INSOL INTERNATIONAL
FOUNDATION CERTIFICATE
IN INTERNATIONAL INSOLVENCY LAW

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: 2021122-526.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 2022**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2022. 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 2022** or by **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. If you elect to submit by 1 March 2022, you **may not** submit the assessment again by 31 July 2022 (for example, in order to achieve a higher mark).

7. Prior to being populated with your answers, this assessment consists of **9 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 substantively harmonised the national insolvency law of the Member States.

(a) False. The objective of an EU regulation is not legal harmonisation.

(b) True. Since the entry into force of the EIR 2000, the insolvency laws of the Member States are similar.

(c) False. The objective of the EIR 2000 was not to harmonise aspects of national insolvency laws but to provide non-binding guidelines only.

(d) False. While the EIR 2000 attempted to harmonise national insolvency laws, its focus was on procedural aspects of insolvency law, not substantive ones.

D was the correct answer.

Question 1.2

The EIR 2000 was the first ever European initiative to attempt to harmonise the insolvency laws of Member States.

(a) 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.

(b) False. There was another EU Regulation regulating insolvency law at EU level before the EIR 2000.

(c) True. Before the EIR 2000, the EU has not sought to harmonise the insolvency laws of EU Member States.

(d) False. An EU Directive regulating insolvency law at EU level existed before the EIR 2000.

Question 1.3

The EIR Recast was urgently needed because the EIR 2000 was considered dysfunctional and ineffective.

(a) True. The EIR 2000 proved to be inefficient and incapable of supporting the effective resolution of cross-border cases over the years.

(b) True. As a result, the EIR 2000 lacked the support of major stakeholders such as insolvency practitioners, businesses and public authorities who considered the instrument fruitless.

(c) False. While a number of shortcomings were identified by an evaluation study and a public consultation, the EIR 2000 was generally regarded as a successful instrument by most stakeholders, including practitioners, businesses, the EU institutions and insolvency academics.

(d) False. The EIR 2000 was considered a complete success to support cross-border insolvency cases and, as a result, the wording of the EIR Recast mirrored its 2000 predecessor.

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

Why can it be said that the EIR Recast is more rescue-oriented than the EIR 2000?

(a) The EIR Recast is more rescue-oriented because all domestic rescue procedures fall within its scope.

(b) The EIR Recast is more rescue-oriented because it harmonises all substantive aspects of national insolvency laws.

(c) It is incorrect to say that the EIR Recast is more rescue-oriented than the EIR 2000, as the latter was already heavily rescue-focused.

(d) The EIR Recast is more rescue-oriented because its scope was extended to cover pre-insolvency proceedings and secondary proceedings can now also be rescue proceedings.

Question 1.6

During the reform process of the EIR 2000, what main elements were identified as needing to be revised within the framework of the Regulation (whether adopted or not)?

(a) The scope of the Regulation was to be expanded to cover pre-insolvency and hybrid proceedings; the concept of COMI was to be refined; secondary proceedings were to be extended to rescue proceedings; rules on publicity of insolvency proceedings and lodging of claims were to be amended; provisions for group proceedings were to be added.

(b) Rules on co-operation and communication between courts were to be refined; the concept of COMI was to be abandoned and a new jurisdictional concept was to be found; the Recast Regulation was to apply to Denmark.

(c) The Recast Regulation was to apply to private individuals and self-employed; a common European-wide insolvency proceeding was to be added to the Regulation.

(d) The Regulation was meant to fully embrace the universalism principle by abandoning the concept of secondary proceedings; the Regulation was meant to mostly promote out-of-court settlement and abandon all intervention of a judicial or administrative authority in cross-border proceedings.

Question 1.7

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

(a) "Synthetic proceedings" means that for the case at hand, several main proceedings can be opened, in addition to several secondary proceedings.

(b) "Synthetic proceedings" means that when secondary proceedings are opened, these are automatically rescue proceedings, as opposed to liquidation proceedings.

(c) "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.

(d) "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.

Question 1.8

In which of the following scenarios may the recognition of a foreign insolvency proceeding be denied under the EIR Recast?

