



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.**
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 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.**

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).

Excellent.

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.”
– Articles 36/38

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

The provisions of the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (“EIR Recast”) addressed in Statement 1 are firstly, the “Right to give an undertaking in order to avoid secondary insolvency proceedings” (Article 36(1) EIR Recast) and secondly, the “Decision to open secondary insolvency proceedings” (Article 38(2) EIR Recast) which provides that where the insolvency practitioner in the main insolvency proceeding has given an undertaking in accordance with Article 36, the court in which a request to open secondary insolvency proceedings has been made shall, at the request of the insolvency practitioner, not open secondary insolvency proceedings if it is satisfied that the undertaking adequately protects the general interests of local creditors. These provisions also embody the concept of “synthetic” secondary proceedings.

The provisions of the EIR Recast addressed in Statement 2 are firstly, “Cooperation and communication between courts” (Article 42 EIR Recast) and secondly, “Cooperation and communication between insolvency practitioners and courts” (Article 43 EIR Recast).

Question 2.2 [maximum 3 marks] 3

The EIR Recast is built upon the concept of modified universalism, as pure universalism has been deemed idealistic and impractical for the time being. Provide **three (3) examples** of provisions from the EIR Recast, which highlight this modified universalism approach.

The provisions from the EIR Recast which highlight a modified universalism approach are –

- (a) firstly, the provisions in relation to jurisdiction for opening of main and secondary insolvency proceedings. Article 3(1) EIR Recast stipulates that the courts of the European Union Member State (with the exception of Denmark) (“Member State”) within the territory of which the centre of the debtor’s main interests is situated shall have jurisdiction to open the main insolvency proceedings. However, the system under the EIR Recast is not purely universal as Article 3(2) EIR Recast provides for the opening of secondary insolvency proceedings in the courts of another Member State where the debtor possesses an establishment within the territory of that Member State;
- (b) secondly, the provisions in relation to the scope of the main and secondary insolvency proceedings. While the main insolvency proceeding has universal scope and aims at

encompassing all of the debtor's assets (Recital 23 EIR Recast), the effects of the secondary insolvency proceedings are limited to the assets that are situated within the territory of the Member State in which the secondary insolvency proceedings are opened (Article 3(2) EIR Recast). Hence, in the event secondary insolvency proceedings are opened, the universal scope of the main insolvency proceedings will be limited and will not apply to the assets within the Member State in which the secondary insolvency proceedings are opened; and

- (c) thirdly, the provisions in relation to the law applicable to the insolvency proceedings. Article 7(1) EIR Recast provides for the general rule that the law applicable to the insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened. However, there are exceptions to the general rule in Article 7(1) EIR Recast and these are set out in Articles 8 to 18 EIR Recast. These exceptions were put in place to protect certain interests that are best determined by the laws of the Member State in which the rights arose, for example, rights under employment contracts;

The above provisions show the shift of the EIR Recast from the pure unity (a single set of insolvency proceedings across the European Union) and pure universalism (the single insolvency proceeding would encompass all of the debtor's assets) approach to a modified universalism approach.

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.

The provisions of the EIR Recast that deal with the obligation of cross-border co-operation and communication between courts are –

- (a) Recital 3 of the EIR Recast. Recital 3 states that the proper functioning of the internal market requires that cross-border insolvency proceedings should operate efficiently and effectively and hence the EIR Recast needs to be adopted in order to achieve this objective, which falls within the scope of judicial cooperation in civil matters within the meaning of Article 81 of the Treaty on the Functioning of the European Union;
- (b) Recitals 48 and 49 EIR Recast. Recital 48 states that main insolvency proceedings and secondary insolvency proceedings can contribute to the efficient administration of the debtor's insolvency estate or to the effective realisation of the total assets if there is proper cooperation between the insolvency practitioners and courts involved in all the concurrent proceedings. In this regard, Recital 49 stipulates that insolvency practitioners and courts should be able to enter into agreements and protocols for the purpose of facilitating cross-border cooperation of multiple insolvency proceedings in different Member States concerning the same debtor or members of the same group of companies, where this is compatible with the rules applicable to each of the proceedings;
- (c) Recital 50 EIR Recast. Recital 50 states that courts of different Member States may cooperate by coordinating the appointment of insolvency practitioners. This may include appointing a single insolvency practitioner for several insolvency proceedings concerning the same debtor or for different members of a group of companies, provided that this is compatible with the rules applicable to each of the proceedings,

particularly those concerning the qualification and licensing of the insolvency practitioner;

