



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2B
THE EUROPEAN INSOLVENCY REGULATION

This is the **summative (formal) assessment** for **Module 2B** of this course and is compulsory for all candidates who **selected this module as one of their compulsory modules from Module 2**. Please read instruction 6.1 on the next page very carefully.

If you selected this module as **one of your elective modules**, please read instruction 6.2 on the next page very carefully.

The mark awarded for this assessment will determine your final mark for Module 2B. In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
4. You must save this document using the following format: **[studentID.assessment2B]**. An example would be something along the following lines: 2021122-526.assessment2B. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the word “studentID” with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
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- 6.1 If you selected Module 2B as one of your **compulsory modules** (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is **23:00 (11 pm) GMT on 1 March 2022**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2022. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
- 6.2 If you selected Module 2B as one of your **elective modules** (see the e-mail that was sent to you when your place on the course was confirmed), you have a **choice** as to when you may submit this assessment. You may either submit the assessment by **23:00 (11 pm) GMT on 1 March 2022** or by **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. If you elect to submit by 1 March 2022, you **may not** submit the assessment again by 31 July 2022 (for example, in order to achieve a higher mark).
7. Prior to being populated with your answers, this assessment consists of **9 pages**.

ANSWER ALL THE QUESTIONS

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

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

Question 1.1

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

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

D was the correct answer.

Question 1.2

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

- (a) **False. The EU sought to draft Conventions with a view to harmonising the insolvency laws of EU Member States as early as the 1960s, but these initiatives failed.**
- (b) False. There was another EU Regulation regulating insolvency law at EU level before the EIR 2000.
- (c) True. Before the EIR 2000, the EU has not sought to harmonise the insolvency laws of EU Member States.
- (d) False. An EU Directive regulating insolvency law at EU level existed before the EIR 2000.

Question 1.3

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

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

- (b) True. As a result, the EIR 2000 lacked the support of major stakeholders such as insolvency practitioners, businesses and public authorities who considered the instrument fruitless.
- (c) False. While a number of shortcomings were identified by an evaluation study and a public consultation, the EIR 2000 was generally regarded as a successful instrument by most stakeholders, including practitioners, businesses, the EU institutions and insolvency academics.
- (d) False. The EIR 2000 was considered a complete success to support cross-border insolvency cases and, as a result, the wording of the EIR Recast mirrored its 2000 predecessor.

Question 1.4

Why can it be said that the EIR Recast did not overhaul the *status quo*?

- (a) The EIR Recast is a copy of the EIR 2000. Its structure and the wording of all articles are similar.
- (b) Although the EIR Recast includes relevant and useful innovations, it has stuck with the framework of the EIR 2000 and mostly codified the jurisprudence of the CJEU.
- (c) The EIR Recast has not added any new concept to the text of the EIR 2000.
- (d) It is incorrect to say that the EIR Recast has not overhauled the *status quo* at all. On the contrary, the EIR Recast has departed from the text of its predecessor and is a completely new instrument which has rejected all existing concepts and rules.

Question 1.5

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

- (a) The EIR Recast is more rescue-oriented because all domestic rescue procedures fall within its scope.
- (b) The EIR Recast is more rescue-oriented because it harmonises all substantive aspects of national insolvency laws.
- (c) It is incorrect to say that the EIR Recast is more rescue-oriented than the EIR 2000, as the latter was already heavily rescue-focused.
- (d) The EIR Recast is more rescue-oriented because its scope was extended to cover pre-insolvency proceedings and secondary proceedings can now also be rescue proceedings.

Question 1.6

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

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

- (b) Rules on co-operation and communication between courts were to be refined; the concept of COMI was to be abandoned and a new jurisdictional concept was to be found; the Recast Regulation was to apply to Denmark.
- (c) The Recast Regulation was to apply to private individuals and self-employed; a common European-wide insolvency proceeding was to be added to the Regulation.
- (d) The Regulation was meant to fully embrace the universalism principle by abandoning the concept of secondary proceedings; the Regulation was meant to mostly promote out-of-court settlement and abandon all intervention of a judicial or administrative authority in cross-border proceedings.

