



AYLIN ROMERO VALETA FC202324-1296

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.**
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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 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.

The answer was D.

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.

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”).

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.

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 : 8/10

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: The provision/concept addressed is "rescue proceedings" under Article 2(12) of the EIR Recast. **[Article 2(12) defines "foreign creditors"]**

Statement 2: The provision/concept addressed is "effects of insolvency proceedings on pending lawsuits or arbitral proceedings" under Article 18 of the EIR Recast.]

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.

[Article 4(2): This provision allows a debtor to designate a Member State where it has an establishment as the state where it has its COMI, even if its COMI is located elsewhere. This departure from the traditional COMI principle allows debtors to choose a jurisdiction where they have an establishment as their COMI, potentially leading to forum shopping and complicating the determination of the main insolvency proceedings. **[Not quite. Article 4(2) states that: *Notwithstanding paragraph 1, where insolvency proceedings are opened in accordance with national law without a decision by a court, Member States may entrust the insolvency practitioner appointed in such proceedings to examine whether the Member State in which a request for the opening of proceedings is pending has jurisdiction.***]

Article 36: This article allows the insolvency practitioner in the main insolvency proceedings to provide an undertaking to a court in another Member State where secondary proceedings could be opened. If the undertaking adequately protects the general interests of local creditors, the court may decide not to open secondary proceedings, thus deviating from the automatic opening of secondary proceedings in favor of local proceedings.

Article 49: This provision allows creditors to lodge their claims in the main proceedings even if they have commenced enforcement proceedings or other legal actions against the debtor in another Member State. It provides for the coordination of such claims in the main proceedings, departing from the traditional fragmentation of claims in multiple jurisdictions.] **[Article 49 deals with the transfer of assets]**

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 sets out the scope of the EIR Recast, defining the types of insolvency proceedings to which it applies. It specifies that the Regulation applies to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator or a trustee.

Article 2: Definitions:

Article 2 provides definitions of key terms used throughout the Regulation, including "insolvency proceedings," "court," "establishment," and "centre of main interests" (COMI). These definitions help to establish a common understanding of the concepts relevant to cross-border insolvency within the

European Union, facilitating uniform interpretation and application of the Regulation in Member States.

Article 3: International jurisdiction: **This does not relate to the material scope.**

Article 3 determines the international jurisdiction for opening insolvency proceedings. It establishes that the main insolvency proceedings should be opened in the Member State where the debtor has its COMI, while secondary insolvency proceedings may be opened in Member States where the debtor has an establishment.]

Question 2.4 [maximum 2 marks] 2/2

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.

[Undertaking by the insolvency practitioner (Article 36):

Under Article 36 of the EIR Recast, the insolvency practitioner appointed in the main insolvency proceedings may provide an undertaking to a court in another Member State where secondary proceedings could be opened. The undertaking assures the court that the general interests of local creditors will be adequately protected in the main proceedings, thereby potentially avoiding the need to open secondary proceedings.

Coordination and communication between insolvency practitioners (Article 41):

Article 41 of the EIR Recast requires cooperation and communication between insolvency practitioners appointed in different proceedings concerning the same debtor. Insolvency practitioners are obligated to cooperate and share relevant information to ensure the efficient administration of the debtor's estate.]

Total: 6.5/10

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] 4/5

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)?

[During the reform process of the EIR 2000, the European Commission identified several main elements that needed revision within the framework of the Regulation. These included:

1. Clarification and enhancement of the rules on jurisdiction.
2. Improvement of coordination and cooperation.

3. Addressing the issue of forum shopping.
4. Enhancement of the rules on recognition and enforcement.
5. Modernization and adaptation to new economic realities.]

Extension of the scope of the jurisdiction to rescue procedures. This was an important element.

Question 3.2 [maximum 5 marks] 5/5

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.

[Clear and Predictable Determination of Jurisdiction: One praise of the COMI concept is that it provides a clear and predictable framework for determining the jurisdiction where main insolvency proceedings should be opened. By focusing on the location where the debtor conducts the administration of its interests on a regular basis, the COMI concept offers a straightforward criterion for identifying the most appropriate jurisdiction for insolvency proceedings.

