



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).

B was the correct answer.

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).

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks] 2

The following **two (2) statements** relate to particular provisions / concepts to be found in the EIR Recast. Indicate the name of the provision / concept (as well as the relevant EIR Recast article), addressed in each statement.

Statement 1. “This article introduces a legal regime for the avoidance of secondary insolvency proceedings, based on the unilateral promise given by the main insolvency practitioner to local creditors that they will receive treatment ‘as if’ secondary proceedings had in fact been open.”
– Articles 36/38

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

[The Statement 1, talks about the concept of “**SYNTHETIC PROCEEDINGS**” (or Virtual Proceedings). The Concept has application in the context of opening of secondary insolvency proceedings in an EU Member State where the debtor does not have their COMI but does have an establishment. While the secondary insolvency proceedings are limited to the debtor’s assets in the member state where they are opened, but such proceedings do pose substantial challenge with regard to smooth conduct of insolvency process in the main proceedings and also have significant cost implications. To meet this challenge, a new approach was adopted in the case of **Collins Vs Aikman Europe SA**. Under this concept, IP in the main insolvency proceedings gives a unilateral undertaking in respect of the assets located in the Member State in which secondary insolvency proceedings could be opened, that when distributing those assets or the proceeds received as a result of their realization, it will comply with the distribution and priority rights under national law that creditors would have if secondary insolvency proceedings were opened in that Member State.

The concept and objective of such proceedings is explained under Recital (42) of EIR- Recast and the related legal support is provided by way of Article 36 of EIR- Recast.

[The Statement 2, reflects the concept of “**MODIFIED UNIVERSALISM**” and finds its reflection in the Recital (3) of EIR Recast which takes note of the fact that for proper functioning of the internal market requires that cross-border insolvency proceedings should operate efficiently and effectively. Recital (5) further elaborates it by mentioning that Regulation should include provisions governing jurisdiction for opening insolvency proceedings and recognition and enforcement of judgments issued in such proceedings, and provisions regarding the law applicable to insolvency proceedings and provide for coordination of insolvency proceedings which relate to the same debtor or to several members. The legal effect of this is found in Article 41 of EIR Recast, which provides for Cooperation and communication between insolvency practitioners, Article 42 which lay down mechanism for Cooperation and communication between courts, and Article 43 with regard to Cooperation and communication between insolvency practitioners and courts.]

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.

[Challenges of cross border insolvency have given rise to different theories to deal with such challenges. The main two theories being "Unilateralism" and "Universalism" of the legal proceedings. While the first propagate about the local effect of insolvency proceedings and advocates multifarious insolvency proceedings in different jurisdictions, the Universalism, on the other hand propagated the ideal of having one insolvency proceeding with universal effect.

Cross border insolvency also has challenges as it involves the issues touching upon sovereignty and local law of the States. These challenges lead to development of "Modified Universalism" which while adopting the universalistic nature of proceedings allow opening up of various insolvency proceedings in local jurisdiction of related states with emphasis co-ordination and co-operation between the judicial court, insolvency professionals, judges and Courts and administrators with a view to achieve a coordinated resolution of the insolvency process for the benefit of the stakeholders.

EIR- Recast assimilate this concept by way of Recital (22) where it is mentioned that "*Regulation acknowledges the fact that as a result of widely differing substantive laws it is not practical to introduce insolvency proceedings with universal scope throughout the Union. The application without exception of the law of the State of the opening of proceedings would, against this background, frequently lead to difficulties*".

The legal effect of the above is found in Article 3 which deals with the issue of opening of Main and Secondary insolvency proceedings and three Articles from 41 to 43 dealing with Cooperation and communication between insolvency practitioners (41), Cooperation and communication between courts (Article 42), Cooperation and communication between insolvency practitioners and courts (Article 43).]

Question 2.3 [maximum 3 marks] 2

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.

[Recitals 48, 49 and 50 deals with the obligation of co-operation and communication between the Courts involved in presiding over main and secondary insolvency proceedings. Recital 48 provides that main insolvency proceedings and secondary insolvency proceedings can contribute to the efficient administration of the debtor's insolvency estate or to the effective realisation of the total assets if there is proper cooperation between the actors involved in all the concurrent proceedings. Proper cooperation implies the various insolvency practitioners and the courts involved cooperating closely, in particular by exchanging a sufficient amount of information.

