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**.

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).

Very good.

Total: 10 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.' – 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."

Statement 1

This statement concerns the **right to give an undertaking in order to avoid secondary insolvency proceedings**. As the statement proposes, this is codified in **Articles 36 and 38(2) of the EIR Recast** (see also recitals 42-43). On the basis of oral assurances by appointed (joint) administrators, the local creditors will receive a treatment and enjoy benefits of secondary proceedings, without such proceedings formally existing. In other words, they are **synthetic secondary proceedings**. This provision is a codification of the innovative solution in the ***Collins & Aikman Europe SA [2006] EWHC 1343 (Ch)*** case, with the aim of balancing two scales, namely (1) centralizing control over the insolvent estate in a single jurisdiction, and (2) safeguarding the rights and legitimate expectations of local creditors regarding their priority rights under local insolvency laws.

Statement 2

This statement concerns **cooperation and communication within the EIR Recast framework** which stems from the principle of **mutual trust and sincere cooperation** for the functioning of the EU. These principles are codified in Articles 4(3) of the Treaty on European Union (TEU) and 81 of the Treaty on the Functioning of the European Union (TFEU). Judicial cooperation, or **cooperation and communication between courts,** is codified in **Article 42 of the EIR Recast** (see also recitals 3 and 48) which are codifications of some best practices regarding cooperation and communication between courts. See also, ***Case C-166/11, Bank Handlowy w Warszawie SA v Christianapol sp. z o.o.*, paragraph 62**, where the Court of Justice of the European Union (CJEU) ruled that the principle of sincere cooperation of Article 4(3) TEU requires the court of the secondary proceeding to take account of the objectives of the main proceeding and the EIR Recast which aims to ensure the efficient and effective cross-border insolvency proceedings through mandatory coordination.

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.

A purely universalist approach would mean a single court having jurisdiction, with one applicable law, and automatic recognition and enforcement across the EU.

The following are examples of provisions of the EIR Recast indicating a modified universalist approach.

Article 3(2) EIR Recast: secondary proceedings (jurisdiction)

This Article (see also recital 23 EIR Recast) provides the option to open secondary proceedings where a debtor has an "establishment" in the meaning of Article 2(10) ie 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. This is an example of modified universalism as opening secondary proceedings limits the (full) universal scope and effects of the main proceedings. The effects of the secondary proceedings are limited to the assets of the debtor situated within the territory of the Member State in which the secondary proceedings are opened.

In a similar vein, Article 3(4) provides the option to open territorial proceedings prior to the opening of main proceedings. Once the main proceedings are opened, the territorial proceedings become secondary proceedings.

Article 13 EIR Recast: contracts of employment (applicable law)

This Article (see also recital 72) limits the scope of the applicable law, which, in principle, is the *lex fori concursus* or the law of the Member State in which the insolvency proceedings are opened. This principle is codified in Article 7 of the EIR Recast (see also recital 66) and it upholds the universal approach. However, the exceptions listed in Articles 8-18 of the EIR Recast, modify this universal approach in applicable law by providing the option to apply laws of other Member States ie other than the lex fori concursus (eg lex rei sitae, lex causae, lex contractus, lex fori processus, or lex fori arbitri). Employment contracts, for example, are governed exclusively by the law of the Member State applicable to the contract of employment.

Article 33 EIR Recast: public policy (recognition and enforcement)

This Article lays down a ground/exception for a Member State to refuse insolvency proceedings opened in another Member State and/or to enforce a judgement if that would be manifestly contrary to the public policy of that Member State (particularly its fundamental principles or the constitutional rights and liberties of the individual). Thus, recognition and enforcement is not absolute, hence limiting the universal scope of the main proceedings.

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 main Article dealing with cross-border cooperation and communication between courts is **Article 42 of the EIR Recast** which aims to facilitate the coordination of main, secondary and territorial proceedings. This could be done by tools provided in a non-exhaustive list under Article 42(3) of the EIR Recast.

