



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).
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- 6.1 If you selected Module 2B as one of your **compulsory modules** (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is **23:00 (11 pm) GMT on 1 March 2022**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2022. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
- 6.2 If you selected Module 2B as one of your **elective modules** (see the e-mail that was sent to you when your place on the course was confirmed), you have a **choice** as to when you may submit this assessment. You may either submit the assessment by **23:00 (11 pm) GMT on 1 March 2022** or by **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. If you elect to submit by 1 March 2022, you **may not** submit the assessment again by 31 July 2022 (for example, in order to achieve a higher mark).
7. Prior to being populated with your answers, this assessment consists of **9 pages**.

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total]

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

The EIR 2000 substantively harmonised the national insolvency law of the Member States.

- (a) False. The objective of an EU regulation is not legal harmonisation.
- (b) True. Since the entry into force of the EIR 2000, the insolvency laws of the Member States are similar.
- (c) False. The objective of the EIR 2000 was not to harmonise aspects of national insolvency laws but to provide non-binding guidelines only.
- (d) False. While the EIR 2000 attempted to harmonise national insolvency laws, its focus was on procedural aspects of insolvency law, not substantive ones.**

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.

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.”

Answer: 2.1.1 The statement pertains to the concept of “synthetic” secondary proceedings as mentioned in Article 38(2) EIR Recast, where the court in the secondary insolvency jurisdiction will refrain to open such proceedings on an undertaking being given by Insolvency practitioner as per Article 36 for ensuring the protection of general interest of the local creditors in the main insolvency proceedings and in return, the actual benefits of secondary proceedings (such as preferential payments) without the formal or actual existence of such proceedings may be reaped by local creditors.

This unilateral undertaking by Insolvency practitioner will avoid the opening of secondary insolvency proceedings in that particular jurisdiction, provided the adequate protection to the rights of such local creditors is mentioned therein. This concept has been derived from the judicial innovation in Collins & Aikman Europe SA and is structurally framed in EIR Recast only to serve the very purpose of avoidance of complications that arises due to opening of secondary insolvency proceedings.

2.1.2

Recital 3 of EIR Recast states that

“Proper functioning of internal market requires that that cross-border insolvency proceedings should operate efficiently and effectively. This Regulation needs to be adopted in order to achieve that objective, which falls within the scope of judicial cooperation in civil matters within the meaning of Article 81 of the Treaty.”

This points out that EIR Recast has been therefore adopted for the efficient administration of insolvency proceedings and proper coordination, communication of judiciary and other stakeholders which are essential for effective functioning of internal market.

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.

Answer: **Article 3 EIR Recast** allows the opening of main insolvency proceedings where COMI of debtor is situated along with the opening of secondary insolvency proceedings where the establishment of debtor is situated. The main proceedings are guided by way of law of insolvency forum (lex concursus) to ensure the concept of universalism in such centralised proceedings for opening, conduct and closure along with the effects on debtor, creditors and third parties. However, this approach did not provide adequate protection to particular types

of creditors like preferential creditors who enjoy security interests, privileges and priority claims etc.

Recital 23 cures such deficiency by way of permitting the opening of parallel proceedings in all cases where debtor has an establishment and *lex fori concursus secundarii* governs the opening, conduct, closure and effects of such secondary proceedings. Such secondary proceedings have limited territorial effects within that particular jurisdiction and this therefore protect the diversity of interest of local creditors or third parties, promote effective administration of complex insolvency estates and mitigate difficulties arising from divergent national laws as mentioned in Recital 40. **The effects of one dominating proceedings have been modified by such secondary proceedings and this highlights the concept of modified universalism which limits the otherwise universal scope of main insolvency proceedings.**

There are few exceptions to the application of *lex concursus* and this includes situations like where the third parties enjoy rights in rem (Article 8 EIR Recast), Detrimental acts (Article 7(2)(m)), Contracts of employment (Article 13), pending lawsuits or arbitral proceedings (Article 18) and in such cases, if secondary proceedings are opened up then *lex fori concursus secundarii* will prevail over the these exceptional circumstances.

Also, **Article 20(2) EIR Recast** also states that the procedural and substantive effects of main proceedings will not apply to the jurisdiction of secondary proceedings as *lex concursus* ends where *lex fori concursus secundarii* begins. This again emancipates the idea of modified universalism.