It further signifies that when cooperating, insolvency practitioners and courts should take into account best practices for cooperation in cross-border insolvency cases, as set out in principles and guidelines on communication and cooperation adopted by European and international organisations active in the area of insolvency law, and in particular the relevant guidelines prepared by the United Nations Commission on International Trade Law.

Recital 49, inter alia, provides that courts should be able to enter into agreements and protocols for the purpose of facilitating cross-border cooperation of multiple insolvency proceedings in different Member States concerning the same debtor or members of the same group of companies, where this is compatible with the rules applicable to each of the proceedings. Recital 50, also mentions that courts of different Member States may cooperate by coordinating the appointment of insolvency practitioners.

The legal effect of the above is found in Article 3 which deals with the issue of opening of Main and Secondary insolvency proceedings and three Articles from 42, which provides for Cooperation and communication between courts and Article 43 which deals with Cooperation and communication between insolvency practitioners and courts.] **You failed to list Article 41 and Articles 56,57 and 58.**

Question 2.4 [maximum 2 marks] 2

It is widely accepted that the opening of secondary proceedings can hamper the efficient administration of the debtor's estate. For this reason, the EIR Recast has introduced a number of legal instruments to avoid or otherwise control the opening, conduct and closure of secondary proceedings. Provide **two (2) examples** of such instruments and briefly (in 1 to 3 sentences) explain how they operate.

[Recital 20 of EIR- Recast acknowledges that "main insolvency proceedings and secondary proceedings can contribute to the effective realisation of the total assets only if all the concurrent proceedings pending are coordinated. Secondary insolvency proceedings do serve important purpose of dealing with cases where estate of the debtor is too complex to administer as a unit, or in cases where legal issues are complex on account of different.

EIR-Recast provide for the insolvency practitioner in main insolvency proceedings giving an undertaking to local creditors that they will be treated as if secondary insolvency proceedings had been opened (Article 36). This undertaking is given by IP of main proceedings and approved by the Court.

Secondly, various provisions have been introduced for co-ordination and cooperation to deal with the multifarious proceedings of insolvency of debtor. This could be in the form agreements and protocols between insolvency practitioners and courts for the purpose of facilitating of multiple insolvency proceedings in different Member States concerning the same debtor or members of the same group of companies, where this is compatible with the rules applicable to each of the proceedings. This may be in the form of agreement to act as coordinator (Article 61) and Article 66 with regard to choice of court for group coordination proceedings.] **Mention of Article 46 would have been welcomed.**

Total: 9 out of 10.

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

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

Question 3.1 [maximum 5 marks] 5

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

[While European States had made considerable progress since 1960 in developing process and regulations to deal instance of insolvency, however, it was acknowledged that activities of undertakings have more and more cross-border effects while they are governed by the local laws. It was also noted that insolvency of such undertakings also affects the proper functioning of the internal market, therefore, need was felt to have regulations which provide for coordination of the measures to be taken regarding an insolvent debtor's assets.

Secondly, it was also increasingly realized that the existing framework focused more on liquidation of the undertaking and realization of the assets and have fewer options for rescue or resolution of insolvency. Further, the existing Regulations did not provide for any pre-insolvency proceedings, or preventive proceedings to check instances of bankruptcy declarations of the debtor. Practical difficulties were also encountered in the application of the COMI principle (necessary to determine the main proceedings and jurisdiction) with instances of forum shopping.

Thus, the major challenges under the EIR 2000 were faced in dealing with cross border insolvency and group insolvencies and in providing for rescue measures in the Regulations. EIR- Recast focused on improving the EIR 2000 by way of suitable provisions to provide for rescue measures and to make the parallel proceeding more effective and meaningful by providing for cooperation and coordination between IP, Courts and Administrator of the insolvency proceedings. At the same time, it also assimilated the judicial precedent of the Court of EU on the issue of COMI on the basis of judgement in the case of **Eurofeed IFSC (Eurofood)** and Synthetic Proceedings on the basis of the pronouncement in the case **of Collins Vs Aikman Europe SA.**

EIR- Recast lay down process for group coordination in the form of Articles 61 to 77. Article 1 has enlarged the scope of the insolvency proceedings by providing that EIR Recast applies to public collective proceedings, including interim proceedings and other proceedings based on law relating to insolvency for the purpose of rescue of the economically viable but financially distressed undertakings.