Recital 3 of the EIR Recast explains the ratio and aim of the new provisions on judicial cooperation. In order to achieve the proper functioning of the internal market, cross-border insolvency proceedings need to operate efficiently and effectively.

Recital 48 of the EIR Recast explains in further detail the need for such cooperation and communication. It argues that main insolvency proceedings and secondary insolvency proceedings can contribute to the efficient administration of the debtor's insolvency estate if there is proper cooperation between the actors involved in all the concurrent proceedings, for example by exchanging sufficient information.

Also, these provisions are reflected in court to court cooperation and communication with regard to insolvency proceedings that relate to two or more members of a group of companies, see **Article 57 of the EIR Recast.**

Question 2.4 [maximum 2 marks] 3

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 example is a solution to avoid the opening of secondary proceedings and is especially useful for the administration of groups of companies, namely the **right to give an undertaking** (also known as **synthetic secondary proceedings**) under **Articles 36(1) and 38(2) EIR Recast**.

The insolvency practitioner of the main insolvency proceeding could give a unilateral undertaking (ie a one-sided promise) to local creditors in respect of the assets located in the Member State in which secondary proceedings could have been opened. The insolvency practitioner promises to comply with the distribution and priority rights of these assets – which become a secondary asset pool – as per the law that would have applied were the secondary proceedings opened.

The second example is a legal instrument to control secondary proceedings and their opening, namely through a **stay** under **Article 38(3) EIR Recast**. The court may also stay the process of realization of assets under Article 46(1) of the EIR Recast.

Based on paragraph 1 of Article 38(3) EIR Recast, upon request of the insolvency practitioner or the debtor in possession, the court may, upon its discretion, grant a stay up to three months on the condition that there are suitable measures in place to protect the local creditors' interests. As per paragraph 2, the court may impose protective measures as well, for example barring the insolvency practitioner from removing or disposing any assets in the territory of the debtor's establishments. This stay ensures the integrity of the insolvent estate and provides a breathing space for parties to negotiate a restructuring deal. Once the deal is reached, the court *must* lift the stay, see paragraph 3. The court *may* lift a stay when an agreement cannot be reached, when it is detrimental for the creditors, or in case of a breach of a protective measure, see paragraph 4.

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.

Based on Article 46 of the EIR 2000, the Commission was required to present a report on the application of the EIR to the European Parliament, the Council, and the Economic and

Social Committee in June 2012. On 12 December 2012, the Commission presented a **Proposal for a Regulation amending the EIR 2000 (COM(2012)744)**.

The Commission acknowledged that the EIR 2000 is generally considered to be operating successfully in facilitating cross-border insolvency proceedings within the European Union. However, after conducting consultations of stakeholders and legal and empirical studies, it discovered several issues in the application of the EIR 2000, and proposed amendments for five main shortcomings. (COM(2012)744, pages 4-5).

Firstly, in Article 1 of the Proposal, it proposed to extend the **scope** by revising the definition of insolvency proceedings, including hybrid (proceedings which leave the existing management in place), pre-insolvency proceedings (proceedings providing for the restructuring of a company prior to insolvency), debt discharge proceedings, and other insolvency proceedings for natural persons. This extension in scope was considered crucial as such proceedings were introduced in the Member States as they tend to increase the chances of successful restructuring of businesses (COM(2012)744, pages 5-6). This amendment has been adopted and is now codified in **Article 1 of the EIR Recast**.

Secondly, in Article 3 of the Proposal, it proposed to clarify the **jurisdiction** rules and improve the procedural framework for determining jurisdiction. There are difficulties in determining which Member State is competent to open insolvency proceedings. Applying the COMI-rule has proven to be difficult in practice, especially due to potential forum shopping by legal and natural persons through abusive COMI-relocations (COM(2012)744, pages 6-7). This clarification has been adopted and is now codified in **Article 3 of the EIR Recast**.