- (d) Recital 52 EIR Recast. Recital 52 states that where insolvency proceedings have been opened for several companies of the same group, there should be proper cooperation and communication between the various insolvency practitioners and courts involved, provided the cooperation does not run counter to the interests of the creditors in each of the proceedings;
- (e) Article 42 of the EIR Recast. For the purpose of facilitating the coordination of main, territorial and secondary insolvency proceedings concerning the same debtor, Article 42(1) EIR Recast requires a court before which a request to open insolvency proceedings is pending, or which has opened such proceedings, to cooperate with any other court before which a request to open insolvency proceedings is pending, or which has opened such proceedings. The cooperation obligated by Article 42(1) is only to the extent such cooperation is not incompatible with the rules applicable to each of the insolvency proceedings; and
- (f) Article 57 EIR Recast. Where insolvency proceedings relate to two or more members of a group of companies, Article 57(1) EIR Recast requires a court which has opened such proceedings to cooperate with any other court before which a request to open proceedings concerning another member of the same group is pending or which has opened such proceedings. The cooperation obligated by Article 57(1) is only to the extent that such cooperation is appropriate to facilitate the effective administration of the proceedings, is not incompatible with the rules applicable to each of the proceedings and does not entail any conflict of interest.

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 first instrument is the right to give an undertaking in order to avoid secondary insolvency proceedings under Article 36 of the EIR Recast. In order to avoid the opening of secondary insolvency proceedings, Article 36 EIR Recast allows the insolvency practitioner in the main insolvency proceedings to give a unilateral undertaking in respect of the assets located in the Member State in which secondary insolvency proceedings could be opened. The undertaking is to the effect that when distributing such assets or the proceeds of realisation of such assets, the insolvency practitioner will act in such a manner as if the secondary insolvency proceedings have been opened, that is, the insolvency practitioner will comply with the distribution and priority rights that creditors would have under the national law if secondary insolvency proceedings were opened in that Member State. Once an undertaking has been given under Article 36, the law applicable to the distribution of assets located in that Member State, ranking of creditors' claims and rights of creditors in relation to the assets shall be the law of the Member State in which secondary insolvency proceedings could have been opened. The undertaking must specify the factual assumptions on which it is based (particularly the value of the assets concerned and options for realisation of the assets), be approved by the known local creditors and once approved, shall be binding on the estate of the debtor. Where an undertaking has been given in accordance with Article 36 EIR Recast, Article 38(2) EIR Recast requires a court seised with a request to open secondary insolvency proceedings, to

not open such proceedings, provided the court is satisfied that the undertaking adequately protects the general interests of local creditors.

The second instrument is a stay of the opening of secondary insolvency proceedings under Article 38(3) EIR Recast. Where a temporary stay of individual enforcement proceedings has been granted in order to allow for negotiations between the debtor and its creditors, Article 38(3) EIR Recast provides that the court, at the request of the insolvency practitioner or the debtor in possession, has the discretion to stay the opening of secondary insolvency proceedings for a period not exceeding three (3) months, provided that suitable measures are in place to protect the interests of local creditors. The court granting the stay may order measures to protect the interests of local creditors including – (a) requiring the insolvency practitioner or the debtor in possession not to remove or dispose any assets which are located in the Member State in which the debtor has an establishment unless it is done in the ordinary course of business; and (b) any other measures that are not incompatible with the national rules on civil procedure. The court must lift the stay either of its own motion or at the request of any creditor if the negotiations between the debtor and its creditors result in an agreement. The court has the discretion to lift the stay, of its own motion or at the request of any creditor, if the continuation of the stay is detrimental to the creditor's rights or if the insolvency practitioner or the debtor in possession has infringed the prohibition on disposal of its assets or on removal of them from the territory of the Member State where the stay is granted.

Total: 10 out of 10.

