



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.

C was the correct answer.

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.

B was the correct answer.

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.

A was the correct answer.

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.

C was the correct answer.

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).

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.’

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

Statement 1: Article 36: Right to give an undertaking in order to avoid secondary insolvency proceedings.

Statement 2: Article 42: Cooperation and communication between 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.

The “modified universalism” model in the EIR Recast may be located in relation to an insolvent debtor’s assets. This model results in the potential split of insolvency proceedings against an insolvent debtor who has operations in two or more EU jurisdictions (Denmark excluded).

Article 3(1) of the EIR Recast designates the jurisdiction of main insolvency proceedings, which must be opened in a Member State in which the debtor’s centre of main interest (COMI) is located.

Secondary insolvency proceedings can be opened under Article 37 of the EIR Recast in the other member states where the debtor has an establishment within the meaning of Article 2(10) of the EIR 2015, but are confined to local assets.

The proceedings, as they are both concerned with the same insolvent debtor and its estate, should be coordinated, but on a practical level they do not operate on an equal footing. This is because the laws of distribution of assets follow the *lex concursus* in the main proceeding, and the *lex concursus secundarii* in the secondary proceedings.

This underlying model has been referred to as “mitigated” or “modified” universalism.¹

The possibility of opening secondary proceedings with territorial effects represents another significant inroad on the principle of universalism. The motivation behind such proceedings is likely in many cases to be the protection of 'local' preferential creditors. It is worth pointing out that all creditors, and not just local preferential creditors, are entitled to claim in the secondary proceedings but there may be little, if anything, left in the pot after the claims of preferential creditors have been satisfied. Recital 21 of the preamble acknowledges that the preferential rights enjoyed by creditors are in some cases completely different.²

Question 2.3 [maximum 3 marks] 3

Cross-border co-operation and communication between courts is now an obligation under the EIR Recast. This was not the case under the EIR 2000. List **three (3) provisions** (recitals and / or articles) of the EIR Recast that deal with this newly introduced obligation.

The EIR Recast introduced duties of cooperation through the following Articles:

1. Article 41: Cooperation and communication between insolvency practitioners
2. Article 42: Cooperation and communication between courts
3. Article 43: Cooperation and communication between insolvency practitioners and courts.³

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.

1. *Article 36(1) of the EIR Recast states:*

In order to avoid the opening of secondary insolvency proceedings, the insolvency practitioner in the main insolvency proceedings may give a unilateral undertaking (the '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 realisation, 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....

Article 36 thus empowers the insolvency practitioner in main proceedings to give an undertaking to local creditors that they will be treated as if secondary proceedings had been

¹ **Modified universalism in European cross-border insolvency**

<https://bobwessels.nl/blog/2019-01-doc3-modified-universalism-in-european-cross-border-insolvency/>

² G McCormack, "Something Old, Something New: Recasting the European Insolvency Regulation" *The Modern Law Review*, Vol. 79, No. 1 (JANUARY 2016), pp. 121-146.

³ Renato Mangano, "From Prisoner's Dilemma to Reluctance to Use Judicial Discretion: The Enemies of Cooperation in European Cross-Border Cases," *International Insolvency Review* 26, no. 3 (Winter 2017): 314-331.

opened, and that the practitioner will comply with the distribution and priority rights that such creditors in the secondary proceedings would have.

2. Under *Article 38(3)* the insolvency practitioner may request the court to temporarily stay the opening of secondary insolvency proceedings for up to three months at a time.

This is done in tandem with the operation of Article 36(6) so that the insolvency practitioner can “transfer any assets which it removed from the territory of that Member State after the undertaking was given or, where those assets have already been realised, their proceeds, to the insolvency practitioner in the secondary insolvency proceedings.”⁴

Total marks: 10 out of 10.

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

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

Question 3.1 [maximum 5 marks] 5

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

Stemming from the recommendations of the European Commission, the EIR Recast was overhauled in response to *inter alia* the growing number of failed enterprises; consequently. It represents a new approach to business failure by encouraging rescue and rehabilitation where insolvency presents as a likelihood.

