



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: 2021122-336.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.**
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 2024**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2024. 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 2024 or by 23:00 (11 pm) BST (GMT +1) on 31 July 2024**. If you elect to submit by 1 March 2024, you **may not** submit the assessment again by 31 July 2024 (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

Article 1(1) of the EIR 2015 relates to the scope of the Regulation. Choose the correct statement from the options below:

- (a) Proceedings will fall under the scope of the EIR 2015 if they are based on laws relating to insolvency for the purpose of rescue, adjustment of debt, reorganisation, or liquidation; are public; and are collective.
- (b) Proceedings will fall under the scope of the EIR 2015 if they are based on laws relating to insolvency for the purpose of rescue, adjustment of debt, reorganisation, or liquidation; are public; and are collective.
- (c) Proceedings will fall under the scope of the EIR 2015 if they are based on laws relating to insolvency for the purpose of rescue, adjustment of debt, reorganisation, or liquidation; and are public.**
- (d) Proceedings will fall under the scope of the EIR 2015 if they are based on laws relating to insolvency for the purpose of rescue, adjustment of debt, reorganisation, or liquidation; and are collective.

The answer would have been A, B, or D.

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 gone against the literal meaning of several provisions of the EIR 2000. A new Regulation was needed to codify the new rules created by the CJEU.

- (b) The EIR 2000 was generally regarded as an unsuccessful instrument in the area of European insolvency law by the EU institutions, practitioners and academics.
- (c) The fundamental choices and underlying policies of the EIR 2000 lacked support from the major stakeholders (businesses, public authorities, insolvency practitioners, etcetera). A new Regulation was therefore needed to meet their expectations.
- (d) The EIR 2000 was generally considered a successful instrument, but areas of improvement had been identified over the years by practitioners and academics.

The answer was D.

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

Article 3 of the EIR 2015 deals with jurisdictional matters. Which statement below is accurate in relation to Article 3?

- (a) Article 3 states that the courts of the Member State within the territory of which the debtor has an establishment shall have jurisdiction to open main insolvency proceedings.
- (b) Article 3 states that the courts of the Member State within the territory of which the debtor has its centre of main interest (COMI) shall have jurisdiction to open main insolvency proceedings.
- (c) Article 3 states that the courts of the Member State within the territory of which the debtor has its centre of main interest shall have jurisdiction to open secondary insolvency proceedings.
- (d) Article 3 states that the courts of the Member State within the territory of which the debtor has an establishment shall have jurisdiction to open territorial insolvency proceedings.

Question 1.6

The EIR 2015 does not provide a definition of “insolvency” or “likelihood of insolvency”. What are the consequences hereof?

- (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 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 (entitled “Effects of insolvency proceedings on pending lawsuits or arbitral proceedings”).

(b) Article 40 EIR Recast (entitled “Advance payment of costs and expenses”).

(c) Article 7 EIR Recast (entitled “Applicable law”).

(d) Article 31 EIR Recast (entitled “Honouring of an obligation to a debtor”).

The answer was D.

Question 1.8

What are some of the main criticisms which have been voiced against the concept of the “centre of main interest”?

(a) The concept makes it impossible for companies to move jurisdiction, which ultimately, may jeopardise their chances of rescue.

(b) The concept does not have any equivalent in international instruments, which makes it difficult for international creditors to understand.

(c) The concept is too similar to that of an “establishment” which makes it difficult for a court to know whether to open main or secondary proceedings.

(d) The concept is too vague; it may result in higher capital costs; it may lead to manipulation; and it is difficult to assess by creditors.

Question 1.9

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.

The answer was A.

Question 1.10

Carala SARL is a French-registered company selling jam jars made out of glass. The company had opened its first store in Strasbourg, France in 2018. It has since opened another 10 stores in France. Its main warehouse is located in Cork, Ireland. 95% of its employees are located in France and 5% are located in Ireland. Most of its customers are located in France, yet some online purchases are coming mainly from the Netherlands.