Shortcoming: Potential for Manipulation and Forum Shopping: One of the shortcomings of the COMI concept is its susceptibility to manipulation and forum shopping by debtors seeking to benefit from insolvency laws in more favorable jurisdictions. Debtors may artificially relocate their COMI to jurisdictions with more debtor-friendly laws to initiate insolvency proceedings, even if their operations are primarily located elsewhere.]

Question 3.3 [maximum 5 marks] 5/5

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.

[Scope and Objectives:

The EIR primarily focuses on procedural aspects of cross-border insolvency proceedings, such as jurisdiction, recognition, and cooperation between courts and insolvency practitioners.

In contrast, the Directive on Preventive Restructuring Frameworks addresses substantive aspects of insolvency law by establishing common principles and procedures for preventive restructuring frameworks in Member States.

Application and Implementation:

The EIR is directly applicable in all Member States of the European Union, providing uniform rules for cross-border insolvency proceedings without the need for transposition into national law.

The Directive on Preventive Restructuring Frameworks requires transposition into national law by Member States, meaning that each Member State must enact legislation to implement the directive's provisions within their respective legal systems.]

Total: 14/15

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] 0.5/5

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.

[Under the European Insolvency Regulation (EIR) 2000, the determination of jurisdiction, including whether safeguard proceedings can be opened, depends on the center of main interests (COMI) of the debtor. The EIR 2000 does not explicitly define COMI, but it is generally understood to be the place where the debtor conducts the administration of its interests on a regular basis and is ascertainable by third parties.

In the case of Dinosaurus SARL, while it has some presence in Ireland and Spain, the majority of its operations, including incorporation, stores, employees, and customers, are in France. Additionally, it initiated safeguard proceedings in France by filing a petition in the Commercial Court in Le Mans. According to the CJEU's jurisprudence, as established in the Eurofoods case (C-341/04), the COMI must correspond to the place where the debtor's decisions are taken and implemented, and where the interests of creditors are primarily pursued.

Given these factors, it is likely that Dinosaurus SARL's COMI is in France. Therefore, under the EIR 2000, the French courts would have jurisdiction to open safeguard proceedings for Dinosaurus SARL. The

EIR 2000 applies to this case, and the French court has jurisdiction to open safeguard proceedings based on Dinosaurus SARL's COMI being in France.]

While some of your reasoning is correct, the answer is not. 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] 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.

[The EIR Recast, Regulation (EU) 2015/848, applies to insolvency proceedings opened after 26 June 2017. If the proceedings in question were opened after this date, then the EIR Recast would apply.

The EIR Recast applies to insolvency proceedings that fall within its material scope, as defined in Article 1(1). This includes proceedings that are collective insolvency proceedings within the meaning of Article 1(1)(a), which covers proceedings "which entail the partial or total divestment of a debtor and the appointment of a liquidator."

Safeguard proceedings typically involve the restructuring of a debtor's debt and the appointment of a judicial administrator to supervise the process, which aligns with the definition of collective insolvency proceedings.

Considering the timing of the proceedings and their nature as safeguard proceedings, it is reasonable to conclude that the EIR Recast is applicable to the proceedings opened by the French High Court on 23 June 2023.

Therefore, the EIR Recast governs the cross-border aspects of these safeguard proceedings.]

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.

[The determination of whether an establishment exists is a fact-specific inquiry and may depend on various factors, including the nature and extent of the debtor's operations in Italy, the presence of employees or assets, and the ongoing economic activity conducted there.

The Court of Justice of the European Union (CJEU) has emphasized the need for a genuine presence and economic activity.

In the "Interdil" case (C-396/09), the CJEU held that the existence of an establishment requires a stable and continuous presence of human and technical resources.

Therefore, whether secondary insolvency proceedings can be opened in Italy for the debtor in this case would depend on whether the debtor has an establishment in Italy where it conducts non-transitory economic activity.

If such an establishment exists, Italy may have jurisdiction to open secondary proceedings under the EIR Recast. However, if no establishment is found, Italy may not have jurisdiction to open secondary proceedings.] **Yes, and you were meant to determine whether that is the case or not.**

Total: 7.5/15

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

Total: 36/50