(a) The rule applied by the court, which has opened insolvency proceedings (originating court), is unknown or does not have an analogue in the law of the jurisdiction, in which recognition is sought.

(b) The judgment, subject to recognition, was passed with incorrect application of the applicable substantive law.

(c) 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.

(d) The court, which has opened insolvency proceedings (originating court), most certainly did not have international insolvency jurisdiction to do so under the EIR Recast.

Question 1.9

In a cross-border dispute, the main proceedings before the Italian court opposes Fema SrL (registered in Italy) and Lacroix SARL (registered in France). The case concerns an action to

set aside four contested payments that amount to EUR 850,000. These payments were made pursuant to a sales agreement dated 5 August 2020, governed by German law. The contested payments have been made by Fema SrL to Lacroix SARL before the former went insolvent. The insolvency practitioner of the company claims that under applicable Italian law, the contested payments shall be set aside because Lacroix SARL must have been aware that Fema SrL 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 Lacroix 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) To defend the contested payments Lacroix 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*.

(d) The contested payments shall not be avoided if Lacroix SARL proves that such transactions cannot be challenged on the basis of the insolvency provisions of German law (Article 16 EIR Recast).

Question 1.10

The French Social Security authority asserts to have a social security contribution claim against an Irish company, Cupcake Cottage Ltd. Cupcake Cottage is subject to the main insolvency proceeding (Examinership) in Ireland. In addition, a secondary insolvency proceeding (*Concurso*) relating to the same company has been opened in Spain.

Assume that:

- Under French law, creditors (except employees) must file proof of their claim within two (2) months from the publication in the French legal gazette of a notice of the judgment opening the insolvency proceedings.

- Under Spanish law, the period within which creditors must file their claims is one month, as set in the order opening secondary insolvency proceedings against Cupcake Cottage.

The French tax authority intends to file its claim in the Spanish proceedings. Within which time period can the French tax authority do so?

(a) Within two (2) months following the publication date, as guaranteed by the French law (law applicable to the creditor).

(b) Within one month, as stipulated in the applicable *lex concursus secundarii* (law of the insolvency proceeding at issue).

(c) Within 30 days following the publication of the opening of insolvency proceedings in the insolvency register of Spain.

(d) Within the time limit prescribed by the *lex concursus* of the main insolvency proceeding (Irish law).

C was the correct answer.

Total: 8 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. "This article introduces a legal regime for the avoidance of secondary insolvency proceedings, based on the unilateral promise given by the main insolvency practitioner to local creditors that they will receive treatment 'as if' secondary proceedings had in fact been open.'

Statement 2. "The proper functioning of the internal market requires that cross-border insolvency proceedings should operate effectively. This requires judicial cooperation."

Statement 1 refers to Article 38(2) of the EIR Recast which, in its nature, is very similar to the "best interest of creditors" test used in confirmation proceedings under Chapter 11 of the US Bankruptcy Code. This provision of the EIR Recast allows for "synthetic" secondary proceedings on the basis that the appointed insolvency practitioner in the main proceedings gives a unilateral undertaking, which satisfies the Court that the interests of local creditors are protected and their distribution rights are the same as if secondary proceedings were opened in that State.

There are a number of provisions and concepts that I think can be related to Statement 2. Statement 2 strikes reference to Article 81 of the Treaty on the Functioning of the European Union and brings to fruition the concept that cooperation and communication within the EIR Recast framework stems from the general idea of mutual trust and cooperation, which is crucial for effective operation. This also ties in with Recital 48 of the EIR framework and the fact that the EIR Recast offers a comprehensive framework for cooperation and communication between insolvency practitioners, Courts and a mixture of the two, further covered in Articles 41 – 43 and Articles 56 – 59 of the EIR Recast.

Question 2.2 [maximum 3 marks] 2

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.

"Modified Universalism" is a concept whereby it is preferable, when faced with cross border insolvency matters, that the proceedings are dealt with and managed by a single office holder in one State, rather than have a number of different elements being dealt with over a number of States with potentially varying legislation and protocol – some of which may even be conflicting from State to State.