In 2020, Bella SARL entered into a loan agreement with a Spanish bank because it was hoping to expand its reach onto the Spanish jam 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 Covid-19 pandemic. By the end of 2021, the company was in financial difficulty, yet managed to keep afloat for another few years. On 10 January 2022, it wants to file for insolvency. In which country is Carala’s centre of main interest presumed to be located?

(a) Its centre of main interest is located in Spain because the loan agreement will lead to a presumption of COMI.

(b) Its centre of main interest is located in Ireland because the warehouse will lead to a presumption of COMI.

(c) Its centre of main interest is located in France because its registration, stores, customer-base and majority of employees lead to a presumption of COMI.

(d) Its centre of main interest is located in the Netherlands because online customers lead to a presumption of COMI.

Total: 6/10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks] 1/2

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. 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 2. Pending lawsuits are not covered by the effects of the lex concursus in insolvency proceedings.

Statement 1: Refers to the concept of rescue proceedings and can be found in Article 1(1) of the EIR Recast]

Statement 2: Refers to the treatment of pending lawsuits under the “lex concursus” in insolvency proceedings. The principle is addressed in Article 5 of the EIR Recast [It is Article 18].

Question 2.2 [maximum 3 marks] 1.5/3

The EIR Recast’s objective remains, as much as possible, the universality of proceedings. However, several exceptions to this universal vision exist throughout the Regulation. Provide **three (3) examples** of provisions from the EIR Recast which depart from a universal approach to cross-border insolvency.

[1. Article 3(1) of the EIR Recast allows for the possibility of territorial proceedings.

2. Article 6 of the EIR Recast provide the possibility of secondary insolvency proceedings [This is Article 3].

3. Article 13 of the EIR Recast allows for the possibility of the contracts of employment [this sentence is incomplete].

Type answer here]

Question 2.3 [maximum 3 marks] 2/3

The EIR Recast regulates the material scope of the Regulation in relation to national insolvency proceedings in Member States. List **three (3) elements** of the EIR Recast that deal with this matter and explain how they relate to this.

- Article 1(1) of the EIR Recast: Defines the scope of the regulation. It also outlines the exclusion of proceedings. With this element, boundaries are established of the regulations applicability within Member states
- Article 3(1) of the EIR Recast: Refers to the debtors Comi. By defining Comi article 3(1) ensure that proceedings initiated in the Member state where the debtors has its main interest. [This is not about the material scope of the Regulation]
- Article 2 of the EIR Recast: It relates to mutual recognition and facilitates the coordination of cross- border insolvency within EU

Question 2.4 [maximum 2 marks] 1/2

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 of the EIR Recast provided the possibility of insolvency practitioner to give an undertaking to court of a secondary proceedings jurisdictions. This is important as it makes sure that creditors will in other jurisdiction for example will be equally protected

Total: 5.5/10

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] 2.5/5

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)?

[Some of the main elements that were identified by EC as needing revision were the following:

1. EIR 2000 covered only intra community effects of the insolvency proceedings therefore it was required revision **What about now? The Regulation remains an instrument of EU law / the EU only.**
2. Coordination and communication – Another main element was the better co-ordination and communication between insolvency practitioners and courts across different Member states
3. Defining the debtor's center of main interest was another important element as with EIR 2000 that was not clear.
4. Issues also has been addressed relating to group insolvency proceedings involving companies related in multiple jurisdictions
5. Creditor's rights and interests are now more protected] **How so? You could have discussed the publication and register requirements.**

Question 3.2 [maximum 5 marks] 4/5

The concept of the “centre of main interest” has been both praised and criticised by EU institutions, academics, and practitioners. List **two (2) praises and / or shortcomings** and explain why they are considered praises / shortcomings.

- With COMI we now have a clear jurisdictional basis for determining the member state where the main insolvency proceedings should be opened. This helps avoid conflicts between member firms **(States?)** and therefore we achieve effective and efficient administration of debtor's assets, creditors leading to more successful liquidation. **(Liquidation only?)**
- One criticism of COMI concept is open to arbitrage and manipulation. For example, debtors may attempt to relocate their COMI to jurisdictions with more favorable insolvency law and procedures and this way disadvantage creditors or other stakeholders.