QUESTION 3 (essay-type questions) [15 marks in total]

In addition to the correctness, completeness (including references to case law, if applicable) and originality of your answers to the questions below, marks may be awarded or deducted on the basis of your presentation, expression and writing skills.

Question 3.1 [maximum 5 marks] 5

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, in the Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings, COM (2012) 744 final ("Proposal"), recommended that the Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings ("EIR 2000") be amended by focusing on the following five (5) aspects –

- (a) scope of the EIR 2000. The Proposal recommended that the scope of the EIR 2000 be extended to cover national procedures which provide for the restructuring of a company at a pre-insolvency stage ("pre-insolvency proceedings"), proceedings which leave the existing management in place ("hybrid proceedings"), debt discharge proceedings and other insolvency proceedings for natural persons which do not fit within the definition of the EIR 2000. This aspect has been introduced in Article 1(1) EIR Recast which sets out the scope of application of the EIR Recast. While the EIR 2000 only applied to traditional liquidation-oriented insolvency procedures, the EIR Recast also applies to certain specified pre-insolvency proceedings aimed at rescuing economically viable but financially distressed businesses. In respect of the requirement in Article 3(3) EIR 2000 that secondary proceedings must be winding-up proceedings, such requirement is no longer stipulated in the EIR Recast;

- (b) jurisdiction for opening insolvency proceedings. While retaining the concept of the centre of the debtor's main interests ("COMI"), the Proposal recommended provisions that would give guidance to legal practitioners in determining COMI, improvement of the procedural framework for determining jurisdiction for opening of proceedings and clarification that the courts opening insolvency proceedings also have jurisdiction for actions which derive directly from insolvency proceedings or are closely linked with them. This aspect has been introduced in the EIR Recast through a stipulation of where a debtor's COMI shall be (Article 3(1) EIR Recast), circumstances under which the presumption of COMI will apply (Article 3(1) EIR Recast), provisions on examination as to jurisdiction (Article 4 EIR Recast) and judicial review of the decision to open main insolvency proceedings (Article 5 EIR Recast) as well as provisions on jurisdiction for actions deriving directly from insolvency proceedings and closely linked with them (Article 6 EIR Recast);
- (c) secondary insolvency proceedings. The Proposal recommended more efficient administration of insolvency proceedings by enabling the court to refuse the opening of secondary insolvency proceedings if this is not necessary to protect the interests of local creditors, by abolishing the requirement that secondary proceedings must be winding-up proceedings and by improving the cooperation between main and secondary proceedings, in particular by extending the cooperation requirements to the courts involved. This aspect has been introduced in the EIR Recast through Article 36 EIR Recast (right to give an undertaking in order to avoid secondary insolvency proceedings), Article 38(2) EIR Recast (where the insolvency practitioner in the main insolvency proceedings has given an undertaking in accordance with Article 36, the court seized of a request to open secondary insolvency proceedings shall, at the request of the insolvency practitioner, not open secondary insolvency proceedings if it is satisfied that the undertaking adequately protects the general interests of local creditors) and Article 42 (cooperation and communication between courts);
- (d) publicity of insolvency proceedings and lodging of claims. The Proposal recommended certain minimum information relating to the insolvency proceedings to be published in an electronic register available to the public free of charge via the internet. The Proposal also recommended facilitating the lodging of claims for foreign creditors by introducing standard forms, setting out a minimum time period following publication of the notice of opening of proceedings in the insolvency register within which to lodge their claims and making legal representation not mandatory for lodging a claim in a foreign jurisdiction. These aspects have been introduced in the EIR Recast through Article 24 (establishment of insolvency registers) and Article 55 (procedures for lodging claims); and
- (e) insolvency of members of a group of companies. The Proposal recommended coordination of the insolvency proceedings concerning different members of the same group of companies by obliging the liquidators and courts involved in different main proceedings to cooperate and communicate with each other. The Proposal also recommended giving liquidators of such proceedings the procedural tools to request a stay of the respective other proceedings and to propose a rescue plan for the members of the group subject to insolvency proceedings. These aspects have been introduced in the EIR Recast through Chapter V, EIR Recast.

Excellent answer and reference to policy documents.

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.