Question 1.7

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

- (a) “Synthetic proceedings” means that for the case at hand, several main proceedings can be opened, in addition to several secondary proceedings.
- (b) “Synthetic proceedings” means that when secondary proceedings are opened, these are automatically rescue proceedings, as opposed to liquidation proceedings.
- (c) “Synthetic proceedings” means that insolvency practitioners in all secondary proceedings should treat the proceedings they are dealing with as main proceedings for the purpose of protecting the interests of local creditors.
- (d) “Synthetic proceedings” means that when an insolvency practitioner in the main insolvency proceedings has given an undertaking in accordance with Article 36, the court asked to open secondary proceedings should not, at the request of the insolvency practitioner, open them if they are satisfied that the undertaking adequately protects the general interests of local creditors.

Question 1.8

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

- (a) The rule applied by the court, which has opened insolvency proceedings (originating court), is unknown or does not have an analogue in the law of the jurisdiction, in which recognition is sought.
- (b) The judgment, subject to recognition, was passed with incorrect application of the applicable substantive law.
- (c) Where the decision to open the insolvency proceedings was taken in flagrant breach of the right to be heard, which a person concerned by such proceedings enjoys.
- (d) The court, which has opened insolvency proceedings (originating court), most certainly did not have international insolvency jurisdiction to do so under the EIR Recast.

Question 1.9

In a cross-border dispute, the main proceedings before the Italian court opposes Fema SrL (registered in Italy) and Lacroix SARL (registered in France). The case concerns an action to set aside four contested payments that amount to EUR 850,000. These payments were made pursuant to a sales agreement dated 5 August 2020, governed by German law. The contested payments have been made by Fema SrL to Lacroix SARL before the former went insolvent. The insolvency practitioner of the company claims that under applicable Italian law, the contested payments shall be set aside because Lacroix SARL must have been aware that Fema SrL was facing insolvency at the time the payments were made.

Considering the facts of the case and relevant provisions of the EIR Recast, which one of the following statements is the **most accurate**?

- (a) The insolvency practitioner will always succeed in his claim if he can clearly prove that under the *lex concursus*, the contested payments can be avoided (Article 7(2)(m) EIR Recast).
- (b) The contested transactions cannot be avoided if Lacroix SARL can prove that the *lex causae* (including its general provisions and insolvency rules) does not allow any means of challenging the contested transactions, and provided that the parties did not choose that law for abusive or fraudulent ends.
- (c) To defend the contested payments Lacroix SARL can rely solely, in a purely abstract manner, on the unchallengeable character of the payments at issue on the basis of a provision of the *lex causae*.
- (d) The contested payments shall not be avoided if Lacroix SARL proves that such transactions cannot be challenged on the basis of the insolvency provisions of German law (Article 16 EIR Recast).

Question 1.10

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

Assume that:

- Under French law, creditors (except employees) must file proof of their claim within two (2) months from the publication in the French legal gazette of a notice of the judgment opening the insolvency proceedings.
- Under Spanish law, the period within which creditors must file their claims is one month, as set in the order opening secondary insolvency proceedings against Cupcake Cottage.

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

- (a) Within two (2) months following the publication date, as guaranteed by the French law (law applicable to the creditor).
- (b) Within one month, as stipulated in the applicable *lex concursus secundarii* (law of the insolvency proceeding at issue).

- (c) Within 30 days following the publication of the opening of insolvency proceedings in the insolvency register of Spain.
- (d) Within the time limit prescribed by the *lex concursus* of the main insolvency proceeding (Irish law).

C was the correct answer.

Total marks: 8 out of 10.

