law. The contested payments have been made by Schatz GmbH to Canetier SARL before the former went insolvent. The insolvency practitioner of the company claims that the contested payments should be set aside because Canetier SARL must have been aware that Schatz GmbH 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 Canetier 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) The contested payments will not be avoided if Canetier SARL proves that such transactions cannot be challenged on the basis of the insolvency provisions of Italian law (Article 16 EIR Recast).**
- (d) To defend the contested payments Canetier 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*.**

The correct answer was C.

Total marks: 8 out of 10.

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks] **1**

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 presumptions that the registered office, the principal place of business and the habitual residence are the centre of main interests need to be rebuttable.

Statement 2. Proceedings covered by the scope of the EIR 2015 should include proceedings promoting the rescue of economically viable debtors, especially at a stage where there is a mere likelihood of insolvency.

Statement 1 is one of the presumptions of COMI which the EIR Recast has laid out. The EIR Recast article relating to this presumption is Recital 30 EIR Recast.

Statement 2 relates to the Directive on Preventive Restructuring. The EIR Recast article which also promotes the concept of statement 2 would be Articles 42 and 57 for cases of groups of companies.

The statement would relate to Recital 10 and Article 1 EIR 2015.

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 first example of modified universalism is in Article 3(1), where the EIR Recast states that the courts of the Member State within the territory of the COMI of the debtor shall have jurisdiction to main insolvency proceedings. These proceedings encompass all the debtor's assets. Along with this, the EIR Recast in Recital 40 has also allowed the opening of secondary proceedings.

In Article 3(2), the EIR Recast allows for the secondary proceedings to be opened across as many Member States which the debtor has an establishment. This allows for one main insolvency proceeding, and a maximum of 26 secondary insolvency proceeding.

Finally, Article 19(2) of the EIR Recast states that the recognition of main proceedings shall not preclude the opening of secondary proceedings by a court in another Member State. As such, this promotes the idea of modified universalism as the courts have to coordinate and cooperate on the proceedings.

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

Because pure universalism has not been adopted under the EIR 2015, main and secondary insolvency proceedings can be opened at the same time against the same

debtor. In light of this, it is seminal that proper co-operation between the actors involved in concurrent proceedings takes place. It is therefore not surprising that co-operation has been introduced as an obligation on several actors in the EIR 2015. List three (3) provisions (recitals and / or articles) of the EIR Recast that deal with the obligation to co-operate.

The first provision that obligates co-operation is stated in Article 41(1) EIR Recast, in which communication between the insolvency practitioners in main insolvency proceedings and secondary insolvency proceedings shall communicate with each other as long as it is compatible with the rules applicable to the respective proceedings.

The second provision is stated in Article 42(1) of the EIR Recast in which it obliges the court before which a request to open insolvency proceedings is pending, or which has opened such proceedings, to co-operate with any other court faced with the issue of opening insolvency proceedings or which has already opened such proceedings. Finally, the third provision is stated in Article 43 EIR Recast, in which three situations arise in which co-cooperation and communication between insolvency practitioners and the respective courts is required.

Question 2.4 [maximum 2 marks] **1**

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 one to three sentences) explain how they operate.

The first instrument is a synthetic secondary proceeding in which the insolvency practitioner of the main proceeding undertakes to the local creditors of the Member States to follow the distribution and priority rights of the national law in that State. As such, if the creditors approve of the undertaking, the creditors would have the rights for distribution as if the secondary proceeding had been opened.

The second instrument is a stay in secondary proceedings which must be requested by the insolvency practitioner or the debtor in possession. The stay gives the debtor time to negotiate a restructuring deal with creditors. The stay cannot be imposed for more than three months and must adhere to the condition that it protect the interest of the local creditors and must be approved by the creditors as well.

Good but you were expected to provide the provisions relating to these concepts too.

Total marks: 8 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] **2.5**

During the reform process of the EIR 2000, what main elements were identified by the European Commission as needing revision within the framework of the Regulation (whether adopted or not)?

