



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: 202223-336.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 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").**

The correct answer was D.

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.*

The correct answer was D.

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.

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: 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. 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: International Jurisdiction: Article 3(1). This Article states that the Member State in which the debtor has its centre of main interest shall have jurisdiction to open main insolvency proceedings.

Statement 2: Scope: Article 1(1). This Article relates to the scope of insolvency proceedings recognized, which would include rescue proceedings.

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.

Article 7 Applicable Law of the insolvency proceedings shall be that of the member state within the territory of which proceedings were opened.

Article 19: Any insolvency related judgments opened in a member state in terms of Article 3 shall be recognised in all other member states from the moment it becomes effective.

Article 21: the Insolvency Practitioner appointed in terms of Article 3(1) shall have the same powers in any other member states.

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.

There are three Articles in the EIR Recast that oblige the parties in concurrent proceedings to cooperate. The first is Article 56 - Cooperation and Communication between Insolvency Practitioners. This Article obliges insolvency practitioners to communicate any information relevant to each other's proceedings.

Article 57 - Cooperation and Communication between Courts. When insolvency proceedings relating to two or more members of a group of company, a court which has opened such proceedings shall cooperate with any other court.

Article 58 - Cooperation and Communication between Insolvency Practitioners and Courts. Here the insolvency practitioner is obliged to cooperate and communicate with any court before which the request for opening proceedings is pending.

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 one to three sentences) explain how they operate.

Article 36 - Right to give an undertaking in order to avoid secondary insolvency proceedings. This provision allows the insolvency practitioner to give a unilateral undertaking in respect of the assets located in the member state of the secondary proceeding, that when the assets are distributed, they will be distributed according to the law of that member state where those assets are located. If this undertaking is given and the insolvency practitioner requests the court not to open of secondary proceedings in terms of Article 38(2), the courts should not open them if the interests of local creditors are adequately protected.

Article 46- Stay of the process of realisation of assets. This provision allows the court to decide whether or not to stay the realisation of the debtor's assets located in the member states where the secondary proceeding have been opened on the request of the insolvency practitioner. The request by the insolvency practitioner may only be rejected if the stay is manifestly of no interest to creditors.

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**

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)?

The Commission highlighted a number of areas for revision, namely the need to introduce provisions relating to the inclusion of business rescue proceedings in the Regulation and the need to improve the efficiency of the European framework for improved cross border insolvency proceedings. With regard to this, it was agreed that the scope of the Regulation needed improvement with regard to what insolvency proceedings fell within the scope of applicability of the Regulation. The jurisdiction was another area identified i.e. which courts are allowed to open insolvency proceedings. These were courts where the debtor had its centre of main interest and would include hybrid insolvency proceedings. Secondary proceedings was another area and had to winding up proceedings, can refuse secondary insolvency proceedings and can be rescue proceedings and promote cooperation, publicity of proceedings publish court decision and introducing insolvency registers and standard claim forms to be used, rules relating to groups of companies with subsidiaries in several members states oblige IP to cooperate and communicate.

Question 3.2 [maximum 5 marks] **3**

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.

Group co-ordinated proceedings set out in recital 56 allows the insolvency practitioners involved to object to their participation in such proceedings. Article 64 further empowers the insolvency practitioner to optout of group co-ordination proceedings. Furthermore even if such proceedings have be initiated the insolvency practitioner is not obliged to follow the co-ordinators recommendations see Article 70. Thus the group co-ordination plan is entirely voluntary and not binding. In this case the insolvency practitioner should be required to follow a group co-ordination plan.

Another missed opportunity that is not addressed by EIR Recast is the problem that may arise in corporate group insolvencies when one of the members is not located in the European union and not a member state. This would mean that the EIR Recast would not bind other courts and insolvency practitioner in such proceedings and that

company would not form part of the group co-ordination proceedings. This would limit the scope of the proceedings and ultimately their effectiveness. **How would you correct this?**

Question 3.3 [maximum 5 marks] **1**

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.

The EIR Recast is focused on the recognition of cross border insolvency proceedings within member states of the European Union. It provides framework for the recognition and procedures that need to be followed. The EIR Recast is regulation which means that it has legal effect in all member states. The Directive on the other hand merely establishes a set of minimum standards which are to be followed in the case of restructuring procedures. Its application is narrow as it only deals with preventative restructuring and doesn't harmonise substantive insolvency laws of each member state. Furthermore it's only there to provide guidance (not quite. The directive is binding on all Member States) to member states when it comes to them enacting legislation in the area of corporate restructuring. As it is not a regulation and doesn't harmonise each member states insolvency laws it is merely a framework and the adoption of its principles are purely optional (this is incorrect. A Directive is a binding piece of legislation).

Total marks: 9 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] **5**

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.

*No, the Strasbourg High Court would not have jurisdiction to open safeguard proceedings under the EIR 2000 for the following reasons. Article 1(1) states that the regulation would only apply to collective insolvency proceedings which entail the partial or total divestment of assets. Article 2(a) states that "insolvency proceedings" would be listed in Annex A for each member state. Annex A proceedings listed under France, include Liquidation Judiciaire and redressement judiciaire avec nomination d'un administrateur. Safeguard proceedings are not listed and are therefore not seen as insolvency proceedings which would be recognised under the EIR 2000. Furthermore safeguard proceedings are restructuring proceedings which did not fall within the scope of the EIR 2000. **Good.***

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

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.

In determining whether or not the EIR Recast would apply to the facts the following needs to be answered. The debtor must have its COMI in a member state in the EU. In this case Bella SARL has its COMI in France as its registered office is in France. The requirement of Article 3(1) is complied with and the answer to the question is yes. The next question that needs to be answered is whether or not the debtor is excluded in terms of Article 1(2). Bella SARL is not an excluded company in that it is not a bank, insurance company so we proceed to the next step. Bella SARL was placed under

safeguard proceedings in France. Sauvegarde proceedings are listed in Annexure A of the EIR Recast and are thus recognised proceedings that fall within the scope of EIR Recast. The answer is yes the safeguard proceedings are listed as insolvency proceedings listed in point 4 of Article 2. Finally were the proceedings opened on or after the 26 June 2017? Yes they were as they were opened on the 30 June 2017. As a result the EIR Recast would be applicable to the proceedings.

Question 4.3 [maximum 5 marks] **2**

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 the opening of secondary proceedings against the debtor in any Member State where the debtor possesses an establishment in terms of Article 3(2). The secondary proceedings are limited to the assets of the debtor that are situated in the territory of the member state where the secondary proceedings have been opened. The opening of secondary proceedings limited the otherwise universal scope of the main insolvency proceedings as such it is vital for the debtor to have an "establishment" in the member state where the secondary proceedings are to be opened. Article 2(10) defines "establishment" 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. In the case of Interedil Srl V Fallimento Interedill Srl C-390/09 the court considered how the term establishment must be interpreted. The court found that the definition links the pursuit of economic activity to the presence of human resources and that a minimum degree of organisation and stability are required for the purpose of perusing economic activity. Furthermore the mere presence of goods in isolation does not meet the requirements for an establishment. Applying the facts to the definition of establishment I believe that secondary proceedings could be opened in Italy. Italy has a warehouse which houses stock. Furthermore Italy also has employees and customers in Italy. Therefore due to the employees which satisfy the presence of human resources requirement and the fact that customers are present in Italy means that the minimum degree of organisation requirements will be met.

While your reasoning is sound, the answer is incorrect.

- **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: 12 out of 15.

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

Total marks: 38 / 50.