Thirdly, as the opening of **secondary proceedings** could hamper the efficient administration of the debtor's estate, it proposed to provide for a more efficient administration of insolvency proceedings by enabling (1) the court to refuse the opening of secondary proceedings if it is not necessary - see Article 29a(2) of the Proposal, (2) the abolishment of the requirement that secondary proceedings must be winding-up proceedings, and (3) the improvement of cooperation between main and secondary proceedings, particularly between courts - see Article 31a of the Proposal (COM(2012)744, pages 7-8). This idea has been adopted, albeit phrased and structured differently, in **Articles 36, 38, and 42 of the EIR Recast.**

Fourthly, it found that there are problems relating to the rules on **publicity of insolvency proceedings and the lodging of claims**, as the publication or registration of decisions are not mandatory. It therefore, and for the sake of better creditor information, proposed in Articles 20a-20b of the Proposal (1) that Member States publish court decisions in cross-border insolvency cases in a publicly accessible electronic register, (2) that the national registers are interconnected, and (3) that a standard form is introduced for the lodging of claims (COM(2012)744, pages 8-9). These provisions are now codified in **Articles 24-25 of the EIR Recast.**

Lastly, as there are no specific rules dealing with the insolvency of multi-national enterprise groups or **group of companies**, and as each individual member of the group is dealt with in separate proceedings that are entirely independent from each other, the possibility of a successful restructuring of the group as a whole is often diminished. For this reason, the Commission proposed for a coordination of the insolvency proceedings concerning different members of the same group of companies by obliging insolvency practitioners and involved courts of different proceedings to cooperate and communicate. It also proposed empowering the insolvency practitioners with the possibility to request the courts for a stay of other proceedings and to submit a rescue plan for members who are subject to the insolvency proceedings (COM(2012)744, pages 9-10). There is a new chapter (**Chapter V**) introduced in the EIR Recast dealing with insolvency of group of companies, **Articles 56-77 EIR Recast.**

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.

With reference to the previous answer, the EIR Recast introduces or improves certain concepts and rules for the proper and efficient administration of a cross-border insolvency case. The following are three examples of such improvements and introductions.

One example is that the EIR Recast - although it allows for several parallel insolvency proceedings against the same debtor - also ensures that cooperation and communication is upheld. According to **Recital 48 of the EIR Recast, for an efficient administration of the insolvency estate and the efficient realization of the assets**, a proper cooperation between the actors involved in all concurrent proceedings is required. Previously, the EIR 2000 only mandated the insolvency practitioners in concurrent proceedings to communicate information to each other. **With the EIR Recast, a wide framework for cooperation and communication was introduced,** not only between insolvency practitioners under Article 41, but also between courts under Article 42, and between insolvency practitioners and courts under Article 43.

A second example for the efficient administration of cross-border insolvency cases are the provisions regarding enterprise group members. The EIR 2000 does not regulate this area, which is why the **EIR Recast introduced new provisions** (or a chapter of provisions) **concerning insolvency of groups of companies.** It should be noted however, that the Recast does not introduce a group COMI as a result of the deep-rooted entity-by-entity approach of the CJEU in the *C-341/04 Eurofood IFSC Ltd*. Case. Articles 56-60 reflect the cooperation and communication provisions mentioned in the previous paragraph, and Articles 61-77 introduce the group coordination proceedings (under the group coordinator). As such, members of a corporate group can be "grouped" under a single jurisdiction and can avoid significant transaction costs arising from multiple proceedings and increases the chances of achieving a (more coordinated) rescue of the whole group.

Another example would be to refuse or postpone the opening of secondary proceedings upon discretion of the court. In other words, the **right to give an undertaking** under Articles 36 and 38 EIR Recast. As secondary proceedings may hamper the efficient administration of the insolvent estate, the court (eg in Italy) opening secondary proceedings should be able, on request of the insolvency practitioner or debtor in possession, to postpone or refuse the opening, if the Italian court determines that the local Italian creditors would be treated as if secondary proceedings had been opened and that compliance will be upheld to apply Italian rules of ranking during the distribution of the assets located in Italy.