Thus, the EIR Recast has tried to achieve a more balanced system of insolvency process with due regard to the local law of the states.]

Question 3.2 [maximum 5 marks] 2.5

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.

[EIR 2000 was a great piece of legislation which structured the regulations to effectively deal with the insolvency across the Member States. It effectively dealt with host of issues concerning insolvency including uniform rules of international jurisdiction, recognition of insolvency judgements, applicable law in insolvency matters and cooperation between insolvency practitioners. EIR 2000 focused on the 'lex concursus', that the law of the state of opening of the insolvency proceedings should determine the effect of the proceedings. At the same time, it also allowed opening up of secondary territorial proceedings in another member

state where debtor might have an establishment, however, it also lay down rules for coordination between main and secondary proceedings.

It thus, attempted to put in place a 'modified universality' through two doctrines of '**lex concursus**' and '**lex concursus secundarii**', recognizing the need for co-existence of both 'main proceedings' and 'the secondary proceeding' for balancing the interest of local creditors and also with a view have more certainty about right under the commercial agreements/transactions.

However, it was increasingly felt that, while the above providing greatly facilitated the process under cross border insolvencies, but not adequate enough to meet the challenges that would arise on account of multifarious proceedings in different States, especially the co-ordination that was needed to put in place an effective system.

Recognizing the need for putting into place a mechanism of co-operation and co-ordination between the two types of proceedings, Recital (48) of EIR Recast, emphasized that main insolvency proceedings and secondary insolvency proceedings can contribute to the efficient administration of the debtor's insolvency estate or to the effective realisation of the total assets if there is proper cooperation between the actors involved in all the concurrent proceedings.

Accordingly, in EIR Recast, provided for the mechanism for cooperation and coordination by laying down set of Rules (Articles from 41 to 43) to deal with Cooperation and communication between insolvency practitioners (41), Cooperation and communication between courts (Article 42), Cooperation and communication between insolvency practitioners and courts (Article 43). At the same time, it also provided provision insolvency practitioners and courts to enter into agreements and protocols for the purpose of facilitating cross-border cooperation of multiple insolvency proceedings in different Member States. EIR Recast also provides for cooperation between the courts of different Member States by coordinating the appointment of insolvency practitioners.

The Regulation introduces a new instrument to improve access to information for creditors, any interested party, and courts. Thus, the EIR Recast has taken these innovative and meaningful steps which addresses some of the operational challenges faced in cross border insolvency and administration of a cross-border case in an efficient manner.]

The question asked you to specifically list three innovations of the EIR Recast 2015. The first chunk of your answer discusses the EIR 2000. This was not necessary and instead, you could have focused on other aspects of the EIR Recast 2015, such as COMI or groups.

Question 3.3 [maximum 5 marks]

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.

[While the EIR Recast set the tone and basis for similar legislative action in many other countries outside Europe, but at the same time some of the insolvency scholars are of the view that in Recast, EU should have addressed the challenges of cross border insolvencies in much more effective manner by laying down more specific provision of binding nature.

Further, it is also said, that while provisions dealing with cooperation and coordination between the parties are welcome but it should also have lay down rules for enforcement of such provisions rather than leaving certain provisions at the option of the insolvency practitioners and courts.

Firstly, the recast EIR does not provide for any legal remedies for enforcing cooperation between the main proceedings and secondary proceedings.

Secondly, in case of group insolvencies, a voluntary procedural coordination approach has been adopted which will not serve the purpose desired to be achieved. EIR Recast provides for soft measures such as right to be heard, right to participate in meetings etc. it is doubted that whether this procedural coordination approach will be effective in practice. Further, the issue of extra costs and delays on account of such formalities will be detrimental to the insolvency.

It seems that while adopting EIR Recast, the provisions relating to co-operation and coordination in case of group insolvencies, was by way of a compromise between the conflicting interests of improving efficiency and the respecting the independency of insolvency proceedings and the rights of the creditors.

It is suggested that in case of group insolvencies, the option for 'opting out' will be destructive to the process therefore, once, the Court has accepted the request for consolidation or coordination, there should not be any option available to insolvency professional of another group company to opt out if such coordination takes care of interest of the related creditors.]