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks] 2

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

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

Article 36, EIR Recast. Right to give an undertaking in order to avoid secondary insolvency proceedings: Under this article, the administrator of a main insolvency proceeding may unilaterally undertake, with respect to assets located in the Member State in which secondary insolvency proceedings may be opened, that, when distributing those assets or the proceeds received as a result of their realization, he will respect the rights of distribution and priority that creditors would have under national law if secondary insolvency proceedings were opened in that Member State. This is in order to avoid the opening of secondary insolvency proceedings. In this way, such distribution rights will be enforced under the national law that the creditors would have had if secondary insolvency proceedings had been opened.

In order for this provision to be applicable, substantive and procedural requirements must be met, which are indicated in question 2.4 of this document.

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

Recital 48, EIR Recast. Communication And Co-Operation: Recital 48 of the EIR Recast states that the efficient administration of the insolvency estate and the effective realization of the totality of the assets require adequate cooperation between the actors involved in all concurrent proceedings. This is because when there are several proceedings against a debtor it is necessary that there is coordination between those proceedings. Therefore, such cooperation implies that the various insolvency practitioners and courts involved cooperate closely, for example through the exchange of relevant information.

Question 2.2 [maximum 3 marks] 1.5

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.

1. First example: EIR Recast provides for the possibility of opening a main proceeding, in the place of the debtor's center of main interest, or COMI. However, it also allows for the possibility of opening a secondary proceeding, in a member state in which the debtor has an establishment. The main proceedings will have a universal scope and cover all the debtor's assets throughout the EU. Secondary proceedings, in turn, could only cover assets within their limited geographical scope. **Yes but no provision (article or recital) provided.**
2. Second example: There can be as many secondary proceedings as there are establishments of the debtor in the Member States. Therefore, it is permitted that there are several proceedings in relation to the same debtor, which are conducted under different national insolvency laws. **Yes but no provision (article or recital) provided.**
3. Third example: EIR Recast introduces in its recital 53 the possibility of a jurisdictional consolidation for the insolvency of multinational enterprise groups. Thus, although the COMI of the members of a group of companies still have to be determined separately for each member of the group, the EIR Recast allows a court to open insolvency proceedings for several companies belonging to the same group in a single jurisdiction if the court considers that the COMI of those companies are located in a single Member State. In such a case, the court must also be able to appoint, if appropriate, the same insolvency administrator in all the proceedings concerned.

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.

According to the guidance text, Article 31 of the EIR 2000 obliged insolvency administrators in main and secondary proceedings to communicate information to each other. This limited treatment changed with the EIR Recast, which introduces a comprehensive framework for cooperation and communication, as follows:

1. Article 41 EIR Recast: Cooperation and communication between insolvency administrators:
 - a. According to Article 41 of the Recast EIR, the insolvency administrator in the main insolvency proceedings and the insolvency administrator(s) in the secondary proceedings relating to the same debtor shall act jointly. This is provided that this is compatible with the rules applicable to the respective proceedings. This cooperation may take any form, which allows the conclusion of agreements or protocols.
 - b. The insolvency administrators must communicate any information that may be relevant for other proceedings, for example in the presence of any of these cases:
 - i. progress made in the filing and verification of claims,
 - ii. Measures aimed at rescuing or restructuring the debtor,
 - iii. Measures to terminate the proceedings
 - iv. Administration or the realization or use of the debtor's assets and affairs. In this regard, the Recast EIR obliges insolvency administrators in secondary proceedings to provide the main insolvency administrator

with an early opportunity to submit proposals on the realization or use of assets in secondary insolvency proceedings

2. Article 42 EIR Recast: cooperation and communication between courts:

- a. The EIR Recast obliges the court before which an application for the opening of insolvency proceedings is pending, or which has opened such proceedings, to cooperate with any other court facing the issue of the opening of insolvency proceedings or which has already opened such proceedings. Thus, cooperation extends in time before the commencement of insolvency proceedings and covers all types of proceedings, including territorial proceedings, and is in principle limited only to the extent that such cooperation is incompatible with the rules applicable to each of the proceedings in question.
- b. Cooperation between courts may take various forms and may be carried out by any means that the court considers appropriate.