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.

First, it is important to note that any EU legal instrument is a compromise between 27 (back then 28) Member States. In order to achieve the necessary or minimum requirement for a piece of legislation to be adopted, and for the Member States to be "on board", compromises need to be made. Such compromises could weaken instrument itself and perhaps not attain the desired outcome.

The EIR Recast is a very welcome improvement for many stakeholders as the statement already mentions. However, some predominant issues are worthy to mention.

Whilst the EIR 2000 and (from an international scope) the Model Law on Cross-Border Insolvency, do not mention **group coordination proceedings** and insolvencies of members of a group were tackled entity-by-entity and by breaking up into parts - which was seen as diminishing the whole point of restructuring of the group as a whole, the idea of universality, procedural efficiency, the paritas creditorum (equal treatment of creditors), and value maximization.

The EIR Recast devoted a whole chapter (Chapter V) on such proceedings and introduced the group coordinator. However, as the statement suggests, doubts have been voiced on whether the group coordinator has any added value to resolve conflicts between group companies and their insolvency practitioners, for instance for the distribution of assets.

Recently, the Conference on European Restructuring and Insolvency Law (CERIL) conducted a study on Chapter V of the EIR Recast and published a statement (**CERIL Statement 2021-2 on EU group coordination proceedings**). They argue that the outcome of their study shows that even after 4-5 years after the EIR Recast became binding, "not a single significant case of a cross-border group insolvency has been handled under the rules on group coordination proceedings". CERIL claims that specific steps to develop proposals for the modification of the current provisions of the EIR Recast should be taken in order to facilitate the full potential of group coordination proceedings.

In the Annex of the CERIL Statement, one of the listed cons is the **lack of power of the group coordinator**. The EIR Recast provides a coordination mechanism named "group coordination proceeding" which is voluntary, as members of the group could opt in or out. Thus, the EIR Recast gives all individual insolvency practitioners taking part in the group coordination proceeding the chance to simply opt out, both at the commencement stage and during the process itself – for example if they do not like the group proposals made by the group coordinator. As such, the voluntary nature of group coordination proceedings (see **Recital 56** of the EIR Recast) and the possibility of an easy opt-out without explanation or good cause (**Article 64** of the EIR Recast) make the group coordination proceedings rather powerless. Good.

Another issue is the fact that the EIR **does not sanction** in cases when proposals from the group coordinator are disregarded or breached. The group coordination proceedings result in non-binding recommendations of a group coordinator. Instead of sanctioning substantive, procedural, or jurisdictional consolidation, the sole obligation "imposed" by the EIR Recast on insolvency practitioners is to state reasons why they do or will not follow the coordinator's recommendations. A successful outcome necessitates the willingness for cooperation from the majority of participants in the individual proceedings. Hence, even if the proceedings have been commenced, the creditors and insolvency practitioners are not obliged to follow the coordinator's recommendations or the group coordination plan in whole or in part (**Article 70** of the EIR Recast).

Moreover, even creditors with a minor role but still enough voting power could block the implementation of the outcome, resulting in the group proceedings to have no effect or to lack any force. In each proceeding, creditors and experienced insolvency practitioners with their own mindsets and strategies are involved. Therefore, proposals of a third person, namely the group coordinator, without an assertive power is unlikely to have much effect. Thus, the group coordinator is unable to impose its will on insolvency practitioners and companies in the group, resulting in to such proceedings being inefficient, and lacking certainty and predictability.

As such, the added value of Chapter V on group proceedings is rather limited. It may even be burdensome as it adds yet another layer of complexity in practice rather than providing an efficient solution to a problem. The benefits of these provisions are overshadowed by their disadvantages, to include additional costs, and loss of time

due to eg the unclear prospects and rules, uncertain results and outcomes because of to their non-binding nature.