Three (3) improvements or innovations that were introduced in the EIR Recast to improve the manner in which the European Insolvency Regulation (“Regulation”) supports the administration of a cross-border case in an efficient manner are –

- (a) extension of the scope of the Regulation to include certain specified pre-insolvency rescue proceedings. While the EIR 2000 only applied to the traditional liquidation-oriented proceedings, to reflect current EU priorities and national practices in insolvency law of promoting the rescue of enterprises in difficulty,¹ the scope of the Regulation was expanded to include certain specified pre-insolvency rescue proceedings aimed at rescuing economically viable but financially distressed businesses. This expansion in the scope of application is reflected in Recital 10 of the EIR Recast and Article 1(1) of the EIR Recast which sets out the scope of application of the EIR Recast;
- (b) introduction of measures that discourage the use of secondary insolvency proceedings where a single main insolvency proceeding is seen as more appropriate. These measures are reflected in –
 - (i) Article 36(1) EIR Recast which provides for the “Right to give an undertaking in order to avoid secondary insolvency proceedings” which also reflects the concept of “synthetic” secondary insolvency proceedings. In order to avoid the opening of secondary insolvency proceedings, Article 36 EIR Recast allows the insolvency practitioner in the main insolvency proceedings to give a unilateral undertaking in respect of the assets located in the Member State in which secondary insolvency proceedings could be opened. The undertaking is to the effect that when distributing such assets or the proceeds of realisation of such assets, the insolvency practitioner will act in such a manner as if the secondary insolvency proceedings have been opened, that is, the insolvency practitioner will comply with the distribution and priority rights that creditors would have under the national law if secondary insolvency proceedings were opened in that Member State; and
 - (ii) Article 38 (2) EIR Recast which provides that where the insolvency practitioner in the main insolvency proceeding has given an undertaking in accordance with Article 36, the court in which a request to open secondary insolvency proceedings has been made shall, at the request of the insolvency practitioner, not open secondary insolvency proceedings if it is satisfied that the undertaking adequately protects the general interests of local creditors; and
- (c) the rules relating to insolvency of members of a group of companies. By Chapter V of the EIR Recast, the EIR Recast introduces a framework for cooperation and coordination of insolvency proceedings in relation to different members of the same group of companies that are opened in more than one Member State, including for group coordination proceedings.

Question 3.3 [maximum 5 marks] 5

¹ Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings, COM (2012) 744 final

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.

One of the shortcomings of the EIR Recast is the preservation of the concept of the debtor’s centre of main interests (“COMI”) in determining jurisdiction for main insolvency proceedings. While the EIR Recast attempts to provide clarity by stipulating that the 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 (Article 3(1) EIR Recast) and provides for certain rebuttable presumptions on COMI (Article 3(1) EIR Recast), the concept of COMI lacks the element of certainty required in determining jurisdiction for main insolvency proceedings that has far-reaching consequences. There is still room for the court of each Member State to interpret the concept of COMI and determine if it has jurisdiction over the matter. One way of correcting this shortcoming, particularly in relation to companies which would be the main category of debtors in the majority of international insolvency cases, is for the EIR Recast to provide greater certainty by replacing the concept of COMI with the place of registered office or place of incorporation of the debtor, for purposes of determining jurisdiction to open main insolvency proceedings. Even though there is a risk that the place of the registered office or incorporation may not reflect the place in which the company is carrying on its business, for example, in the case of a “letterbox” company, the certainty and ease of determining the place of the registered office or incorporation would outweigh its negative implications.