3. Article 43 EIR Recast: cooperation and communication between insolvency administrators and courts.

Article 43 provides for three situations in which the obligation of coordination between insolvency administrators arises:

- a. An insolvency administrator in a main insolvency proceeding must cooperate and communicate with any court before which an application for commencement of secondary insolvency proceedings is pending, or which has commenced such proceedings;
- b. An insolvency practitioner in territorial or secondary insolvency proceedings must cooperate and communicate with any court before which an application for the commencement of main insolvency proceedings is pending or which has commenced such proceedings;
- c. The insolvency administrator in a territorial or secondary insolvency proceeding shall jointly operate and communicate with the court before which an application for the opening of another territorial or secondary insolvency proceeding is pending or which has opened such a proceeding.

These three articles have their correspondence in articles 56-59 of the Recast IR regarding cooperation and communication in insolvency proceedings concerning two or more members of an enterprise group.

Question 2.4 [maximum 2 marks] 1

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

The REI **[spelling]** Recast allows the opening of secondary proceedings, which run in parallel to the main insolvency proceedings and only produce effects on assets located in a State of secondary proceedings. However, secondary proceedings generate secondary effects: they entail additional costs for insolvency practitioners and courts; they lengthen the proceedings

for creditors; they may disrupt the efficient restructuring of the debtor; they generate fragmentation of the insolvency estate, etc. For the above reasons, the EIR Recast contains the following options to avoid the opening of secondary insolvency proceedings:

1. Right to compromise

The insolvency administrator in the main insolvency proceedings may enter into the undertaking permitted by Article 36 of the REI Recast: According to Article 36 EIR Recast to avoid the opening of secondary insolvency proceedings, the insolvency administrator in the main insolvency proceedings may give a unilateral undertaking in respect of 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 respect the distribution rights that creditors would have under national law if secondary insolvency proceedings were opened in that Member State. **Yes but no provision (article and/or recital) provided.**

In doing so, the insolvency administrator undertakes that creditors will receive the benefits of the secondary proceedings even if such proceedings did not formally exist.

2. Suspension of the opening of secondary insolvency proceedings

The EIR Recast provides for the possibility for the court to temporarily stay the opening of secondary insolvency proceedings, where a temporary stay of individual enforcement proceedings has been granted in the main insolvency proceedings. This figure has the following characteristics: i) The stay of the opening of secondary insolvency proceedings does not occur automatically as it requires a request from the insolvency administrator or the debtor in possession; ii) The stay may be imposed for a period not exceeding three months and on condition that appropriate measures are taken to protect the interests of local creditors; and iii) it may be lifted in three circumstances. **Yes but no provision (article and/or recital) provided.**

Total marks: 7.5 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.

According to Article 46 of the EIR 2000, by June 1, 2012 at the latest, the European Commission was to submit a report on the implementation of the EIR 2000 with a proposal for adaptation. The recommendations were based on the following points, which were introduced in the recast EIR as follows:

- Expansion of the scope of application of restructuring proceedings: The scope of application is expanded. It no longer focuses only on partial or total liquidation

proceedings of the debtor (as initially applied in the EIR 2000), but now allows the initiation of restructuring proceedings.

