



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: **(it seems that this is a mistake down under, all the options a-d are the same)**

- (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.

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: 10/10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks] 2/2

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.

The first statement relates to the promotion of the rescue of the insolvent debtor. Such rule can be found in the first Article of EIR Recast, which determines its scope and includes the rescue of the debtor. The promotion of rescue is envisaged also by means of Recital 10.

The second statement relates to Article 18 of EIR 2015, which has the title “Effects of insolvency proceedings on pending lawsuits or arbitral proceedings”. The rule prescribes that the law which governs the effect of the insolvency proceedings on pending lawsuits and arbitral proceedings is the law of the Member State in which the lawsuit is pending or in which the arbitral tribunal has its seat. This is the exception to the rule that the *lex concursus* regulates the effect of insolvency proceedings.

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.

Firstly, for the third party’s rights *in rem*, the opening of the insolvency proceedings does not have an effect on rights of creditors on *in rem* (on things), whether they are tangible, intangible, movable, immovable, indefinite assets as a whole. Hence, the ownership or mortgage (or other types of collateral rights) are not regulated by *lex concursus*.

The second example is employment contracts, which are regulated by the law of the Member State in which the employment took place. The rationale is the protection of employees and their jobs.

Third example are detrimental acts, when the beneficiary of such acts provides proof that such act is regulated by the country (Member State) other than that country of opening of insolvency proceedings and that that law of the Member State does not provide the possibility of challenging of such act. [No references provided]

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.

The material scope of EIR Recast as defined in the Article 1 consists of three elements: 1) the insolvent debtor is divested of its assets and insolvency practitioner is appointed, 2) the assets and affairs of the debtor is subject to control or supervision of the court, [reference?] 3) there is a temporary stay of individual actions of creditors (usually understood as *moratorium*). [Reference? - This is not about the material scope] The proceedings understood as insolvency under the EIR Recast are listed in the Appendix A. When the material scope, together with the personal, territorial and temporal conditions are fulfilled, the EIR Recast is applicable to such insolvency proceedings.

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.

In order to prevent the secondary insolvency proceedings the insolvency practitioner is given the opportunity to provide an undertaking, which is also called synthetic secondary proceedings. This possibility was created by judicial jurisprudence. Insolvency practitioner nominated in the main insolvency proceedings can provide a one-sided promise given by such IP to the local creditors regarding the assets of the insolvent debtor in the other Member State where the secondary proceedings otherwise could be opened. The promise is that the local creditors from that other Member State will be treated as if the secondary proceedings are opened in that Member State (regarding distribution of proceeds and creditors priority rights).

The other possibility is the stay of secondary proceedings. The IP of the debtor in possession can request such stay for the period of up to three months and if the interests of local creditors are protected by sufficient and adequate measures. The court is not obliged to grant the stay, which differs from the case of the first example (undertaking). **[No references provided]**

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] 3.5/5

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)?

The European Commission recognized the necessity to provide a more business friendly environment and to broaden the scope of application of EIR in such matter that it also provides the regulatory framework for the rescue mechanisms in insolvency, such as reorganization / restructuring, preventive mechanisms. Another improvement was the introduction of the concept of insolvency of groups of companies, which did not exist in the EIR 2000 text. In addition, more efficient rules for cooperation between IPs, courts, and IP and between courts were necessary.

The European Parliament issued a set of recommendations to the European Commission and the Commission prepared in 2012 the New Approach to Business Failure and Insolvency and in 2014 the Recommendation "New Approach to Business Failure and Insolvency". The harmonized approach was proposed which would include the preventive restructuring models, stay of individual actions, protections of dissenting creditors, debtor in possession model, cram-down, protection of new and interim financing. The recommendation had modest results and limited acceptance between Member States. Therefore, in 2016 the Commission formed a new Expert Group on Restructuring and Insolvency law which proposed the new Insolvency Directive. **These are not improvements considered within the context of the Regulation.**

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.