The re-drafting and insertions of new Articles represent a solution to the challenges primarily associated with multi-national entities, and features such as the re-drafting of the principle of ‘centre of main interests’ or COMI, designed to underscore the facilitation thereof, either through a restructuring, or the broadening of the rules of Insolvency.

The following aspects indicate the thrust of the movement from the EIR to the EIR Recast based on the findings and recommendations of the Commission.

Broadening the scope of insolvency proceedings to include business rescue or restructuring.

As transnational commerce increased globally, so too did recessions and accompanying insolvency.

Whilst integration of multi-national companies became more common, their collapse led to a host of insolvency-related issues, notably, the mass loss of employment, and also, a need to prevent asset transfers or forum manipulation to the detriment of the general body of creditors.

In some companies, insolvency could have been prevented through early diagnosis and treatment.

Hence, one of the primary objectives of the European Insolvency Regulation was to shift away from the traditional liquidation approach to a ‘economic rescue approach’ or ‘second-chance

⁴ Article 36(6).

approach' in the national insolvency laws of the Member States to avoid insolvency.⁵ This had the benefit also of preserving employment.

Therefore Article 1 introduced public collective proceedings based on laws relating to insolvency *and*, for the purpose of rescue, adjustment of debt, reorganisation or liquidation.

Possibility of proceedings of members of the same group of companies.

Following recommendations of the Commission, the EIR Recast introduced Articles 56-73, and Recital 53 which dealt with multinational group insolvencies.

the EIR Recast harmonized the substance of Member States differing insolvency laws and restricts itself to the pro unified scheme for allocating jurisdiction and choice of law.⁶

Recital 73 endorses the approach of applicable law of the Member State in which "the effects of insolvency proceedings on any pending lawsuit or pending arbitral proceedings concerning an asset or right which forms part of the debtor's insolvency estate should be the law of the Member State where the lawsuit is pending or where the arbitration has its seat.

The rise of this Article stemmed from the case of *Eurofood IFCS Ltd.—Bondi v. Bank of America*⁷ which concerned a dispute regarding the opening of main proceedings as between Ireland and Italy. Prior to the Recast, the problems were those surrounding the uncertainty of COMI.

The aspects relating to the refining of the doctrine of the 'centre of main interests' or COMI thus took on a pivotal in the drafting of regulations that would facilitate multi-national insolvencies by strengthening its definition and introducing presumptions.

The concern arose also due to the avalanche of forum shopping or 'bankruptcy tourists, where it could be found that the principal registered office of a company was moved to obtain a more favourable legal position as well as to prevent creditors from enforcing their individual claims against the debtor independently of the harm this may cause to other creditors and to the going concern value of the debtor's business.⁸

In addition to the issues surrounding COMI, and to discourage the opening of secondary proceedings due to the hazards associated with the consolidation of assets for distribution to creditors, Article 46 was crafted in for a Court faced with an application to open secondary proceedings could stay the process of the realization of assets.

Prior hereto, the consolidation of assets was a complex web for Insolvency Practitioners who had to battle a delicate balance of laws of *lex concursus* and those of the national state in which secondary proceedings were opened.

The solution was therefore to create a synthetic proceeding. As follows from its Article 46, the original EIR only represented a provisional solution to the problems related to cross-border insolvencies within the EU.⁹

⁵ David Rhodin A look at the recast EC regulation on insolvency proceedings - with particular focus on corporate insolvencies.

<https://lup.lub.lu.se/luur/download?func=downloadFile&recordId=8873823&fileId=8876888>; Dubravka Aksamovic, "EU Insolvency Law - New Recast Regulation on Insolvency Proceedings," *EU and Comparative Law Issues and Challenges Series 1* (2017): 69-94.

⁶ J Armour, "European Cross-Border Insolvencies: The Race Goes to the Swiftest?" *The Cambridge Law Journal* Nov., 2006, Vol. 65, No. 3 (Nov., 2006), pp. 505-507.

⁷ of *Eurofood IFCS Ltd.—Bondi v. Bank of America* NA (C 04, OJ. [2006] C 14.

⁸ Rhodin note 5 above

⁹ *Ibid.*

Stronger rules for cooperation between insolvency practitioners and the Courts

In keeping with the overhaul of multi-national companies which were situated in different Member States with different national laws, the EIR Recast birthed a novel framework for cooperation and coordination amongst Courts as well as Insolvency Practitioners.