- Stricter rules for cooperation between insolvency practitioners and courts: The EIR Recast introduces a comprehensive framework for cooperation and communication. To this end, it included a regulatory framework for cooperation and communication between insolvency administrators; between courts; and between insolvency administrators and courts.
- Possibility of proceedings in respect of members of the same enterprise group: although the EIR Recast provides that the COMI of the members of an enterprise group has to be determined separately for each member of the group, the EIR Recast introduced the possibility for a court to open insolvency proceedings for several members belonging to the same group in a single jurisdiction if the court considers that the COMIs of those members are located in a single Member State. Also, under this framework, a broad framework for cooperation and communication in insolvency proceedings was introduced where there are two or more members of a group of companies.
- Improved information to creditors (interconnection of insolvency registries): The exercise of the right to lodge claims depends on creditors being aware of the opening of insolvency proceedings. To make the right to lodge claims and participate in insolvency proceedings meaningful, the EIR Recast contains mandatory rules on creditor notification and the creation of insolvency registers. These rules constitute a major advance when compared to the provisions of the EIR 2000, mainly because of the introduction of the following two tools:.

1. Information: Despite the importance of publicity for the sound management of cross- border insolvencies, the EIR 2000 left the publication of information on the opening of insolvency proceedings in other Member States to the discretion of the insolvency practitioner. In contrast, Article 28(1) of the EIR Recast obliges insolvency administrators or debtors in possession to request publication of notice of the opening of insolvency proceedings, whether main or secondary, at the debtor's place of establishment, in accordance with the publication procedures provided for in that Member State.

2. Insolvency register: The efficient functioning of cross-border insolvency proceedings relies on the exchange of information between insolvency administrators, courts and creditors. In particular, a court opening insolvency proceedings needs to know whether the debtor is already subject to insolvency proceedings in another Member State. With the EIR 2000, each Member State had its own insolvency registry system which did not guarantee the interconnection of these registries. The EIR Recast stipulates that Member States must establish and maintain on their territory one or more registers in which information concerning insolvency proceedings is published. This information must be published as soon as possible after the opening of such proceedings..

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.

1. The concept of COMI is modified:

- a. The EIR 2000 did not contain a definition of COMI (although it included some paragraphs in its recital 13). On the other hand, the EIR Recast establishes as a binding rule that the COMI shall be the place where the debtor carries out the administration of its interests on a regular basis and which is determinable by third parties.
- b. In order to understand this concept, the EIR Recast included the presumption of the registered office, whereby in the case of a company or legal entity, the place of the registered office is presumed to be the place of the COMI. However, this presumption will only apply if the registered office has not been transferred to another Member State in the 3-month period preceding the request for the opening of insolvency proceedings.
- c. If the registered office has been transferred within such period, the court will disregard this change of registration for the purpose of determining the COMI, as if no such change had occurred.

2. Mandatory nature of judicial decisions:

- a. Prior to the EIR Recast, i.e. under the EIR 2000, the enforceability of an insolvency judgment required a declaration of enforceability by the court of the State in which enforcement was sought.
- b. This situation changed with Article 32(1) of the EIR Recast, which provides that insolvency judgments are to be enforced in accordance with Articles 39-44 and 47- 57 of Brussels I Recast. According to these articles, a judgment given in one Member State that is binding in that Member State will be binding in the other Member States without any declaration of enforceability being required. Therefore, with the EIR Recast no form of approval or exequatur is necessary.

3. Notification of creditors and creation of insolvency registers:

- a. In order to make the right to file claims and participate in insolvency proceedings meaningful, the EIR Recast contains mandatory rules on the notification of creditors and the creation of insolvency registers.
- b. Under the EIR 2000, each Member State had its own insolvency registry system. According to Article 24 of the EIR Recast, Member States must establish and maintain within their territory one or more registers in which information concerning insolvency proceedings is published. To improve the publicity of insolvency proceedings, Article 25 of the EIR Recast prescribes the creation of a decentralized system for the interconnection of insolvency 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.

The following will indicate the shortcomings identified in the changes included in the EIR Recast with respect to insolvency proceedings of members of an enterprise group. Although

the question asks to include two shortcomings, for a better understanding of the problem identified, I will point out more shortcomings identified in the guidance text on this topic.