This idea is also subtly highlighted in **Article 45(1) EIR Recast** where the creditors are required to lodge claims in main and secondary proceedings separately. This reflects that the universality of claims-collation with main proceedings is limited or modified by the mandate of separate claim-lodging with secondary proceedings.

Article 19(2) EIR Recast adds that recognition of main proceedings would not affect the opening of secondary proceedings as the concept of modified universalism has been adhered to in the text which ensures that plurality of secondary proceedings might exist in place.

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.

Answer: Cross border cooperation and communication is a salient and innovative feature of EIR Recast, unlike EIR 2000 which mentioned cooperation between insolvency practitioners only. This framework is reflected **Article 42(1) EIR Recast** which mandates that cooperation between courts is required even before the opening of insolvency proceedings to ensure the avoidance of abusive forum shopping. Even an independent person or body may be appointed provided such appointment is not incompatible to the existing rules of the jurisdiction. Relevant part of Article is reiterated here:

“ a court before which a request to open insolvency proceedings is pending, or which has opened such proceedings, shall cooperate with any other court before which a request to open insolvency proceedings is pending, or which has opened such proceedings, to the extent that such cooperation is not incompatible with the rules applicable to each of the proceedings....”

Article 42(3) EIR Recast provides for better coordination in the appointment of the insolvency practitioners, in administration and supervision of the debtor's assets and affairs, in conduct of hearings, in approvals of protocols etc.

Recital 50 EIR Recast also provides that such coordination may be effectuated by appointment of single insolvency practitioner after taking into consideration the relevant rules applicable to each proceedings including the qualification and licensing of insolvency practitioner. The joint hearings and electronic communications are also used effectively on the pedestals of cooperation and coordination in EU jurisdictions and the all the ideas are culminated by the EIR Recast framework.

Question 2.4 [maximum 2 marks]

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.

Answer: Secondary proceedings hamper the effective administration of debtor's estate resulting in additional costs including transaction costs, lengthening of process, fragmentation of debtor's estate etc. and to avoid this conundrum, EIR recast has introduced two sets of legal instruments in **Article 38(2) r.w. Article 36 EIR Recast** referring to synthetic secondary proceedings and **Article 38(3) r.w. Recital 45 EIR Recast**.

Synthetic Secondary proceedings are virtual or artificial proceedings which do not exist in reality but produce the effects of their very existence by virtue of an undertaking made by Insolvency practitioner of main insolvency proceedings as per the terms of Article 26 EIR Recast. This undertaking when accepted by the court where the opening of secondary insolvency proceedings is pending, such court would be bound to not to open the secondary proceedings as the general interest of local creditors in terms of priority payments or preferential rankings would be taken care of in the main insolvency proceedings as per the undertaking. This provision has been absent in EIR 2000 and therefore the avoidance of secondary proceedings would entail the level playing filed for all the stakeholders. This allows centralisation of control over major decisions in one jurisdiction and also safeguards the rights and legitimate expectations of local creditors. Since there are few essential substantive and procedural requirements (Article 36 EIR recast) in relation to the factual assumptions, official language and necessary approvals by local creditors etc, minimum discretionary power has been therefore granted to the court for not avoiding the secondary insolvency proceeding.

In order to ease the complex cross border insolvency, EIR Recast has included the provision of **Stay of opening of insolvency proceedings to preserve the efficiency of the main insolvency proceedings as per Recital 45 of EIR Recast**. This stay though does not take place automatically and is obtained only upon the request of the insolvency practitioner or the debtor-in-possession as mentioned in Article 38(3) EIR Recast and this is daunted by the wide discretionary powers of the court. The maximum period for the operation of stay is 3 months and even conditions may also be attached to ensure that the interests of local creditors are adequately protected.

The stay may therefore provide sufficient space to effectively negotiate with creditors and rescue the feasible entities but there are some situations when the stay may be lifted and this includes detrimental effects on creditors', infringement of conditional orders by Insolvency practitioner of main insolvency proceedings or approval of a restructuring plan etc. The stay is therefore a weaker form of protection in comparison to synthetic proceedings which has better applicability in terms of time period and discretionary powers of court.