Under this modified universalism approach adopted by the EIR Recast, the main proceedings are opened where a debtor has its Centre of Main Interest ("COMI"), and if applicable / needed, the main proceedings are supported by secondary proceedings opened to support the main proceedings in another State. The idea of this approach is that the Courts dealing with the proceedings in both States should cooperate with each other. There can be only one main insolvency proceeding but at the same time, there could be as many as 26 secondary insolvency proceedings opened. This was first covered in EIR 2000, Article 3(1) but is provided for further in Recital 25 of the EIR Recast

Secondly and supplementary to this approach just mentioned, the idea is that the insolvency proceedings then capture and cover the debtors assets, no matter where in the EU they are (with the exception of Denmark, who decided to opt out), per Recital 23. The main insolvency proceedings can extend and be recognised to assets situated to other member states, except those where the secondary proceedings have been opened. Secondary insolvency proceedings are confined to dealing with just local assets.

Thirdly, whilst the main insolvency proceedings and secondary insolvency proceedings are, in theory, well coordinated and communicated under the EIR Recast modified universalism approach, it is clear that the insolvency practitioner in the main proceedings is dominant and has the control, with the option of intervening in the secondary insolvency proceedings. Which provision is this?

Question 2.3 [maximum 3 marks] 3

Cross-border co-operation and communication between courts is now an obligation under the EIR Recast. This was not the case under the EIR 2000. List **three (3) provisions** (recitals and / or articles) of the EIR Recast that deal with this newly introduced obligation.

Three provisions which deal with cross border cooperation and communication between Courts are: Article 42, Article 43 and Recital 50 of the EIR Recast.

Article 42 of the EIR Recast provides for Court-to-Court cooperation, as summarised below:

Article 42(1) of the EIR Recast provides that a Court before which insolvency proceedings are pending, or before which insolvency proceedings have been opened, should cooperate with any other Court which is faced with insolvency proceedings to be opened, or which may have already opened insolvency proceedings. The obligation is for the Courts to cooperate and communicate, however, the Courts of the EU are not always forthcoming to oblige or do so in a limited way.

Article 42(3) of the EIR Recast allows the Court to coordinate the administration and supervision of the debtor's assets and affairs, synchronise hearings and their conduct as well as approve protocols, to enhance and improve cross border cooperation and communication between Courts. Joint hearings may be considered and electronic communication is encouraged to be utilised.

Recital 50 of the EIR Recast allows the Court to appoint one single insolvency practitioner over several different insolvency proceedings which concern the same debtor, provided that this is compatible with the Rules applicable to each of the proceedings, particularly with the qualifications and licensing of the insolvency practitioner. Independence must be ensured. It is indeed these licensing differentials from State to State that limits this method in practice, together with other limitations such as language barriers.

Finally, Article 43 of the EIR Recast provides for Court-to-Insolvency Practitioner cooperation, as summarised below:

Pursuant to Article 43, the insolvency practitioner of the main insolvency proceedings must cooperate and communicate with any Court whereby any connected secondary proceedings are pending or ongoing. Conversely, any insolvency practitioner involved in these secondary proceedings must cooperate and communicate with any Court request from which the main proceedings are held. Both of the aforementioned insolvency practitioners must also cooperate with any Court before a request to enter into any other insolvency proceedings is made.

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 1 to 3 sentences) explain how they operate.

The EIR Recast allows for the opening of parallel insolvency proceedings against the same debtor. Often, these proceedings can complicate the operation of an insolvent debtor due to increased costs, lack of streamlining in the administration of the estate and drawn out proceedings.

The first instrument used to avoid such an occurrence is the right to give an undertaking in accordance with Articles 36 and 38(2) of the EIR Recast, subject to which the Court will agree to secondary proceedings not being opened on the basis that the insolvency practitioner appointed over the main proceedings offers the assurance that the general interests of local creditors are protected. The distribution rights of those creditors must be the same as if secondary proceedings were opened in that State. This allows for centralisation of control over the decisions affecting the debtors estate, without the inevitable complications and relinquished control that secondary proceedings would bring.