In truth, these cooperative efforts find their roots in variations of “modified” universalism, where “main” proceedings are supported by “ancillary” proceedings or “secondary” proceedings.

Cooperation was a necessary feature to improve the practicalities of business entities with establishments in different Member States and was not in the 2000 EIR.

Under Recital 49: '[i]n light of such cooperation, insolvency practitioners and courts should be able to enter into agreements and protocols for the purpose of facilitating cross-border cooperation of multiple insolvency proceedings in different Member States concerning the same debtor or members of the same group of companies, where this is compatible with the rules applicable to each of the proceedings...

The EIR Recast thus made communication mandatory for Insolvency Practitioners dealing with cross-border insolvencies and they subsequently have become obliged to communicate and cooperate with office-holders in other member states as the Courts as required.

To strengthen the bonds of communication and facilitate the insolvency, the Recast also instructs the relevant courts to communicate and cooperate with one another.

The Recast EIR now sets out a new voluntary process overseen by the courts for coordinating some elements of the proceedings.

Improvement of creditor information.

The Recast EIR introduced an insolvency register which all Member States were obliged to contribute toward its updating of information.

Naturally, this was for the benefit of creditors, or Insolvency Practitioners in the interests of whether secondary proceedings may have opened or were opened and possibly finalized.

The Register thus serves an important practical function and is in the public interest.

General modernization of the legal rules

In line with the privacy laws surrounding data, some of which could be regarded as sensitive, the Recast introduced a regulation concerning data protection and privacy.

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.

A number of the changes in the recast EIR have taken place: a wider scope (it covers more types of insolvency proceedings than the original EIR), enhanced cooperation between different proceedings, various mechanism to minimise the need to open secondary proceedings, the establishment of insolvency registers, and the new provisions dealing with multi-national groups of companies.¹⁰

¹⁰ *Ibid.*

The following three improvements have been selected:

1. The inclusion of Rescue procedures as introduced in Article 1 has been a noticeable innovation.

The original Regulation referred to collective insolvency proceedings involving the partial disinvestment of the debtor and the appointment of a liquidator language of the recast is much broader. The new Article Regulation applies to public collective proceedings, which law relates to insolvency.¹¹

The Recast has replaced the word 'liquidator' and replaced it with 'Insolvency Practitioner' an embodiment of the broad ambit of the Recast proceedings.

What is noteworthy about the recast Regulation is the emphasis placed on rescue and sustaining business activity. The preamble in recital 10 talks about promoting the rescue of economically viable but distressed businesses and giving entrepreneurs a second chance.¹²

Secondary proceedings which were opened subsequent to the commencement of main insolvency proceedings, could only be liquidation proceedings and secondary proceedings initiated before main insolvency proceedings had been opened had to be converted into liquidation proceedings at the request of the liquidator in the main proceedings.

Moreover, the person who took control of a debtor's affairs after main insolvency proceedings had been opened, was referred to throughout the Regulation as a liquidator even though that person might be charged with the task of preparing a restructuring plan.¹³

2. The 'centre of main interests' or COMI is now defined in the Recast, taken directly from the 2000 EIR recital. This represents a bolder approach and was seen as a need to give clarity and as an ancillary, to stomp out the ever-growing cottage industries of forum-shopping.

The case that really set the cat amongst the pigeons was the *Eurofood IFSC Ltd*¹⁴ decision in which the Courts gave guidance by delineating the determination of COMI. As COMI is fundamental to founding jurisdiction of the main proceedings and the accompanying smooth facilitation of cross-border insolvencies, the EIR Recast reworked the definition of COMI to make a determination easier and more precise through Articles 3-6; and Recitals 30-32.

Firstly, the EIR Recast introduced three presumptions for ascertaining a debtor's COMI in Article 3 and Insolvency Practitioners are obliged to examine whether or not COMI is in the jurisdiction in which they are appointed.

Secondly, the EIR Recast refined the definition of establishment in Article 2(10) of the EIR Recast.

By keeping to the wording of establishment as found in Article 2(h) of the EIR, the Recast has added a relevant time period thus negating forum shipping.