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]

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.

Answer: The European Commission consulted various stakeholders to understand if the European Insolvency Regulation (2000) needed amendments for successful proceedings of cross border insolvency and it was found that the Regulations do not reflect the current EU priorities and national practices in rescuing an entity and therefore various aspects were highlighted for improvisation:

The Regulations suffer from directions over pre-insolvency proceedings, hybrid proceedings, personal proceedings etc.

The concept of forum shopping has been widely found in place and the competence of member state jurisdiction is often found to be disruptive especially in case of COMI relocation. Secondary proceedings have to be mandatorily liquidation oriented and the parallel course of secondary and main proceedings is often found to be difficult in proper administration of debtor's estate as the then liquidator (Insolvency practitioner) cannot control the assets of secondary insolvency jurisdiction.

Further amendments to rules on publicity of insolvency proceedings and lodging of claims as no mandatory publication for opening of insolvency proceedings exist. The urgent need of European Insolvency Register was highlighted as even the judges remained unaware of the parallel proceedings that might have been opened up in other parts of EU and all the stakeholders including creditors or the third parties or the potential creditors remained unaware the process of filing claim.

Rules relating to the insolvency of multi-national enterprise groups were major missing as the restructuring of the enterprise as a whole could not be achieved as the basis of EIR 2000 was based on the concept that such enterprises need to be treated separately as all the entities are independent.

The above proposed reforms were therefore incorporated in EIR Recast and the major outlines included the scope, jurisdiction, secondary proceedings, publicity of proceedings and lodging of claims, group companies.

SCOPE: The definition of "insolvency proceedings" include pre- insolvency, hybrid proceedings, debt discharge proceedings of natural persons. The scope of Article 1 EIR Recast widened to include all public collective proceedings on laws relating to insolvency and for the purposes of rescue, adjustment of debt, reorganisation or liquidation. The broadened coverage is to effectively promote restructuring and rescuing economically viable financially distressed entities and therefore the basic liquidation oriented approach has now been shifted to rescue oriented.

JURISDICTION:

Definition of COMI inserted in Article 3(1) of EIR Recast and various circumstances in which basic presumption of registered office as the place of COMI would be rebutted are mentioned.

The suspect period of three months has been introduced to avoid forum shopping and therefore prevents fraudulent manipulation of COMI. Procedural framework for determining jurisdiction has been incorporated under Recital 25 EIR Recast and the court is required to check if it has relevant jurisdiction and the grounds underlying it need to be recorded.

SECONDARY INSOLVENCY PROCEEDINGS:

The introduction of concept of Synthetic proceedings in Article 38(2) r.w. Article 36 EIR Recast allows for efficient administration of debtor's estate and effective safeguards have been put in place to ensure that rights of local creditors are genuinely protected without the opening of secondary proceedings in real. The complexity of the parallel proceedings has been removed by including this innovative procedure and at the same time allowing the benefits to be reaped.

The three-month stay on the secondary proceedings have been held to be legally admissible by way of Article 38(3) r.w. Recital 45 EIR Recast which will provide a breather space for effective restructuring of the debtor. Also, the secondary proceedings have been widened to include all insolvency related proceedings.

Improved coordination and communication between courts (Article 42 EIR Recast), between insolvency practitioners (Article 41 EIR Recast) between courts and insolvency practitioners (Article 43 EIR Recast) have also been accordingly envisaged in EIR Recast.

PUBLICITY OF INSOLVENCY PROCEEDINGS AND LODGING OF CLAIMS:

Certain minimum information related to date of opening of proceedings, type of proceedings, date of closing of proceedings, name of liquidator, deadline for lodging claims etc need to be mentioned by insolvency practitioners or debtors in possession as per Article 28(1) of EIR Recast. Article 54 also casts responsibility on courts/practitioners to inform foreign creditors by use of individual notices or mails etc. It is imperative to note that other substantive and procedural frameworks including the Insolvency registers under Article 25 of EIR Recast have been incorporated to ensure the proper publication of insolvency proceedings. E-justice portal is yet another remarkable initiative for inter connectivity of insolvency registers.