The second instrument is the stay of opening of secondary proceedings, granted under Recital 45 of the EIR Recast. This is particularly crucial when the debtor may be considering a rescue or restructuring approach, as certain options and negotiations may be frustrated by the presence of secondary proceedings. As such, if secondary proceedings are temporarily stayed, this allows the debtor the required breathing room to explore this alternative approach. There are circumstances upon which the stay can be lifted, including if a restructuring plan is put in place or if continuing to stay is detrimental to creditors.

Total: 9 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

In 2012, the European Commission recommended that the European Insolvency Regulation be amended by focusing on specific aspects of the instrument. Explain what these aspects were and how they have been introduced in the EIR Recast.

The European Commission presented a report in 2012 on the application of the EIR 2000 with a proposal to adapt as needed. Whilst the EIR 2000 was generally acknowledged as a success, 15 years following its formation it was decided that there were some provisions that were to be adjusted and reformed; this lead to the creation of the EIR Recast which came into force on 26 June 2017. Though very much based on EIR 2000, the EIR Recast fully replaced the EIR 2000, is twice as long as the EIR 2000, and became (and still is) the new legislation and framework for European Insolvency matters.

To summarise, the EIR Recast includes introductions of, or improvements to, the international jurisdiction of a court in a Member state to open insolvency proceedings and clarity of what law applies, the automatic recognition of these proceedings in other member states, the authority of insolvency practitioners to act in other member states, the framework for cooperation between insolvency practitioners and courts in cross border insolvency matters and concurrent proceedings and a specific framework for group company insolvencies. I have discussed in more detail below.

One of the most obvious yet also important elements included in the EIR Recast was the scope for rescue and restructuring, targeted at financially struggling but potentially economically viable businesses, a consideration which was previously excluded from EIR 2000 and actually became the most innovative change in the new regulatory framework. Part of this new regime also included provisions such as a stay of creditor actions with the view of protecting the general body of creditors as a whole by allowing the debtor time to consider and put into place restructuring options that may in fact lead to a more favourable outcome than a more traditional insolvency procedure.

The EIR Recast also brought stronger rules and a more rigid framework obligating cooperation and communication between insolvency practitioners and courts from State to State, particularly when there are concurrent proceedings in place. Recital 48 indicates that the efficient administration of the insolvency estate with effective asset realisations required proper cooperation between all involved and that proceedings should be coordinated. The EIR Recast gives a comprehensive framework for communication and cooperation between insolvency practitioners from State to State, Courts from State to State and insolvency practitioners and Courts from State to State, as covered in Article 41 of the EIR Recast.

Next, the EIR Recast revamped the way creditor information is shared and is available through Article 24 of the EIR Recast, which provides that Members must establish and maintain registers of insolvency proceedings which are then to be published. Not only that, but there is a set minimum amount of information which should be included on the register, to ensure the registers are as complete and informative as possible. This allows for creditors, both local and foreign, to have information regarding proceedings and critically, the information required to allow them to submit claims in the set timeframe in the appropriate place. The European e-Justice Portal is a central public electronic access point set up for this very purpose. In addition, the principle of *paritas creditorum* ensures equality for creditors, further supported by Article 28(1) of the EIR Recast, which obliges the insolvency practitioner to request the publication of the notice of insolvency proceedings in the COMI and Article 54 of the EIR Recast, which obliges the court or the appointed insolvency practitioner to immediately inform foreign creditors as soon as the proceedings are opened.

Finally, I will also cover the provisions made for proceedings with regards to members of the same group of companies. Articles 56 – 60 of the EIR Recast prescribe cooperation and communication duties for courts and insolvency practitioners involved with insolvency proceedings opened against members of an enterprise group. Articles 61 – 77 also include a mechanism for group coordination proceedings. The setup of such cooperation and communication is similar to when there are main insolvency proceedings and concurrent secondary proceedings. The EIR Recast insists that insolvency practitioners appointed over companies in the same group must coordinate to the extent that it facilitates the effective administration of the estates to maximise the outcome for stakeholders. There are various ways in which this can be done in practice, including for the insolvency practitioners to grant powers to one another as needed, to ask the court to appoint an intermediary as well as general voluntary cooperation to the extent the cost benefit analysis is favourable in that the costs in doing so do not outweigh the anticipated gains, i.e. that a practical view must also be taken.