The second part of this question asks how these shortcomings could be corrected or improved. One could suggest to include a provision with a sanction for not complying with the group coordination plan. The insolvency practitioner could still be able to opt-out or not to comply with the plan with expressed reasons, but the final decision should be left to the court. This would give the EU legal instrument more "teeth". This would also balance out the voluntary nature of the process with the power of the group coordinator.

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.

This question asks whether the Dublin High Court in Ireland has international insolvency jurisdiction under the EIR 2000.

According to **Article 3(1) of the EIR 2000**, the court of the Member State within the territory of which the **center of a debtor's main interests (COMI)** is situated shall have jurisdiction to open insolvency proceedings. Such a proceeding is a **main insolvency proceeding** and has universal scope, "main" because if local proceedings are opened, they will be subject to mandatory rules of coordination, and "universal" because, unless local proceedings are opened, all assets of the debtor will be encompassed therein, wherever located (see also **Virgos-Schmit Report 1996**, **point 14)** . The COMI was not defined in the EIR 2000. However, **Recital 13** provided some guidance stating that the COMI is "the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties". Normally this will be the place of the registered office in the case of legal persons. There can be only one main set of insolvency proceedings (**Virgos-Schmit Report 1996, point 15**).

Article 3(1) also stipulates that, for companies or legal persons, the place of the **registered office shall be presumed** to be the COMI, in absence of proof to the contrary.

In ***Case C-341/04 Eurofood IFSC Ltd***, the CJEU ruled that the COMI has an autonomous meaning and should be interpreted uniformly, independent from national interpretation of the term (see paragraph **31**). It also stated that the COMI should be identified by reference to objective criteria that are ascertainable by third parties in order to ensure legal certainty and foreseeability (paragraph **33**). Thus, the registered office

presumption can only be rebutted if objective factors which are ascertainable by third parties could lead to the conclusion that the COMI is located elsewhere than the registered office – such as letterbox companies (paragraphs **34&35**).

The "ascertainability by third parties"- criteria is linked to the time factor meaning that the activities of the debtor should be regular and lasting for a COMI to be established. The rationality derives from the fight against abusive forum shopping for a more favorable legal position to the detriment of the general body of creditors of the debtor.

In this case, the registered office of the furniture company "Cardinal Home" is located in Ireland. Therefore the COMI is presumed to be in Ireland. As such, the Dublin High Court in Ireland should, in principle, have international jurisdiction to open the requested insolvency proceeding.

However, it is clear from the facts of the case that Cardinal Home has a warehouse in Milan, entered into a credit agreement with an Italian bank, opened a bank account and negotiated with local distributers by signing some (non-binding) memoranda of understanding with them.

On the other hand, the registered office is in Ireland, the first store was opened in Cork, and it has warehouses across Europe (and not only in Milan). The question is whether the registered office presumption could be rebutted.

In ***Case C-396/09 Interedil Srl, in liquidation v Fallimento***, the CJEU stated that the registered office presumption is irrebuttable and wholly applicable if "the bodies responsible for the management and supervision of the debtor are in the same place as its registered office and the management decisions of the company are taken, in a manner that is ascertainable by third parties" (paragraph **50**). The CJEU recalled its ruling of the *Eurofood case* and stated that the presumption could be rebutted if, from the viewpoint of third parties, the place of a company's central administration is located elsewhere than that of its registered office. In other words, "if factors which are both objective and ascertainable by third parties enable it to be established (…)" that the COMI's location does not coincide with the place of the registered office (paragraph **51**). More importantly, the CJEU rules that the mere presence of company assets, contracts (concluded with a financial institution), etc located in a Member State other than that in which the registered office is situated cannot be seen "as sufficient factors to rebut the [registered office] presumption (…) unless a comprehensive assessment of all the relevant factors makes it possible to establish, in a manner that is ascertainable by third parties, that the company's [COMI] is located in [an]other Member State" (paragraph **53**).