Total: 12.5 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] 1

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.

[It is seen that Article 1 of EIR 2000, has limited scope to deal with cases of insolvency and liquidation. The Article provided that this Regulation shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator. Thus, the focal point remained 'insolvency' and 'liquidation'. It did not provide for interim proceedings for the purpose of rescue of debtor. Ireland is part of EU thus, EIR 2000 were applicable. Since, the matter arose prior to 26 June, 2017, therefore, it would be governed by EIR 2000 as EIR Recast would apply only to insolvency proceedings opened after 26 June 2017.

Examinership process of Ireland is akin to US Chapter 11 proceedings, and it lays down the process to deal with cases where the debtor companies is going through difficulty to pay debts

and wish to explore options to tide over that phase. On filing a court petition, the company is protected from its creditors by an automatic moratorium which remain operative for a limited period, and an examiner is appointed to examining the state of the company's affairs with a view to compiling a restructuring plan for the company.

Thus, the process is purely a pre-insolvency stage process, which is not recognized under EIR Recast, therefore, the Dublin High Court will not have international jurisdiction under the above mentioned Examinership proceedings.

In this context, reference is also drawn from the judgement of European Court of Justice in **Seagon v Deko Marty**, where it was observed that “It is exactly that criterion that is used by recital 6 in the preamble to Regulation No 1346/2000 in order to delimit the purpose of the regulation. Thus, according to that recital, the regulation should be confined to provisions governing jurisdiction for opening insolvency proceedings and judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings.”

Thus, the Examiner Proceedings before the Dublin High Court not being in the nature of insolvency and liquidation, the Dublin High Court will not have international jurisdiction under EIR 2000.]

- The Dublin High Court has international insolvency jurisdiction to open insolvency proceedings against Cardinal House.
- Examinership is listed in Annex A of the EIR 2000.
- Under both the EIR Recast (Article 3) and the EIR 2000 (Article 3), the determination of international jurisdiction to open main insolvency proceedings is linked to the debtor's centre of main interest (COMI). According to Article 3 EIR Recast, COMI shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties (see also Recital 28). In the EIR 2000, similar statement was only provided in a recital (Recital 13). In the case of a company, the place of the registered office shall be presumed to be the COMI in the absence of proof to the contrary.
- Relevant case law: *Eurofood IFSC Ltd*, Case C-341/04, ECLI:EU:C:2006:281 (May 2, 2006) and *Interedil Srl, in liquidation v Fallimento Interedil Srl*, Case C-396/09, ECLI:EU:C:2011:671 (Oct. 20, 2011).
- Cardinal Home is registered in Ireland and operates from there. The fact that Cardinal Home owns some assets (i.e. warehouse) in Italy and has entered into contracts for the financial exploitation of those assets cannot be regarded as sufficient factors to rebut the presumption laid down in Article 3(1) (see para. 52 in *Interedil*).

The plans to expand to the Italian luxury market and ongoing negotiations with local distributors (with whom some non-binding memoranda of understanding have been signed) also cannot rebut the strong presumption in favour of the jurisdiction of the registered office, which resulted from the *Eurofood* judgement. Besides, it must have been obvious to such local distributors that the debtor conducted the administration of its interests from Ireland (actual centre of management) and it did so on a regular basis, since Cardinal Home's Italian presence was rather incidental, marginal and limited in time and purpose.

Question 4.2 [maximum 5 marks] 5

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

[In case the Dublin High Court has opened the Examiner Proceeding on 30 June 2017, i.e. after the EIR Recast came into effect (26 June 2017), the issue would be governed by EIR Recast and under EIR Recast, the scope of the proceeding was widened to cover proceedings which are aimed at rescuing financially viable undertakings which are facing financial crises and are unable to meet its financial obligations to discharge the debt.

Recital 10 of EIR Recast, provides that the scope of this Regulation should extend to proceedings which promote the rescue of economically viable but distressed businesses, and which give a second chance to entrepreneurs. It should extend to proceedings which provide for restructuring of a debtor at a stage where there is only a likelihood of insolvency, and to proceedings which leave the debtor fully or partially in control of its assets and affairs. Recital 15, further clarifies that this Regulation should also apply to proceedings that, under the law of some Member States, are opened and conducted for a certain period of time on an interim or provisional basis before a court issues an order confirming the continuation of the proceedings on a non-interim basis.