Question 3.3 [maximum 5 marks] 1/5

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.

- [1. The EIR focuses more on procedural aspects such as determining the jurisdiction and harmonization between member firms, the Directive on Preventive Restructuring Frameworks aims to prevent restructures (no, it encourages them, it does not prevent them) measures for financially distressed business
2. The EIR is regulation and it applicable in all member states (so is the directive) and it is binding on all member where as the Directive which allow flexibility and variations between users in laws and approaches.]

Total: 7.5/15

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

Scenario

Dinosaurus SARL is a company selling children stuffed animals. It is incorporated in France and has opened its first store in La Flèche in 2015 and another 10 stores across France since. 80% of its employees work in France. It also has an office in Cork, Ireland, as well as three stores around Ireland. 20% of its employees are located in Ireland. Its main warehouse is in Spain. Most of its customers come from France, and some online purchases are coming mainly from the United Kingdom.

In 2020, Dinosaurus SARL entered into a loan agreement with a Spanish bank because it was hoping to expand its reach onto the Spanish children toys 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 Dinosaurus SARL, the timing of this initiative coincided with the Covid-19 pandemic which hit the world in 2020. By 2021, the company was in financial difficulty, yet managed to keep afloat for another two years. On 20 June 2023, it filed a petition to open safeguard proceedings in the Commercial Court in Le Mans, France.

Question 4.1 [maximum 5 marks] 0/5

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 EIR 2000 apply to this case and to the opening of safeguard proceedings?

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.

[Firstly, with EIR 2000 we can determine the jurisdiction of opening insolvency proceedings by considering debtor's center of main interest.

In this case of Dinosaurus Sarl, the COMI is France as this is determined by the following factors:

1. It is incorporate in France
2. The employees and stored are located in France

3. The most of its customers are in France

The fact that the Company has a loan with a Spanish Bank or has stores in Ireland we cannot automatically determine COMI. However, with Eurofood IFSC Ltd (page 19 of guidance text) takes the case as an example that COMI should correspond to the place where the company carries out its main administration functions.

Your answer is unclear. It was meant to be a yes or no answer.

The Commercial Court in France does not have international insolvency jurisdiction to open insolvency proceedings.

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. The place of the registered office shall be presumed to be the COMI in the absence of proof to the contrary = France.

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] 0.5/5

Assume that the timeline is as explained in the original scenario above and that the French High Court opens safeguard proceedings on 23 June 2023.

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.

[Since safeguard proceedings are a form of a preventing restructuring proceedings, they are cover by the scope of EIR Recast and this mean that EIR recast will be applicable to safeguard proceedings initiated by Dinosaurus Sarl in the French High Court on 23 June 2023]

Your answer 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 Dinosaurus SARL is in the EU (and not in Denmark), i.e. in France (as stated in the answer to Question 4.1.). YES
- Article 1(2) EIR Recast. Dinosaurus 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 23 June 2023, i.e. after the EIR Recast has entered into force. The filing date is not determinative for the temporal scope. YES

Question 4.3 [maximum 5 marks] 2/5

A Spanish bank files a petition to open secondary insolvency proceedings in Spain with the purpose of securing a Spanish 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.

Under EIR Recast, secondary insolvency proceedings may be opened in another Member State.

In case of the Dinosaurus Sarl, while the Company has a loan agreement with a Spanish Bank and conduct business activities there, it does not have an establishment there. An establishment is defined as a place of operations where the debtor carries out its economic activities and has its administration functions.

For the CJEU has clarified with the Eurofood case that the establishment requires a place of operations where a debtor carries out its economic activity.

Therefore based on the fact provided, it is unlikely that secondary proceedings can be opened in Spain for Dinosaurus Sarl under EIR Recast as the Company does not have establishment there.

While your answer is correct, it is not sufficiently developed.

- 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 Dinosaurus SARL in Spain. 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 Spain.

Total: 2.5/15

*** END OF ASSESSMENT ***

Total: 21.5/50