Another shortcoming of the EIR Recast is the provisions in relation to insolvency proceedings of members of a group of companies in Chapter V of the EIR Recast, in particular, on group coordination proceedings in Section 2, Chapter V of the EIR Recast. Recital 51 EIR Recast states that the Regulation should ensure efficient administration of insolvency proceedings relating to different companies forming part of a group of companies. However, the following Recitals and the provisions in Section 2, Chapter V reflect the voluntary nature of group coordination proceedings, one of the most important instruments in the EIR Recast to ensure efficient administration of group insolvency proceedings. Insolvency practitioners are able to object to their participation in the group coordination proceedings (Article 64 EIR Recast) without having to explain or give any good reasons for the objection. As provided for in Article 63 EIR Recast, the court seised [seized] of a request to open group coordination proceedings will only give the necessary notices on the request to open group coordination proceedings where it is satisfied that the opening of such proceedings is appropriate to facilitate the effective administration of the insolvency proceedings relating to the different group members and no creditor of any group member expected to participate in the proceedings is likely to be financially disadvantaged by the inclusion of that member in such proceedings. Hence, in my view, this shortcoming in Section 2, Chapter V could be corrected by requiring any insolvency practitioner objecting to participation in the group coordination proceedings to give valid reasons for the objection. In particular, the insolvency practitioner should be required to show that the opening of group coordination proceedings will not facilitate the effective administration of the insolvency proceedings relating to the different group members or that such proceedings are likely to financially disadvantage creditors of the group member which the insolvency practitioner is administering. Since the ultimate aim of insolvency proceedings is for the benefit of the debtors of the creditors, the insolvency practitioners should also be required to obtain approval of the creditors before agreeing to join or opt-out of the group coordination proceedings. While Article 64(3) EIR Recast requires the insolvency practitioner to obtain any approval required under national law prior to making the decision whether to participate or not to participate in the group coordination proceedings, if national law does not require approval of the creditors, the insolvency practitioner would not need to obtain such approval. To resolve this potential difference in national law, the EIR Recast should expressly require the insolvency practitioner to obtain approval of the creditors.

Excellent answers.

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.

The courts in Ireland will have international jurisdiction to open the requested insolvency proceeding if the debtor has a centre of main interests (“COMI”) in Ireland as provided for by Article 3(1) EIR 2000 or an establishment in Ireland as provided for by Article 3(2) EIR 2000.

Though the EIR 2000 does not provide a definition for COMI, guidance may be found from Recital 13 EIR 2000 which states that the COMI should correspond to the place where the debtor conducts the administration of its interests on a regular basis and is therefore ascertainable by third parties. Further, Article 3(1) EIR 2000 provides that in the case of a company or a legal person, the place of the registered office shall be presumed to be the COMI in the absence of proof to the contrary.

It would be pertinent at this point to discuss the ruling of the Court of Justice of the European Union (“CJEU”) (then known as the European Court of Justice), in the case of *Eurofood IFSC Ltd*² (“Eurofood”). In determining the COMI of Eurofood, the CJEU stated as follows –

- “31 *The concept of the centre of main interests is peculiar to the Regulation. Therefore, it has an autonomous meaning and must therefore be interpreted in a uniform way, independently of national legislation.*
- 32 *The scope of that concept is highlighted by the 13th recital of the Regulation, which states that ‘the ‘centre of main interests’ should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties’.*
- 33 *That definition shows that the centre of main interests must be identified by reference to criteria that are both objective and ascertainable by third parties. That objectivity and that possibility of ascertainment by third parties are necessary in order to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open main insolvency proceedings...*”

² Case C-341/04, ECLI: EU:C:2006:281 (May 2, 2006)

The ECJ in *Eurofood* went on to hold that the presumption in favour of the registered office laid down in Article 3(1) EIR 2000 can be rebutted only if the factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect, for example, in the case of a “letterbox” company not carrying on any business in the territory of the Member State in which its registered office is situated.

Coming to the case on hand, the facts of the case state that Cardinal Home is an Ireland-registered company. Pursuant to Article 3(1) EIR 2000, Ireland would be presumed to be the COMI of Cardinal Home, unless there is proof to the contrary. Applying the ruling of the ECJ in *Eurofood*, the presumption in Article 3(1) can only be rebutted if the factors which are both objective and ascertainable by third parties establish that an actual situation exists which is different from that which locates the COMI of Cardinal Home in Ireland. There is nothing in the facts of the case to rebut the presumption in Article 3(1). In fact, on top of being registered in Ireland, Cardinal Home also has its first store in Ireland.

Based on the facts of the case, we can conclude that Cardinal Home’s COMI is in Ireland. Hence, pursuant to Article 3(1) EIR 2000, Ireland will have international jurisdiction to open the requested insolvency proceedings against Cardinal Home. The Irish insolvency proceedings would be the “main insolvency proceedings”.