Here, it is also relevant to note the Recital 17, which mentions that scope of the regulation extend to proceedings which are triggered by situations in which the debtor faces non-financial difficulties, provided that such difficulties give rise to a real and serious threat to the debtor's actual or future ability to pay its debts as they fall due.

In line with the above approach to extend the scope of EIR Recast to rescue proceedings, Article 1 laid down that the regulation shall apply to public collective proceedings, including interim proceedings, which are based on laws relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganization or liquidation. It would also cover the case where a temporary stay of individual enforcement proceedings is granted by a court or by operation of law, in order to allow for negotiations between the debtor and its creditors, provided that the proceedings in which the stay is granted provide for suitable measures to protect the general body of creditors.

While Dublin High Court proceedings would have international effect, however, still the proceedings would need to satisfy the four tests in order to be recognized and attract coverage under EIR Recast. It should satisfy test of '**Material Scope**' in the sense that it should be public collective proceedings including interim proceedings, which are based on laws relating to insolvency for the purpose of rescue, adjustment of debt, reorganization or liquidation.

Secondly, it should satisfy the '**Temporal Scope**' i.e. the proceeding should be opened on or after 26 June, 2017. Thirdly, it should also satisfy '**Personal Scope**', i.e. the debtor should not be an entity exempted from operation of EIR Recast and the proceedings should be covered under Annex A. Fourthly, it need to satisfy '**Territorial Scope**', the debtor COMI should be located within the Member State where such proceedings have been opened.]

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.

[Article 3 of EIR Recast deal with the issue of International jurisdiction. It provides that the courts of the Member State within the territory of which the centre of the debtor's main interests is situated shall have jurisdiction to open insolvency proceedings (main proceedings). At the same time, it also provides for opening of Secondary proceedings, where the centre of the

debtor's main interests is situated within the territory of a different Member State if the debtor has an establishment within the territory of such Member State.

The effects of those proceedings will be restricted to the assets of the debtor situated in the territory of the latter Member State. Such secondary proceedings deals with the separate insolvency estate based on *lex concursus secundarii*. . In the case of **Burgo Vs Illochroma SA** decided by CJEU on 04.10. 2014, it was held that where main insolvency proceedings concerning a legal person have been opened in a Member State other than of its registered office, it should be possible to open secondary insolvency proceedings in the Member State of its registered office, provided that state the debtor is carrying out an economic activity with human means and assets in that state.

As per the definition of the terms establishment, it is defined under Article 2(10) of EIR Recast, to mean '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'. Thus, focus is on non-transitory nature of activity which should be economic activity to be carried on with human means and assets. The scope of the term 'establishment' was further explained by CJEU in the case of **Interedil (under liquidation) decided on 20 October 2011**, it was held that the term 'establishment' within the meaning of Article 3(2) of the Regulation must be interpreted as requiring the presence of a structure consisting of a minimum level of organization and a degree of stability necessary for the purpose of pursuing an economic activity. The presence alone of goods in isolation or bank accounts does not, in principle, meet that definition.

As mentioned in the Virgos-Schmit Report, the decisive factor is also as to how the activity appears externally in the perception of third parties and not the intention of the parties. EIR Recast does not require any particular form of establishment it is sufficient as long as it is ascertainable by third parties.

Therefore, in this case, although Cardinal Home is an Ireland-registered company, but it has warehouses across Europe, including in Milan, Italy. It has also entered into a credit agreement with an Italian bank and opened a bank account with the bank and started negotiating with local distributors and also signed non-binding memoranda of understanding with them. Thus, as the Company has opened godowns in Milan, Italy and also signed MoUs for development of business there and also entered into credit facility arrangement with Bank, it is thus recognized as such in third party perception i.e. Bank and the parties having entered into MoU with the Company. Thus, the set up of the Company in Italy satisfies the definition of establishment under Article 2(10) of EIR Recast and keeping in view the judgement of CJEU in the case of Interedil, Bank is entitled to open second proceedings in Italy.]

No - 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: 7 out of 15.

*** End of Assessment ***

Total: 37.5 out of 50.