EIR Recast provided in Article 3 the definition of COMI as “place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties”. The advantage of COMI is that it has an autonomous meaning, as it was held in jurisprudence of CJEU, and this enables the legal certainty and foreseeability among the Member States. There are few presumptions of COMI, such as in the case of legal entities the place of its registered office (unless this place has moved in the 3 months suspect period), for physical persons the place of their habitual residence and for individuals conducting business activities – the principal place of business. Such presumptions contribute to the easier determination of the center of main interests. However, these presumptions can be rebutted. The COMI model contributes to the association of the insolvent debtor with its closest territorial link, and it helps the creditors to understand their risks better when dealing with such private or legal entities, as Virgos-Schmit Report indicated.

Critics raised arguments that the concept of COMI is vague and there is not enough guidance in EIR recast for its interpretation. COMI cannot be easily determined, and it may be subject of forum shopping. The term administration of the main interest of the debtor, which is recognized by the creditors is not precise and provides space for different understanding.

Question 3.3 [maximum 5 marks] 1.5/5

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.

The Directive introduces the more flexible approach to insolvency restructuring and it is a first harmonized approach to insolvency in EU. It introduced the **minimum standards for preventive mechanisms** to facilitate the harmonization between the EU Member States and early warning mechanisms. The directive introduced the obligation to the Member State to enable the preventive restructuring for debtors in financial distress, i.e. for the debtors which face the likelihood of insolvency. In addition, the Directive **introduces the cram-down between classes of creditors**. Both of these examples did not exist in EIR Recast. **This is not specific enough. You could have discussed the following differences:**

- A Directive needs to be implemented by Member States whereas a Regulation is directly applicable
- The Directive is a minimum standards harmonization (i.e. substantive harmonization) instrument whereas the Regulation is a conflict-of-law/choice-of-forum instrument (i.e. procedural harmonization)
- The Directive promoted the introduction of pre-insolvency rescue mechanisms into the national regimes of Member States whereas the Regulation attempts to regulate the effects of cross-border insolvencies.

Total: 10/15

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] 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.

EIR 2000 was applicable in all EU Member States except for Denmark. Having in mind that the countries involved are France, Ireland, Spain, all EU states, the territorial precondition is fulfilled. SARL company form in France is the limited liability company (*Société à responsabilité limitée*), therefore the personal aspect is also covered. Article 3 of the EIR 2000 prescribed that the court of the country where the debtor's main interests is situated (presumption of registered office) has jurisdiction to open insolvency proceedings. Article 1 of EIR 2000 defines the scope of EIR application for the collective insolvency proceedings, "which entails partial or total divestment of a debtor and appointment of a liquidator." Article 2 defines insolvency proceedings and indicates that such proceedings are listed in the Annex A.

It is important to note that rescue proceedings are not included in the definition of insolvency proceedings and that in the Annex A under France, *sauvegard* proceedings were not included, but solely 1) *Liquidation judiciaire* and 2) *Redressement judiciaire avec nomination d'un administrateur*. Therefore, EIR 2000 would not be applicable.

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.

Here, the situation would be different. Namely, the debtor has its COMI in France, as the debtor has the closest link with this country (registered seat, most of its stores are located in France, 80% of the work force, most of customers are coming from France). Debtor is not excluded from the scope of application of EIR Recast, as it is not a bank, insurance company, investment company (Article 1, para 2 of EIR Recast). The *sauegard* proceedings is listed in Annex A of EIR Recast. The proceeding is opened after 26 June 2017. Therefore, EIR Recast is applicable in this scenario.

Question 4.3 [maximum 5 marks] 5/5

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.

In the present case, we do not have any information if the debtor has any establishment in Italy, therefore with such assumption (such establishment does not exist) it would not be possible to open secondary insolvency proceedings in Italy. The establishment is necessary in a Member State in order to open secondary insolvency proceedings.

Article 2 of EIR Recast 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."

Article 3 para 2 prescribes that the secondary insolvency proceedings can be opened only if the insolvent debtor possesses an establishment within the territory of the other Member State.

CJEU has determined in the case *Interedil Srl v Fallimento Intereedil Srl* (Case C-396/09, ECLI:EU:C:2011:671 (Oct 20, 2011)) that the minimum level of organization, stability and human resources are enough for the presence of the establishment.

As there is no establishment in Italy, the secondary insolvency proceedings cannot be opened in that country.

Total: 15/15

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

Total: 41.5/50