GROUP COMPANIES:

Proper cooperation and communication between different insolvency practitioners and courts have been envisaged to ensure the effective administration of entities of the same group. Procedural tools given to stay or rescue the entity has been handed over.

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.

Answer: The overall success of EIR 2000 has not been suspected but considering the general EU practices and priorities certain amendments were crucial to effective operation of Regulation and many innovative concepts were introduced and few of them include:

INTRODUCTION OF SUSPECT PERIOD:

It has been observed that as a matter of manipulation or because of fraudulent intentions, the debtor might shift its COMI shortly before the opening up of insolvency proceedings and in

such cases EIR Recast has been innovated to provide discretionary powers to court to disregard the basic presumption of registered office as COMI. The Article 3(1) of EIR Recast mandates that the presumption shall only apply if the registered office has not been moved to another member state within three-month suspect period prior to the request for the opening of insolvency proceedings. This will thereby avoid the abusive forum shopping by debtors who have mala fide intentions to preserve their illegitimate assets which is detrimental of general body of creditors.

This suspect period is applicable to principal place of business where the insolvency of individuals is concerned who carry the independent business/professional activity. In case of individuals, the look back period for determining the habitual residence shall be six months.

SPECIAL CHARACTERISTICS OF SECONDARY INSOLVENCY PROCEEDINGS:

The concept of modified universalism is exquisite to the EIR Recast as the secondary proceedings are allowed to run simultaneously to ensure that territorial implications come to rescue the local creditors. Even the application of law of secondary proceeding jurisdiction would be applicable where there is pending lawsuit or arbitral proceedings, unlike EIR 2000 which had limited its scope to lawsuits only. Also, the scope of secondary insolvency proceedings to include various insolvency related proceedings with rescue-oriented approach are allowing the restructuring probabilities in such proceedings under the ambit of EIR Recast only.

On the other side, EIR Recast has taken effective measures to the efficient administration of the debtor's estate by incorporation of Synthetic insolvency proceedings in Article 38/36 of EIR Recast which provides that unilateral undertaking by the insolvency practitioner in relation to the protection of the interests of local creditors would avoid the opening of such secondary proceedings

Furthermore, Communication and Cooperation has been ensured between insolvency practitioners (Article 41 EIR Recast), between Courts (Article 42 EIR Recast) and between insolvency practitioners (Article 43 EIR Recast) to ensure greater administration in contrast to the earlier coordination mandate that restricted to only liquidators. This comprehensive framework therefore widens the scope and policy preferences towards business rescue approach.

NOTIFICATION OF CREDITORS AND INSOLVENCY REGISTERS:

The major progress in EIR Recast in comparison to EIR 2000 includes the incorporation of various rules which makes the participation of foreign creditors viable and adding to the effectiveness of insolvency administration.

EIR 2000 had imputed discretions in the hands of liquidator in relation to informing the creditors but Article 28(1) EIR Recast obliges the insolvency practitioners and debtors in possession to request the publication of notice of opening of insolvency proceedings, whether main or secondary, at the place of debtor's establishment. Separate intimation needs to be given as per Article 54 SIR Recast as per the debtor's books, contracts, other statutory filings record etc. Some basic details need be mentioned in the notice as per Article 55 EIR Recast along with a standard form for the lodging of claims.

Article 25 talks about maintenance of Insolvency Registers in their territory for information on insolvency proceedings. It is pertinent to mention here that even EIR 2000 had the requirement of insolvency registration system but the system has some inherent deficiencies and now a replacement to the same is sought. European E-justice portal will herein act as the central public access point to ensure interconnection of various registers.

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.

Answer: The EIR Recast is overall welcomed by all stakeholders in view of new concepts introduced. The introduction of one whole chapter on group proceedings has been hailed about. But certainly few shortcomings exist and these are as following:

Group Coordination Proceedings

The EIR Recast had brought procedural rules on coordination of insolvency proceedings of the various members of group without bringing in any substantive, procedural or jurisdictional consolidation. These procedural rules have proven to be modest in the sense that the entire proceedings have been left to the discretion of member of the group if the entity wants to be resolved by way of group coordination proceedings.