In order to improve the coordination of the insolvency proceedings of the members of an enterprise group and to enable coordinated restructuring of the group, the EIR Recast introduces procedural rules on the coordination of the insolvency proceedings of the members of an enterprise group. These rules are intended to ensure the effectiveness of coordination while respecting the separate legal personality of each group member (recital 54 of the EIR Recast).

However, taking into account that these rules i) are based on the fact that each member of the group has its own legal personality; ii) does not introduce the concept of "COMI (company)" , nor; iii) includes the concept of fund (grouping of assets and liabilities) or procedure (single insolvency procedure) for consolidation of insolvency proceedings opened against members of a group of companies, the expected effects of this reform have not been entirely successful. On the contrary, this reform has generated doubts as to its effectiveness and practical value.

Thus, the REI Recast did not include a substantive, procedural or even jurisdictional regulatory consolidation to deal with insolvency proceedings opened against a company that is part of a corporate group .

Likewise, it should be noted that the coordination mechanisms included in the REI Recast called "group coordination procedure", present the following shortcomings that have led these mechanisms to fail to achieve the objective of ensuring an efficient administration of group insolvency proceedings, including the coordinated restructuring of the group:

- Enforce non-binding actions (recommendations) of a group coordinator
- No actions are contemplated in case the group of companies has members located in non-member States. This situation implies then, that the EIR Recast will not bind the courts and insolvency administrators in such proceedings in non-member States and that the latter will not be able to be part of the group coordination proceedings.
- There is no indication of the main court before which group coordination proceedings can be initiated .
- The voluntary nature of group coordination procedures (recital 56 of the EIR Recast) and the possibility of easy waiver without explanation or just cause (Article 64 of the EIR Recast) make group coordination procedures an ineffective instrument.
- Even if such a procedure has been included the insolvency administrators are not obliged to follow the recommendations of the coordinator or the group coordination plan in whole or in part (Article 70 of the EIR Recast).
- The fact that creditors of group members are not necessarily consulted on the commencement of (or accession to) the group coordination proceeding, or opt-out of the group coordination proceeding, could render the group coordination proceeding artificial, without real creditor participation and support.

Thus, a possible correction to this situation is to include the following aspects in the regulation:

- Introduce the concept of "COMI (company)" and substantive and procedural rules for insolvency proceedings opened against a company that is part of a corporate group: This should take into account that for these cases the company cannot be considered individually, but rather the context of a multinational company, which is experiencing financial difficulties in multiple jurisdictions and at the same time intends to carry out a restructuring in a single point. This can ensure a coordinated solution for the entire group.

- In addition to the procedural and substantive rules for the insolvency of corporate groups, it is important to include binding coordination rules so that such rules do not depend on the will of the insolvency administrators, but include clear rules to be followed by such administrators in order to ensure the coordination of these proceedings. Such binding rules should include rules regarding i) the participation of creditors, ii) the court before which group coordination proceedings may be initiated, iii) participation of companies that are not located in a Member State, iv) criteria for identification of the COMI of the group, among others.

Total marks: 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.

According to Article 3(1) of the EIR 2000, insolvency proceedings could be commenced in the place of the debtor's COMI. While the EIR 2000 did not contain a definition of COMI, it did provide some guidance in recital 13 (which was for guidance only). This recital expressly states the following¹ :

“The ‘centre of main interests’ should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties”

Thus, the COMI should be the place where the debtor conducts the administration of its interests on a regular basis and which is determinable by third parties.

In the Eurofood IFSC Ltd case, the CJEU, in considering which court had jurisdiction to initiate insolvency proceedings, highlighted the following two elements to be taken into account when establishing COMI:

1. First, COMI has an autonomous meaning, which means that it must be applied uniformly in all member states. This is intended to create legal certainty on the part of all parties involved.