Excellent answer.

Question 3.2 [maximum 5 marks] 5

While the EIR 2000 was considered to work well overall, several innovative concepts and rules were introduced in the EIR Recast to improve the manner in which the Regulation supports the administration of a cross-border case in an efficient manner. Describe **three (3)** improvements / innovations that made their way into the EIR Recast.

As included in my prior question (as I think this is applicable to both), the introduction of rescue and restructuring options brought about by the EIR Recast forms one of the most innovative improvements that was made to the existing EIR 2000 framework, which focused on more traditional insolvency procedures. Under the EIR Recast, economically distressed yet financially viable businesses can now seek a stay of creditor action to allow them to explore other less terminal restructuring options, which may result in a more favourable outcome for the general body of creditors.

Another important and innovative improvement made by the EIR Recast is the establishment of cooperation in the context of enterprise group insolvency, aimed at finding a solution across the group rather than the individual proceedings being managed in a fragmented way, with the ultimate aim of preserving and maximising the insolvency estate for the ultimate benefit of the general body of creditors as a whole. Under the EIR Recast, insolvency practitioners and courts must cooperate and communicate with each other as much as possible with this goal in mind. It also encourages coordination of parallel court proceedings and ultimately, the resolution of a group insolvency solution.

A third example of an innovation that was developed from EIR 2000 to the EIR Recast is the introduction of a suspect period, which serves to protect manipulations being made in a set timeframe prior to the insolvency occurring that may lead to a more favourable insolvency forum, also known as ‘forum shopping’. For example, a company in financial difficulty (or anticipating financial difficulty) may change its registered office to a location whereby the insolvency legislation is perhaps more lenient, in order to manipulate its COMI and have the main insolvency proceedings conducted in that preferred place. However, thanks to the EIR Recast providing for a three month ‘suspect period’ prior to the request for the opening of insolvency proceedings, there is an appropriate preventative safeguard in place.

Excellent answer.

Question 3.3 [maximum 5 marks] 5

While the EIR Recast was welcomed by most stakeholders, it was also criticised by some as a "missed opportunity" and "modest". List **two (2) flaws** or shortcomings of the EIR Recast and explain how you consider they could be corrected.

The first shortcoming of the EIR Recast is in relation to what is, in fact, one of its most innovative and significant addition and that is in relation to group insolvency proceedings. The EIR Recast offers welcomed provisions for group insolvency proceedings with obligations to enhance communication between the insolvency practitioners and courts, harmonisation of concurrent court proceedings and common goals of achieving the most beneficial outcome for the benefit of the general body of creditors as a whole. However, per Article 56 of the EIR Recast, such group coordination is in fact voluntary and it allows for an insolvency practitioner to opt out, without having to give good cause or even explanation (per Article 64 of the EIR Recast). If a group coordination plan is put in place, the insolvency practitioner is not obliged to follow it – in whole, or in part, per Article 70 of the EIR Recast. Therefore, this non-committal system, whilst promising in theory, is flawed in practice. In addition, the group insolvency proceedings do not necessarily have the creditor support required to make the process be effective, as creditors are not necessarily consulted about a group structure. Further, by increasing the entities within an insolvency structure, the complexities of the case (not to mention costs) are also bound to increase, due to the layering of proceedings, potential conflicting objectives and potential lack of direction – not to mention if any of the parties in the structure had dealings or proceedings ongoing in non Member States. The way of correcting this would be to introduce a more rigid structure, with duty bound obligations to which you cannot opt to ignore, as well as full disclosure, clarity and consultation with stakeholders..

A second shortcoming within the EIR Recast comes from the procedure for informing creditors, as the procedure set out in the EIR Recast is somewhat contradictory, hard to achieve in a practical sense and has no proper provisions set out for the breach of these duties. Let me expand. Article 54(2) of the EIR Recast states that individual notices should be used whilst Article 54(3) of the EIR Recast suggests publication on the European e-Justice system. There is a lack of clarity for creditors as to how they shall be notified and it could also be suggest that either or both of these two methods are insufficient in ensuring all required parties receive or have sight of the notification. In addition, and to expand further on the practical barriers, is that Article 54(1) suggests that an insolvency practitioner shall inform all known foreign creditors 'immediately'. This could never occur in practice and should in fact be amended to provide a 'as soon as reasonably practicable' time frame.