Thus, while one could argue that the fact that Cardinal Home owns immovable property (warehouse) in Milan, has a bank account and a contract concluded with an Italian bank, and non-binding memoranda of understanding with local parties - may be regarded as objective factors and, - since they are likely to be matters in the public domain - as factors that are ascertainable by third parties, the CJEU clearly stated that these factors are insufficient to rebut the registered office presumption.

Therefore, based on the EIR 2000 and the CJEU caselaw, the COMI is located in Ireland, which means that the Dublin High Court has international jurisdiction to open the requested insolvency proceeding.

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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.

To determine whether the EIR Recast applies to this case, one should assess whether it falls under the EIR Recast's personal, material, temporal, and territorial scope.

Firstly, the **material scope** is codified in **Article 1(1)** of the EIR Recast. According to this Article, the EIR Recast only applies to public collective proceedings and interim proceedings, which are based on insolvency-related laws and in which, for rescue, adjustment of debt, reorganization or liquidation purposes (a) the debtor is totally or partially divested of its assets and an insolvency practitioner is appointed, (b) the debtor's assets and affairs 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, on the condition that the proceedings in which the stay is granted provide for suitable measures to protect the general body of creditors. Such proceedings are listed country-by-country in **Annex A** of the EIR Recast. As such, any proceeding in that list would trigger the provisions of the EIR Recast. Proceedings not listed in Annex A do not enjoy the benefits of automatic recognition in other Member States.

In this case, the examinership proceeding is a proceeding listed in Annex A of the EIR Recast under the Member State Ireland. Therefore, the type of proceeding filed by Cardinal Home and opened by the Dublin High Court satisfies the first criterion.

Secondly, the **personal scope** is stipulated in **Article 1(2)** of the EIR Recast. As a general rule, the EIR Recast applies to insolvency proceedings listed in Annex A irrespective of whether the debtor is a natural or a legal person. However in this Article, some entities are explicitly excluded such as (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, and (d) collective investment undertakings. Such entities are governed by other legal instruments such as the BRRD (Directive 2014/59/EU), CRR (Regulation (EU) No 575/2013), CRD IV (Directive 2013/36/EU), EMIR (Regulation (EU) No 648/2012), DGSD (Directive 2014/49/EU), UCITS (Directive 2009/65/EC), or the AIFMD (Directive 2011/61/EU).

In this case, Cardinal Home is not excluded from the personal scope of the EIR Recast as it does not fall under the exceptions listed under Article 1(2). After all, Cardinal Home is a company and not an entity listed under the exceptions. As such, the second criterion is satisfied.

Thirdly, with regard to the **geographical scope**, **Recital 25** of the EIR Recast states that the EIR Recast only applies to proceedings in respect of a debtor whose COMI is located in the EU. The competent court will examine if it is actually located within its jurisdiction. Thus, the EIR Recast does not apply where Denmark or non-EU Member States are concerned (see also the **Virgos-Schmit Report 1996, point 44(b)** for further guidance). Two side notes, however, are that, although there are no extensive set of rules provided in the EIR Recast itself, the EIR Recast applies to cases with no cross-border elements. Also, the CJEU extended the geographical scope of the EIR to persons whose residence is located in a third country for the sake of legal certainty and based on the principles of foreseeability and the universal character of main insolvency proceedings (see *Case C-328/12 Ralph Schmidt v Lilly Hertel,* paragraphs 23 *and* 39). The third country would be under no obligation to recognize or enforce a judgement, unless an international treaty or applicable national law provides otherwise.

Going back to our case, it is established that the furniture company "Cardinal Home" has its COMI in an EU Member State (which is not Denmark), namely Ireland. As the Dublin High Court has jurisdiction to open proceedings since the COMI is in Ireland, the third criterion is satisfied.