The EIR 2000 determines whether and which European Union (“EU”) Member State has international jurisdiction to open insolvency proceedings. Once this has been determined, the EIR 2000 does not go on to determine the territorial jurisdiction within that Member State. The territorial jurisdiction must be established by the national law of the Member State concerned (Recital 15 EIR 2000). As concluded above, under EIR 2000, Ireland has international jurisdiction to open insolvency proceedings against Cardinal Home. The question of whether the Dublin High Court in Ireland is the competent court to open such insolvency proceedings will have to be ascertained by reference to Ireland’s domestic laws.

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.

In order for the EIR Recast to apply, the insolvency proceedings must fall within the material scope, temporal scope, personal scope and geographical scope of the EIR Recast as discussed in detail below –

- (i) material scope of the EIR Recast. Article 1 EIR Recast states that the EIR Recast shall apply to public collective proceedings, including interim proceedings, which are based on laws relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation – (a) a debtor is totally or partially divested of its assets and an insolvency practitioner is appointed; (b) the assets and affairs of a debtor are subject to control or supervision by a court; or (c) a temporary stay of individual enforcement proceedings is granted by a court or by operation of law, in order to allow for negotiations between the debtor and its creditors, provided that the proceedings in which the stay is granted provide for suitable measures to protect the general body of creditors, and, where no agreement is reached, are preliminary to one of the proceedings referred to in point (a) or (b). Annex A of the EIR Recast exhaustively sets out the national procedures to which the EIR Recast would apply;

- (ii) temporal scope of the EIR Recast. Article 92 EIR Recast stipulates that with the exception of Articles 86, 24(1) and 25 (which have separate application dates), the EIR Recast shall apply from 26 June 2017. Article 84 EIR Recast states that the EIR Recast shall apply only to insolvency proceedings opened from 26 June 2017 and insolvency proceedings opened before 26 June 2017 will continue to be governed by EIR 2000. According to Article 2(8) EIR Recast, “the time of the opening of proceedings” means the time at which the judgment opening insolvency proceedings becomes effective, regardless of whether the judgment is final or not. Pursuant to Article 2(7) EIR Recast, “judgment opening insolvency proceedings” includes – (i) the decision of any court to open insolvency proceedings or to confirm the opening of such proceedings; and (ii) the decision of a court to appoint an insolvency practitioner;
- (iii) personal scope of the EIR Recast. Recital 9 EIR Recast states that the EIR Recast applies to the insolvency proceedings listed in Annex A EIR Recast, irrespective of whether the debtor is a natural person or a legal person, a trader or an individual. However, Article 1(2) EIR Recast specifically excludes from the scope of the EIR Recast, insolvency proceedings that concern – (a) insurance undertakings; (b) credit institutions; (c) investment firms and other firms, institutions and undertakings to the extent that they are covered by Directive 2001/24/EC; or (d) collective investment undertakings; and
- (iv) territorial or geographical scope of the EIR Recast. Being a regulation at the EU level, the EIR Recast is binding in its entirety and directly applicable to all EU Member States with the exception of Denmark, which decided to opt-out. The EIR Recast does not provide clear rules in relation to its geographical application. However, Recital 25 EIR Recast states that the EIR Recast only applies to proceedings in respect of a debtor whose centre of main interests is located in the EU. In this regard, Recital 27 EIR Recast requires a competent court, before opening insolvency proceedings, to examine of its own motion whether the centre of the debtor’s main interests or the debtor’s establishment is actually located within its jurisdiction. The EIR Recast would not apply in the event it is found that the debtor’s centre of main interests is located in Denmark or outside of the EU. In such scenario, the national conflict of laws rules and insolvency laws of the EU Member States will determine the question of whether the Member State has jurisdiction to open insolvency proceedings.

Based on the above, a determination of whether the EIR Recast applies to a particular set of facts involves a step-by-step plan³ as follows -

- (a) the debtor has its centre of main interests in a Member State of the EU, except Denmark (territorial or geographical scope);
- (b) the debtor is not a bank, insurance company or other “excluded” entity or undertaking as set out in Article 1(2) EIR Recast (personal scope);
- (c) the proceeding opened against the debtor is one of the procedures listed in Annex A to the EIR Recast (material scope); and
- (d) the proceeding is opened after 26 June 2017 (temporal scope).