Excellent answer.

Total: 15 out of 15.

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

Cardinal Home is an Ireland-registered furniture company. The company opened its first store in Cork, Ireland in 2009 and has warehouses across Europe, including in Milan, Italy. In 2010, Cardinal Home entered into a credit agreement with an Italian bank since it was planning to expand its reach to the Spanish luxury furniture market, expected to grow by over 8% annually. It opened a bank account with the bank and started negotiating with local distributors, thus signing some (non-binding) memoranda of understanding with them.

Cardinal Home grew and performed well for several years. However, the impact of the economic and financial crisis of the late 2000s eventually hit the company who suffered financial difficulties from 2016. On 22 June 2017, it filed a petition to open examinership proceedings in the High Court in Dublin, Ireland.

Question 4.1 [maximum 5 marks] 5

Assume that the EIR 2000 applies. Does the Dublin High Court have international jurisdiction to open the requested insolvency proceeding? (Explain why it does or does not have jurisdiction.) Your answer should contain references to the applicable law and the relevant CJEU jurisprudence.

Ireland has been a member of the European Union since 1973. When EIR 2000 came into force in 2002, it became binding on all EU Member States and therefore is applicable to all of the involved parties here, being Ireland, Italy and Spain.

The EIR 2000 promotes "modified universalism" and includes a framework for, amongst other things, recognition of insolvency judgments, law in insolvency matters and cross border cooperation between Member States. The CJEU is an EU institution with the purpose of ensuring that EU Law is interpreted and applied in the same way in every Member State.

Both EIR 2000 and EIR Recast cover the same considerations here (though, noting we are assuming EIR 2000 applies) in that it designates the Member State the courts of which may open proceedings. Territorial jurisdiction within that Member State is established by its own domestic laws and in this case would be dependent on the provisions of the Irish Companies Act and whether or not, pursuant to Irish Law, the High Court has the jurisdiction for these proceedings, which I assume it would. These examinership proceedings facilitate cross border restructuring as the examinership, if approved, would automatically be recognised and binding on all other Member States, with the exception of Denmark and is therefore binding on Italy and Spain.

However, a flaw of EIR 2000 which must be considered in this case is that it did not properly define the debtors Centre of Main Interest, rather only provided guidance in Recital 13. Unfortunately, at the time of the EIR 2000 framework, there was no uniform interpretation of the COMI and in fact it could be viewed upon very subjectively, at times causing confusion and differences of opinion, well known and demonstrated by the *Eurofood IFSC Ltd* case law example. It was off of the back of this example that the CJEU called for proper definition and criteria of a debtors COMI that was both objective and easily ascertainable by third parties.

That being said, in this instance, the company is registered in Ireland with its first store being in Ireland and despite European expansion, I would still assume the debtors COMI is Ireland and therefore the main proceedings can be opened there. In fact, one of the main assumptions of COMI is the location of the company's registered office, in this case, Ireland. I would take a different view on this had the company not originated in Ireland and if say, for example, had run into financial difficulties in Italy or Spain and then later tried to move its registered office to Ireland in order to seek a more favourable restructuring option. This is not necessarily prohibited but it does abuse the system. In terms of ascertainability and visibility for third parties, most importantly the creditors, for this case then I do not have these concerns as the company is registered in Ireland and first opened its stores in Ireland before expansion, therefore, has a lasting COMI in Ireland.

I can, therefore, conclude, taking into account all of these considerations, that the Dublin High Court does have the jurisdiction to open the requested insolvency proceeding.

Question 4.2 [maximum 5 marks] 5

Assume that the Dublin High Court opens the respective proceeding on 30 June 2017. Will the EIR Recast be applicable? Your answer should address the EIR Recast's scope and contain **all** steps taken to answer the question.