On no later 1 June 2012, the European Commission had to present a report on the application of the EIR 2000 as well as a proposal for its adaptation. The first element identified by the European Commission was that the EIR Recast would have to respond to the need of insolvency practice. This means that it would have to broaden its scope to include restructuring proceedings as well as create stronger rules for cooperation and co-ordination between insolvency practitioners and the courts. It would also have to open to the possibility of proceedings with regards to members of the same group companies.

Another element identified by the Commission was that there would have to be an improvement of creditor information. This would include an interconnectivity of insolvency registers, as well as a general modernization of the legal rules such as data-protection. This also resulted in better communication between insolvency practitioners and courts.

Some elements missing. You should have discussed the scope of the instrument and the COMI as well.

Question 3.2 [maximum 5 marks] **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 first point which stakeholders have criticized is the lack of focus the EIR Recast has given to the restructuring of businesses. The EIR recast has tried to widen its scope and establish a rescue friendly culture, however it does not provide enough emphasis towards restructuring in its articles.

However, recently the Directive on Preventative Restructuring has been introduced and now co-exists with the EIR Recast. This has given a more focused view on assisting viable businesses to have access to frameworks which will assist them in restructuring at an early stage to prevent their insolvency.

Another weak point is found in the group co-ordination regime in which it is the right of every insolvency practitioner concerned to object, without being required to give reason for their objection, against the inclusion within group co-ordination

proceedings of the insolvency proceedings in which they have been appointed to. As such, one way to correct this would be to explicitly state that the insolvency practitioner should give the reason for objection as well as proof supporting the reason if possible.

Question 3.3 [maximum 5 marks] **2.5**

The European Insolvency Regulation is a choice-of-forum instrument, which although aiming at procedural harmonisation, did not harmonise the substantive insolvency laws of the Member States. Because of lingering disparities among the national insolvency regimes across the EU, the European institutions introduced the Directive on Preventive Restructuring Frameworks in 2019, which is meant to dovetail the European Insolvency Regulation. List two (2) ways in which the Regulation and the Directive differ.

One difference between the Regulation and the Directive is that the Regulation primarily deals with cross-border cases within the EU, and establishes rules and regulations for insolvency and restructuring procedures as well as main and secondary proceedings. The Directive, on the other hand, focuses on preventive restructuring frameworks within the Member States, and establishes its framework primarily through principals rather than rules and regulations.

The second difference is that Regulation is binding and enforceable in all Member States and works to a harmonized platform for all Member States. In contrast, the Directive, caters to a jurisdiction's *status quo* (this is not quite accurate) and as such implementation from Member States will vary differently, resulting in a variety of different restructuring models.

Total marks: 10 out of 15.

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

Scenario

Bella SARL is a French-registered company selling cosmetic products. The company had opened its first store in Strasbourg, France in 2010 and has warehouses across Europe, including in Germany, Ireland, Italy, Spain and Portugal. Its main warehouse is located in Cork, Ireland. All of its employees are located in these countries and most of its customers are also located in these countries, yet some online purchases are coming mainly from the Netherlands and Poland.

In 2011, Bella SARL entered into a loan agreement with a Spanish bank because it was hoping to expand its reach onto the Spanish luxury cosmetic market. It opened a bank account with the bank while also negotiating prices with local suppliers. It signed some (non-binding) memoranda of understanding with three Madrid-based suppliers.

Unfortunately for Bella SARL, the timing of this initiative coincided with the Great Economic and Financial crisis which hit Europe in the late 2000s. By 2014 the company was in financial difficulty, yet managed to keep afloat for another few years. On 20 June 2017, it filed a petition to open safeguard proceedings in the Strasbourg High Court in France.

Question 4.1 [maximum 5 marks] **1**

Assume that the timeline is slightly different and, therefore, assume that it is not the EIR 2015 that applies but the EIR 2000.

Does the Strasbourg High Court have jurisdiction to open the requested safeguard proceedings under the EIR 2000?

You must justify your answer when explaining why it does or does not have jurisdiction. Your answer should contain references to the applicable law and the relevant CJEU jurisprudence.