If the answer to all four (4) steps above is in the affirmative, then the EIR Recast would be applicable.

³ Professor Bob Wessels, Mr Ilya Kokorin and Dr Emilie Ghio, *Foundation Certificate in International Insolvency Law, Module 2B Guidance Text, The European Insolvency Regulation, 2021/2022* (INSOL International 2021), page 67

Applying the above to the facts of the case on hand –

- (a) firstly, Cardinal Home has its centre of main interests in Ireland, that is, an EU Member State that is not Denmark. Hence, the requirement of territorial or geographical scope of the EIR Recast is satisfied;
- (b) secondly, Cardinal Home is not a bank, insurance company or other “excluded” entity or undertaking as set out in Article 1(2) EIR Recast. Hence, the requirement of personal scope of the EIR Recast is satisfied;
- (c) thirdly, the insolvency proceeding of Examinership opened by the Dublin High Court against Cardinal Home is one of the procedures listed in Annex A EIR Recast. Hence, the requirement of material scope of the EIR Recast is satisfied; and
- (d) fourthly, the proceeding is opened on 30 June 2017. Hence, the requirement of temporal scope of the EIR Recast is satisfied.

Therefore, it may be concluded that the EIR Recast is applicable to the insolvency proceedings opened by the Dublin High Court in respect of Cardinal Home.

Question 4.3 [maximum 5 marks] 5

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.

Italy is a Member State of the EU and subject to the EIR Recast. The Italian courts will have international jurisdiction to open secondary insolvency proceedings against Cardinal Home only if Cardinal Home possesses an establishment within the territory of Italy (Article 3(2) EIR Recast).

Hence, in order to determine if secondary insolvency proceedings can be opened in Italy under the EIR Recast, the court will have to determine if Cardinal Home has an establishment in Italy. Article 2(10) 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.

In the case of *Interedil Srl v Fallimento Interedil Srl*,⁴ the CJEU once again asserted that the provisions of the EIR 2000 which makes no reference to the law of the Member State for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the EU. In this case, the CJEU was also asked to determine how the term “establishment” must be interpreted. Though the case relates to an interpretation of the term “establishment” under the EIR 2000, the CJEU’s authoritative interpretation continues to be relevant for the application of the EIR Recast⁵ even more so since the term “establishment” in Article 2(10) EIR Recast is almost identical to the definition in Article 2(h) EIR 2000, save for the addition of the relevant time period.

⁴ Case C-396/09, ECLI:EU:C:2011:671 (Oct. 20, 2011)

⁵ Professor Bob Wessels, Mr Ilya Kokorin and Dr Emilie Ghio, *Foundation Certificate in International Insolvency Law, Module 2B Guidance Text, The European Insolvency Regulation, 2021/2022* (INSOL International 2021), page 13

In interpreting the term “establishment” in Article 2(h) EIR 2000, the CJEU in *Interedil*, held as follows –

- (a) the fact that the definition of “establishment” in the EIR 2000 links the pursuit of an economic activity to the presence of human resources shows that a minimum level of organisation and a degree of stability are required;
- (b) the presence alone of goods in isolation or bank accounts does not, in principle, satisfy the requirements for classification as an “establishment”;
- (c) in order to ensure legal certainty and foreseeability concerning the determination of the courts with jurisdiction under Article 3(2) EIR 2000, the existence of an “establishment” must be determined, in the same way as the location of the centre of main interests, on the basis of objective factors which are ascertainable by third parties; and
- (d) the term “establishment” within the meaning of Article 3(2) EIR 2000 must be interpreted as requiring the presence of a structure consisting of a minimum level of organisation and a degree of stability necessary for the purpose of pursuing an economic activity. The presence alone of goods in isolation or bank accounts does not, in principle, meet that definition.