The EIR Recast is the current applicable regulation of the EU which was created in 2015 but only actually came into legal force on 26 June 2017. The answer is yes, EIR Recast would apply, taking the following considerations in more detail:

To address the temporal scope first, the consideration here that needs to be made is whether the applicable date is the petition date, being 22 June 2017 (prior to the EIR Recast coming into legal force), or, whether the applicable date is the date of commencement of proceedings, being 30 June 2017, some 4 days after the EIR Recast came into legal force.

To answer this question, Article 2(8) of the EIR Recast applies, which states that the "time of opening" of insolvency proceedings means the time at which the judgment opening insolvency proceedings becomes effective, regardless of whether the judgment is final or not. Further, Article 2(7) of the EIR Recast defines the "judgement opening insolvency proceedings" as the decision of any court to open insolvency proceedings or to confirm the opening of such proceedings, or the decision of a court to appoint an insolvency practitioner.

To that end, give that the Dublin High Court opened the respective proceeding on 30 June 2017 then the provisions of EIR Recast will apply, as the insolvency proceedings were opened after the indicated date pursuant to Article 84(1) of the EIR Recast.

We should also consider the geographical scope and any geographical limitations there may be. In this instance, the Centre of Main Interest would be Ireland and the proceedings are also being opened in Ireland. Ireland is a Member State of the EU and, therefore, the EIR Recast would apply.

Next, personal scope – to whom do the proceedings apply? Cardinal Home is a furniture company, therefore, not a bank, insurance company or other exempted entity. As such, the provisions of EIR Recast would apply.

Finally, we must consider the material scope and the type of proceedings we are looking at here. Under Recital 9 of the EIR Recast, the provisions of EIR Recast automatically apply if the proceedings are contained within Annex A – a list of 112 procedures for all 27 countries covered by the EIR Recast. In this instance, the petition is to open examinership proceedings which is a procedure under the Irish Companies Act which can be proposed to permit a company to compromise with its creditors through a viable scheme of arrangement. Examinership proceedings do fall within Annex A and, therefore, EIR Recast automatically applies.

Question 4.3 [maximum 5 marks]

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.

Article 3(1) EIR Recast states that the courts of the Member State within the territory of which the COMI is situated shall have jurisdiction to open the main insolvency proceedings, which would have universal scope and encompass all of the debtors assets. In this instance, we assume that the COMI is Ireland and therefore this allows for the main proceedings to be opened in Ireland.

Recital 23 would allow Italy to open secondary proceedings to run parallel to these main insolvency proceedings, but only with the jurisdiction to cover assets within Italy. The company

has its furniture warehouses in Italy and therefore, the debtor has an establishment there under the definition of having operational activities there, meaning secondary proceedings can be opened there, pursuant to Article 3(2) of the EIR Recast. However, pursuant to the more complex, detailed definition of "establishment" (as I have only covered a very simple view here), the criteria of such would be scrutinised at the time of opening the proceedings to ensure such criteria are met per Article 2(10) of the EIR Recast. The CJEU examined the concept of an "establishment" and concludes that "the definition connects the pursuit of an economic activity to the presence of human resources, shows that a minimum level of organisation and degree of stability are required".

It is true that the secondary proceedings can serve to protect the local interest, in this case, the creditors in Italy, where otherwise they may not have been able to rely on the recognition of their rights and raking in proceedings in another State, particularly important for any smaller creditors who only participated in domestic transactions, a concept which is further explained in the Virgos-Schmit Report.

As regards to securing the Italian insolvency distribution ranking, the EIR Recast serves to protect the local interests and safeguard the expectations of local creditors as to the applicable insolvency law and their ranking as creditors. It also provides an easier outlet for local creditors in Italy to participate in the insolvency proceedings where otherwise it may have proved to be too complex, costly or difficult if the only proceedings were in Ireland and barriers such as language, understanding, legal and travel costs may prevent them from participating in the foreign proceedings.

Overall a good answer but no reference to case law -

- 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 Cardinal Home 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.

Total: 13 out of 15.

*** End of Assessment ***

Total: 45 out of 50.