Even the actions by the group coordinator are non-binding in nature and the entire essence of the rules are lost, the moment such freedom is vested with the individual group member. The costs and the complexity of such group proceedings is not proportional to the gains of such coordination. Also. The ambit of EIR Recast is easily evaded by group entities who have COMI outside the EU.

The high level of burden entrusted upon the Group coordinator (Article 72 EIR Recast) and the insolvency practitioner for justifying the opening of group proceedings before the Court as per Recital 55, Article 61 EIR Recast). The specific right to object against the inclusion has been vested with the Insolvency Practitioner who has been appointed in a concerned group entity as per Article 64(1) EIR Recast without allocating any substantial reasons for it, seems to be diluting the stringent or sanctioning effect of the provisions.

There are few suggestions which might cure the above defects and those are presented hereunder.

- The process may be modified and rectified to ensure more cooperation and coordination by bringing in concept of group COMI so that jurisdictional consolidation is assured. The main court, just like the main proceedings, might be indicated on the basis of underlying control and unity, which will then be decisive of all matters of such group proceedings.
- The entire voluntary nature of the group member in relation to the inclusion in the proceedings has proved to be fragile and the final decision be entrusted to that of the Main Court having COMI of Main Group entity. Moreover, the reasoned statements need to be given by Insolvency practitioner for objecting against the inclusion as per Article 64(1) EIR Recast.

Cooperation and communication in Group Proceedings

Though Recital 53 EIR Recast entails that if COMI of various group entities is located within one member state then one particular court may be entrusted with the jurisdiction to deal with Group Insolvency Proceedings but still it's a missed opportunity as all the rules fail to ensure effective coordination while every single draft has been framed while keeping in mind the legal sovereignty or personality of each group member.

The duties of cooperation and communication in the context of group insolvencies has been entrusted with Insolvency practitioners, courts and both under Article 56, 57 and 58 EIR Recast respectively. The only role they need to perform is to facilitate effective administration of group proceedings unlike the pro-active role they are required to play in context of main and secondary proceedings. These Articles are less prescriptive. The cooperation between proceedings is demanded only when commercial sense is made out and only the commercial aspect if given priority over effective administration which hits the basic of the Chapter outline. The conflict of interest that is really probable to arise in case of such group proceedings deter Insolvency practitioners to take bold move and ask for cooperation as they have not been invested with vibrant powers to deal with such situations. Since lot of grounds exist for refusal of cooperation, this act as deterrent factor.

This situation may be improvised **[improved?]** by making the framework more prescriptive and adding compulsory obligations upon Insolvency practitioners and courts to have the group consolidation approach. The mandatory role needs to be assigned to the players to actively apply for such group consolidations for the overall benefit of the stakeholders.

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.

Answer: Cardinal Home has its registered office in Ireland and has various establishments across Europe including Italy. Since main insolvency proceedings are intrinsically connected to the debtor's Centre of Main Interest (COMI) and here Ireland can be presumed to be COMI as Cardinal Home conducts the administration of its interests on a regular basis from Ireland only. Considering the facts of the case, it can be ascertained that creditors must relate the company origins to Ireland as the major conduct of business is done from Ireland.

But since EIR 2000 does not specifically mandate the registered office presumption as mentioned in EIR Recast but certain jurisprudence is available to resolve the conundrum. In Eurofood IFSC Ltd it has been held that COMI is peculiar to the regulation and autonomous meaning need to be given to the term to ensure that its application is uniform in all the member states. Also, it has been emphasized that the activities of the debtor in a particular member state should be regular and lasting to create COMI and here since the debtor has been

operating from Ireland since 2009 and examinership proceedings have been filed in 2017, COMI can be safely presumed to be in IRELAND.

Since EIR 2000 states that international jurisdiction for insolvency cases lie within EU, the courts of the member states are designated to open insolvency proceedings. The situation is similar in EIR Recast as mentioned in Recital 26. The territorial jurisdiction for opening up of insolvency proceedings is not a matter of EU law but rather it is national/domestic law of the country that designates their domestic courts for entertaining such proceedings.

The High Court of Dublin will have the jurisdiction as the company seeking the court protection is required to present a petition to the Circuit Court or the High Court as per the relevant laws of Ireland as the territorial jurisdiction of insolvency proceedings will be governed by domestic laws of the IRELAND and here Companies Act,2014 being the relevant statute. The High Court has the jurisdiction to entertain the examinership proceedings.