Lastly, the **temporal scope** codified under **Article 84(1)** of the EIR Recast states that it only applies to insolvency proceedings opened after 26 June 2017, as this is the date of entry into force of the EIR Recast, see **Article 92**. Before this date, the EIR 2000 applies. It is important to note that the relevant date is not the date of application for the opening of the insolvency proceedings, but the date of the decision of the court to open insolvency proceedings.

In this case, as the Court opened the proceedings on the 30th of June 2017, the fourth and last criterion is also satisfied.

Hence, all four requirements for the case to fall within the scope of the EIR Recast are satisfied. As such, the EIR Recast **is applicable** to this case.

To open a secondary insolvency proceeding, an establishment of the debtor is required in that member state according to Article 3 sub 2 EIR Recast.

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.

Secondary insolvency proceedings under **Article 3(2)** of the EIR Recast are proceedings opened in the territory where the debtor has an "establishment" within the meaning of **Article 2(10)** of the EIR Recast. As such, courts of the Member State in which the debtor has an establishment, and not a COMI, have jurisdiction to open secondary insolvency proceedings. The effects of those proceedings are restricted to the assets of the debtor situated in the territory Member State of the secondary proceeding. It thus creates a separate insolvency estate or *lex concursus secundarii* and limits the universal scope of the main insolvency proceeding. The aim of such proceedings are to protect local interests and creditors, to facilitate the handling of complex insolvency estates, but also to support the main insolvency proceeding (**Virgos-Schmit Report 1996, points 32&33)**. As such, secondary proceedings can only be opened after the opening of main insolvency proceedings, see Article 3(3) of the EIR Recast. As a side note, in certain cases, territorial proceedings could be opened prior to the main insolvency proceeding. However, they turn into secondary proceedings after the main proceeding is opened, see Article 3(4) of the EIR Recast.

Article 2(10) of the EIR Recast states that an 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 asset".

In ***Case C-396/09 Interedil Srl, in liquidation v Fallimento***, the CJEU ruled that the existence of an establishment should be determined on the basis of objective factors which are ascertainable by third parties (paragraph 63). This definition links the pursuit of an economic activity to the presence of human resources, which indicates the need for a minimum level of organization and a degree of stability. Therefore, "the presence alone of goods in isolation or bank accounts does not, in principle, satisfy the requirements for classification as an 'establishment'" (paragraph 62).

The purpose of the "non-transitory activity" criterion is provided in the Virgos-Schmit Report, where it states that a purely occasional place of operations cannot be classified as an establishment. Instead there should be a degree of continuity and stability from the viewpoint of third parties (see **point 71** of the Report).

In our case, Cardinal Home owns immovable property (warehouse) in Milan, has a bank account and a contract concluded with an Italian bank, and non-binding memoranda of understanding with local parties. As discussed in the CJEU caselaw above, owning an immovable property and/or a bank account is insufficient to satisfy the definition of an "establishment" under the EIR Recast.

On the one hand, one could argue that, for the sake of protecting local creditors such as the Italian bank (who filed a petition to open the proceedings in Italy in the first place) and other local creditors with whom the company negotiated with, the court could open secondary proceedings.

On the other hand, it can be deducted from the facts of the case that Cardinal Home entered into these agreements for the purpose of entering the Spanish luxury furniture market.

As such, the conducted activities seem to be temporary (instead of stable and continuing activities), leaving only the immovable property and the bank account within the territory of Italy which remain insufficient for an “establishment”. As such, in my opinion, there is **no establishment and therefore no possibility for the Italian court to open secondary insolvency proceedings**. This seems to be more in line with the CJEU caselaw.

However, more information is needed on whether the company conducts, from the viewpoint of third parties, non-transitory economic activities with human means and assets within the territory (or whether the negotiations were purely occasional). The facts of the case should be carefully scrutinized. The final decision on whether or not to open secondary insolvency proceedings is left to the discretion of the Italian court.

Total: 15 out of 15.

*** End of Assessment ***

This is an excellent paper. Well done.

Total: 50 out of 50.