2. Second, the COMI must be identified by reference to criteria that are objective and determinable by third parties.

*“The courts of the Member State within the territory of which the centre of a debtor’s main interests is situated shall have jurisdiction to open insolvency proceedings. **In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary**” (Emphasis outside the original text).*

Thus, taking into account such concepts and rules, it could be thought that the Irish Court has international jurisdiction to open the insolvency proceedings requested by Cardinal Home. The above, taking into account the following arguments:

1. Cardinal Home is a company registered in Ireland. Therefore, it "triggers" the presumption of Article 3 (1) according to which in the case of a company, COMI shall be presumed to be the place of the registered office, unless proved otherwise.

Based on the facts of the case, there is no evidence to the contrary with respect to this presumption.

2. Cardinal Home's first store is located in Ireland.
3. The two aforementioned facts are objective criteria and easily identified by third parties. The above, since both the place of registration and the location of its first establishment are facts that can be easily consulted by its creditors in the corresponding public registry of Ireland.

This situation differs for example from the fact that the debtor has contracts with local creditors in Italy and an Italian bank, taking into account that these are legal acts that are generally not public, and that by themselves would not allow to conclude that Italy is the COMI of the debtor.

4. For its part, I consider it important to point out that the EIR 2000 does not indicate that territorial jurisdiction within the Member State itself does not fall within the competence of EU law. This is because these elements must be established in the national (domestic) law of the Member State in question. Thus, it will have to be considered under Irish law, whether it is Dublin or Cork that has jurisdiction to open the insolvency proceedings within Ireland.

However, according to Article 1 of the EIR 2000, this regulation has a reduced scope of application, as it applies only to "traditional" liquidation-oriented proceedings or to proceedings involving the partial or total assignment of a debtor and the appointment of a liquidator.

Thus, taking into account that an "examinership proceeding" is a process aimed at getting a company to compromise with its creditors and propose a viable reorganization plan, which means that this process avoids the liquidation of the company¹, this process would not be within the scope of application of the EIR 2000.

In this regard, Article 1 of the EIR 2000 states 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”

¹ <https://www2.deloitte.com/ie/en/pages/finance/solutions/examinership.html>
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Therefore, taking into account that the examination proceedings are not a process within the scope of the EIR 2000, as it is not a process aimed at the liquidation of the company, the Irish Court does not have jurisdiction to open insolvency proceedings under the EIR 2000.

Question 4.2 [maximum 5 marks] 5

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

In order to determine whether or not the EIR Recast should be applied in this case, it is necessary to study the following points: i) temporal scope of application; ii) personal scope of application; iii) material scope of application; iv) geographic scope of application, as indicated below:

1. Temporal scope of application: This refers to when it applies in time. For this, it should be determined whether the procedure is opened after June 26, 2017.

Specific case: according to the facts of the case, the insolvency process was opened on June 30, 2017. Therefore, it falls within the scope of the EIR Recast.

2. Personal scope of application: Refers to whom it applies. For this, it must be determined whether or not the debtor is a bank, insurance company or other company "excluded" from the EIR Recast.

Specific case: According to the facts of the case, Cardinal Home is a furniture company. Therefore, it is not a company excluded from the EIR Recast.

3. Material scope of application: This refers to which proceedings are covered by it. For this purpose, it should be determined whether the proceedings opened against the debtor are listed in Annex A of the EIR Recast.

Specific case: The national procedures listed in Annex A must be applied without any further examination and therefore automatically fall within the scope of application. By the courts of another Member State. National insolvency proceedings not listed in Annex A are therefore not covered by EIR Recast.

The facts of the case do not establish whether or not the insolvency process requested by Cardinal Home is included in Annex A of the EIR Recast. However, in Annex A, the "company examinership" process is included among the Irish processes. Therefore, this insolvency process is also part of the material scope of the EIR Recast.

4. Geographical scope: This refers to the geographical limitations. For this, it must be determined whether the debtor has the center of main interests in an EU Member State, except Denmark.