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.

Answer: The major pedestals that the Dublin High Court would test would cover the Material Scope, Temporal Scope and Personal Scope and territorial Scope.

Material Scope: The Article 1 EIR Recast mandates that the proceedings must relate to insolvency and for the purpose of rescue, adjustment of debt, reorganisation or liquidation and specific list of such proceedings is mentioned in Annex A of the EIR Recast. In the given example, Examinership proceedings have been specifically stated in Annex A as item no. 7 in EIR Recast and therefore EIR Recast is applicable. Recital 9 further states that EIR Recast should apply without any further examination by the courts of another Member State as to whether the conditions set out in the Regulation are met.

Temporal Scope: If the proceedings are opened after 26 June 2017 as mentioned in Article 92 EIR Recast then such proceedings shall be governed by EIR Recast and all proceedings opened before this date shall be governed by EIR 2000. Since the indicate date in the question is mentioned as 30 June 2017, then Article 92 EIR Recast applies and now the Dublin High Court is bound to follow the EIR Recast Regulations.

It is pertinent to mention here that the Dublin High court must pass the judgment of opening of insolvency proceedings on the indicated date as the relevant time of the opening of insolvency proceedings means the time at which the judgment opening insolvency proceedings becomes effective as per the mandate of Article 2(8) and 2(7) of EIR Recast.

Personal Scope: since some entities are excluded from the personal scope of EIR Recast and the company in question does not relate to insurance undertakings, credit institutions, investment firms, collective investment undertakings etc. and therefore, the company is rescued from the excluded entities. Personal scope would definitely entail the application of EIR Recast.

Territorial Scope: The EIR Recast is applicable to all member states excluding Denmark. Recital 25 also states that EIR Recast would apply only if the debtor's COMI is located in EU. Since the debtor's COMI may be presumed to be in Ireland as per the registered office presumption and therefore, the territorial scope makes it clear that the present example falls within the jurisdiction of Dublin High Court.

Question 4.3 [maximum 5 marks] 2.5

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.

Answer: Since it becomes clear as per the above answer that EIR Recast would become applicable to the present set of facts. Since EIR Recast allows for modified Universalism, it permits the opening of secondary insolvency proceedings as per Article 3(2) EIR Recast and the effects of secondary proceedings would be restricted to the particular member state as mentioned in Recital 23.

The debtor company has its main operations in Ireland and has entered with certain memoranda of understanding with local Italian distributors as part of its expansion strategy. As has been held in *Interdil Case*, minimum level of organisation and degree of stability is required for concurrence of an “establishment” as per the definition. The presence alone of goods in isolation or bank accounts does not in principle satisfy the requirements for classification as an “establishment”. The debtor in this case has its warehouses in Italy and subsequently opened up bank account and even participated to negotiate with local distributors. The cumulative impact of the three might bring legal certainty and foreseeability concerning the jurisdiction of Italian Court as the objective factors seem to be fulfilled to the extent.

Under-developed answer.

- According to Article 3(2) EIR Recast, where the debtor’s COMI is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if it possesses an establishment within the territory of that other Member State.
- Under Article 2(10) EIR Recast, ‘establishment’ means any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets.
- Relevant case law: *Interedil Srl, in liquidation v Fallimento Interedil Srl*, Case C-396/09, ECLI:EU:C:2011:671 (Oct. 20, 2011), *Burgo Group SpA v Illochroma SA*, Case C-327/13, ECLI:EU:C:2014:2158 (Sep. 4, 2014).
- The facts of the case do not support the finding of an establishment of Cardinal Home in Italy. The presence alone of assets (leased-out warehouse) in isolation, contractual relations with a local bank (including maintenance of a bank account) and occasional negotiations (whether individual or collective) with local distributors do not qualify as ‘non-transitory economic activity with human means and assets’. The requisite minimum level of organisation and a degree of stability (see para. 64 in *Interedil*) is evidently missing.
- Therefore, under the EIR Recast, secondary insolvency proceedings cannot be opened in Italy.

Total: 12.5 out of 15.

*** End of Assessment ***

Total: 47.5 out of 50.