In order to determine if the Strasbourg High Court has jurisdiction to open the requested safeguard proceeding, the COMI of Bella SARL would have to be identified first. Under Article 3(1) of the EIR 2000 the COMI is defined as 'the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.' As Bella SARL is a French-registered company and also has a store in Strasbourg, France, the COMI is most likely in France. As such, the Strasbourg High Court has the jurisdiction to open the requested proceeding.

This is not correct.

- The Strasbourg High Court does not have international insolvency jurisdiction to open insolvency proceedings.**
- Students are expected to mention that under the EIR 2000 (Article 3), the determination of international jurisdiction to open main insolvency proceedings is linked to the debtor's centre of main interest (COMI). According to Article 3 EIR Recast, COMI shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties (see also Recital 28). The place of the registered office shall be presumed to be the COMI in the absence of proof to the contrary.**
- Relevant case law: Eurofood IFSC Ltd, Case C-341/04, ECLI:EU:C:2006:281 (May 2, 2006) and Interedil Srl, in liquidation v Fallimento Interedil Srl, Case C-396/09, ECLI:EU:C:2011:671 (Oct. 20, 2011).**
- However, Article 1 of the EIR 2000 states that 'this Regulation shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator.'**

- **Article 2 EIR 2000 states that “insolvency proceedings” shall mean the collective proceedings referred to in Article 1(1). These proceedings are listed in Annex A.**
- **Annex A of the EIR 2000 only listed two French insolvency proceedings which came under the scope of the EIR 2000: (i) liquidation; (ii) redressement judiciaire (rehabilitation).**
- **Therefore, the EIR 2000 would not apply to safeguard proceedings.**

Question 4.2 [maximum 5 marks] 1

Assume that the timeline is as explained in the original scenario above and that the French High Court opens safeguard proceedings on 30 June 2017.

Will the EIR Recast be applicable to the proceedings?

Your answer should address the EIR Recast’s scope and contain all steps taken to answer the question.

The EIR Recast is applicable to proceedings which have been opened after 26 June 2017. However, according to Article 2(8) EIR Recast, the ‘time of the opening’ of the insolvency proceeding is when the judgement opening proceeding becomes effective, whether or not it is a final decision. According to Article 2(7) EIR Recast, the ‘judgement opening proceeding’ is the decision of the court to open to proceeding or when it decides to appoint an insolvency practitioner.

Too many steps are missing.

- **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 Bella SARL 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. Bella SARL 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 ‘Safeguard’ is listed in Annex A to the EIR Recast. YES**
- **Article 2(7), 84(1), 92 EIR Recast. The proceedings in question were opened on 30 June 2017, i.e. after the EIR Recast has entered into force. The filing date (20 June 2017) is not determinative for the temporal scope. YES**

Question 4.3 [maximum 5 marks] 1

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.

The EIR Recast allows for a secondary insolvency proceeding to be opened if the debtor has an 'establishment' in that Member State. The definition of an 'establishment' which is also approved in *Interedil* by the CJEU, an establishment is any place in which the debtor, three months prior to the request to open the main insolvency proceeding, carries or has carried non-transitory economic activity with human means and assets.

With the definition above, the proceeding can be opened in Italy as Bella SARL has a warehouse in Italy with employees working there, as well as customers in Italy.

Your answer is incorrect.

- **According to Article 3(2) EIR Recast, where the debtor's COMI is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if it possesses an establishment within the territory of that other Member State.**
- **Under Article 2(10) EIR Recast, 'establishment' means 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.**
- **Relevant case law: *Interedil Srl, in liquidation v Fallimento Interedil Srl*, Case C-396/09, ECLI:EU:C:2011:671 (Oct. 20, 2011), *Burgo Group SpA v Illochroma SA*, Case C-327/13, ECLI:EU:C:2014:2158 (Sep. 4, 2014).**
- **The facts of the case do not support the finding of an establishment of Bella SARL in Italy. 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 (see para. 64 in *Interedil*) is evidently missing.**
- **Therefore, under the EIR Recast, secondary insolvency proceedings cannot be opened in Italy, nor Spain.**

Total marks: 3 out of 15.

***** END OF ASSESSMENT *****

Total marks: 29 / 50