Specific case: in order to establish this requirement, it is necessary to look for the "center of the debtor's main interests" (Article 1(1) of the EIR Recast), i.e. the COMI. The EIR Recast only applies when the COMI of the debtor is located in the EU (excluding Denmark).

In determining the COMI, the EIR Recast contains a presumption of registered office, namely that the COMI of the insolvent company is presumed to be the jurisdiction (of the country) in which that company is registered. This presumption can only be rebutted if objective factors indicate that the administration of the debtor's interests takes place in a state other than the state of the registered office.

Likewise, the debtor's activity in a particular Member State must be regular and lasting in order to create the COMI. Therefore, this presumption will only apply if the registered office has not been transferred to another Member State within a period of 3 months prior to the request for the opening of insolvency proceedings.

For this case, by virtue of the presumption of domicile, it can be concluded that Cardinal Home's COMI is Ireland. The above, since (i) its registered office is Ireland, (ii) this domicile has been regular and lasting and (iii) it has not been modified in the 3 months prior to the request for the opening of the insolvency process.

Thus, it can be concluded that the COMI of the debtor is Ireland, a country that is part of the EU. Therefore, the EIR Recast would also apply according to the geographical scope.

Therefore, after studying the facts of the case, we can conclude that the Recast EIR is applicable to the insolvency proceedings against Cardinal Home.

Question 4.3 [maximum 5 marks] 3

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.

Under Article 3 (2) of the EIR Recast it is permitted to open one or more secondary insolvency proceedings against a debtor in any Member State in which it has an establishment.

The concept of "establishment" is essential for the opening of the secondary proceeding, as it can only be opened in a Member State where the debtor has an establishment.

According to Article 2(10) of the EIR Recast, "place of business" means any place of operations where the debtor carries on or has carried on, in the three-month period preceding the application for the opening of main insolvency proceedings, a non-transitory economic activity with human means and assets.

Likewise, according to the EIR Recast, the secondary procedure has the following characteristics:

1. It is not necessary for the secondary proceeding to be a liquidation proceeding. Therefore, it is allowed for other types of restructuring processes.
2. Secondary proceedings have a supporting function to the main insolvency proceedings. Therefore, they can only follow in time the commencement of the main insolvency proceedings.
3. The establishment must not have any official (corporate) form, e.g. a branch or a representative office. In this respect, organizational presence may involve any form of external business activity of the debtor.

4. The effects of secondary proceedings are limited to the debtor's assets located in the territory of the Member State in which the secondary proceedings have been opened.

Without prejudice to the concept of establishment given by the EIR Recast, the CJEU clarified it and concluded that the fact that the definition links the exercise of an economic activity to the presence of human resources shows that a minimum level of organization and a degree of stability are required. Therefore, the mere presence of isolated assets or bank accounts does not qualify as "establishment" (paragraph 62).

In view of the above, I consider that an insolvency proceeding can be opened in Italy under the REI Recast. The above since:

1. The opening of a secondary insolvency proceeding can occur in any member state in which it has an establishment. Thus, in this case, Cardinal Home has a warehouse in Milan, Italy, which is a member state.
2. The debtor conducts its operations through this warehouse. According to the facts of the case, such operations have been carried out for several years. Therefore, the requirement that the establishment be constituted at least three years prior to the request for the opening of an insolvency proceeding has been exceeded.
3. According to the facts of the case, it can be considered that the debtor exercises a non-transitory economic activity with human means and goods in said warehouse. The above, since in that store luxury furniture is sold, which implies the existence of both human means (sellers) and goods (the furniture).

While your reasoning is sound, the answer is incorrect because the facts of the case do not support the finding of an establishment of Cardinal Home in Italy. The presence of assets (leased-out warehouse) in isolation, contractual relations with a local bank (including maintenance of a bank account) and *occasional* negotiations 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 missing.

Total marks: 13 out of 15.

*** End of Assessment ***

Total marks: 43.5 out of 50.