Guidance on the concept of “establishment” may also be found from the *Report on the Convention on Insolvency Proceedings*⁶ by Professor Miguel Virgos and Etienne Schmit (Virgos-Schmit Report). Though the Virgos-Schmit Report is an explanatory report on the European Union Convention on Insolvency Proceedings, judicial opinion and legal scholars consider this report to be of significant value and authority in interpreting the EIR 2000 and the EIR Recast.⁷

Based on the definition of “establishment” in Article 2(10) EIR Recast, the case of *Interedil* and the Virgos-Schmit Report, in order to show “establishment” –

- (a) the debtor must have a place of operations in the Member State;
- (b) the debtor’s activities in the Member State must be non-transitory in nature, that is, there must be a certain degree of continuity and stability and a purely occasional place of operations cannot be classified as an “establishment”;
- (c) the debtor’s activities in the Member State must involve human means and assets, which together demonstrate the organisational presence in the forum. In this regard, it must be noted that the EIR Recast does not require the establishment to have any official corporate form, for example a branch or a representative office;⁸ and
- (d) the requirements in (a), (b) and (c) above are to be determined objectively and must be ascertainable by third parties. As stated in paragraph 71 of the Virgos-Schmit

⁶ M. Virgos and E.Schmit, *Report on the Convention on Insolvency Proceedings*, Brussels, 3 May 1996

⁷ Professor Bob Wessels, Mr Ilya Kokorin and Dr Emilie Ghio, *Foundation Certificate in International Insolvency Law, Module 2B Guidance Text, The European Insolvency Regulation, 2021/2022* (INSOL International 2021), page 13

⁸ Professor Bob Wessels, Mr Ilya Kokorin and Dr Emilie Ghio, *Foundation Certificate in International Insolvency Law, Module 2B Guidance Text, The European Insolvency Regulation, 2021/2022* (INSOL International 2021), page 23

Report,⁹ the decisive factor is how the activity appears externally in the perception of third parties, and not the intention of the debtor.

As provided for in Article 2(10) EIR Recast, the timing for making a determination on whether the debtor has an “establishment” in the Member State is as of the moment of the filing for the opening of secondary insolvency proceedings. If the criteria for “establishment” cannot be shown at that moment, the court must look at whether there was an establishment in the 3-month period prior to the request to open main insolvency proceedings.

Coming back to the case on hand, the facts state that Cardinal Home has a warehouse in Milan, Italy, entered into a credit agreement with an Italian bank in 2010, opened a bank account with the Italian bank and started negotiating with local distributors and signing some (non-binding) memoranda of understanding with them.

Applying the definition of “establishment” in Article 2(10) EIR Recast and the principles discussed above to the facts of the case, it is highly unlikely that Cardinal Home will be deemed to have an “establishment” in Italy for the following reasons –

- (a) Cardinal Home only has a warehouse in Italy. The facts do not indicate that the warehouse has any office attached to it or any personnel present at the warehouse on a continuous basis to manage it. This could be an indication that the warehouse is used purely for storing goods. While an office or a shop will qualify as an establishment, incidental storage in a warehouse would not qualify as an establishment.¹⁰ Hence, it's unlikely for the warehouse to be considered as a place of operations;
- (b) Cardinal Home has entered into a credit agreement with an Italian bank as well as opened a bank account with the Italian bank and it has also started negotiating with local distributors and signed some (non-binding) memoranda of understanding with them. The activities of Cardinal Home in Italy appear to be intermittent and does not show a degree of continuity and stability; and
- (c) Cardinal Home has assets in the form of the warehouse and a bank account in Italy. There also appears to be some human presence in Italy as the entering into of the credit arrangement with the Italian bank and the negotiations with the local distributors would involve human resources. However, taking into account factors (a) and (b) above, it is unlikely for these factors alone to contribute to the existence of an establishment.

Since Cardinal Home does not have an “establishment” in Italy, the Italian court would not have jurisdiction to open the secondary insolvency proceeding against Cardinal Home in Italy under the EIR Recast.

Total: 15 out of 15.

*** End of Assessment ***

This is an excellent paper. Well done!

Total: 50 out of 50.

⁹ M. Virgos and E. Schmit, *Report on the Convention of Insolvency Proceedings*, Brussels, 3 May 1996

¹⁰ Bob Wessels, *International Jurisdiction to Open Insolvency Proceedings in Europe, in particular against (Groups of) Companies* at [https://www.iiiglobal.org/sites/default/files/11- InternJurisdictionCompanies.pdf](https://www.iiiglobal.org/sites/default/files/11-InternJurisdictionCompanies.pdf) , accessed 23 February 2022.