3. The EIR Recast introduced "synthetic" or "virtual" secondary proceedings which are those opened in an EU member state where the debtor does not have their COMI but does have an economic presence known as an establishment.

¹¹ G McCormack note 2 above.

¹² G McCormack note 2 above.

¹³ G McCormack note 2 above.

¹⁴ *Eurofood* note 7 above.

This is an approach that has been approved by the English courts for some time, and is now set out in Article 36 of the Recast EIR.¹⁵

Secondary proceedings could originally only be opened if they were winding up proceedings but the introduction of rescue and pre-insolvency related matters was an attempt to cure the challenges of consolidating assets to maximise distribution to creditors.

The introduction of synthetic proceedings consequently also found its way into Articles 56-77 as the original EIR did not contain any provisions specifically tailored to such scenarios.

To avoid further difficulties, rules of co-operation under Article 41 obliged the Insolvency Practitioner to give an undertaking to treat claims of foreign creditors in the same way as they would be treated in the local jurisdiction.

The undertaking was specific in that the Insolvency Practitioner must protect local creditors in order for the Court to refuse an application to open secondary proceeding.

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.

In the first place, the EIR Recast limits the territorial scope of application by making the application of the Regulation subject to the location of the centre of main interests within the territory of a Member State.

Writers have suggested that the preferred approach is to extend the scope of application of the Regulation unilaterally, thereby including insolvencies significantly linked with third States i.e. those not listed in Article 1 proceedings listed in Annexure A. This would go a long way in curing the discrepancies associated with the winding-up or rescue of multinational groups with establishments beyond those listed in Annexure “A.”

Secondly, Article 45(3) of the EIR Recast grants Insolvency Practitioners the right to “participate in other proceedings on the same basis as a creditor.”

However, academics have argued that despite the usefulness of this provision, its right is limited to the attendance of the practitioner, without granting any participatory powers and is “ultimately hardly more than a courtesy.”

It has been opined that Article 45(3) EIR – specifically the term “on the same basis as a creditor”- is to be understood as meaning that the administrators are not just allowed attendance of creditor meetings, but rather that they might also represent the creditors of “their” parallel proceeding.

It is suggested that this Article be refined to specificity by allowing for greater participation of Insolvency Practitioners. This would entail a legislative change.

Alternatively, at a minimum level, office-holders could be instructed to provide specific reports at certain stages, much like the system in Dubai, which calls for continuous reporting by the trustee tasked with the matter.

Total marks: 15 out of 15.

¹⁵ J Forsyth, “European Union: The Recast European Insolvency Regulation: What Is Changing?” available online at <https://www.mondaq.com/uk/insolvencybankruptcy/601068/the-recast-european-insolvency-regulation-what-is-changing>. Accessed 15th July 2022.

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.

ISSUE:

- (a) Whether the Dublin High Court has international jurisdiction to open insolvency proceedings?
- (b) Where is Cardinal Home's COMI situated?

LAW:

Legislation: Regulation No 1346/2000

Regulation No 1346/2000 ("EIR 2000") allows for recognition of insolvency proceedings among Member States of the European Union, excluding Denmark.

Article 3(1) establishes that main insolvency proceedings can be opened at a debtor's COMI.

*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.*¹⁶

Thereafter, in terms of Article 2(b) of the EIR, foreign main proceedings opened in a European jurisdiction where the debtor has its COMI is given exclusive competence to open main insolvency proceedings.

Foreign non-main proceedings, which equate to secondary proceedings, refers to foreign proceedings which are opened in a State where the debtor has an "establishment."

Under the EIR 2000, "Establishment" is defined as "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services."

Article 16(1) of the EIR 2000 states:

¹⁶ Article 3(1) of Regulation No 1346/2000.

'Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings.

Case Law: Eurofood

Recognizing whether to open foreign main or non-main proceedings in the case of companies belonging to a group of companies became the key issue in the matter of *Eurofood*¹⁷ and revolved around the determination of COMI.

To settle the 'jurisdictional quarrel' between Ireland and Italy, upon request of the Supreme Court of Ireland, the CJEU settled the matter, laying the foundation for international jurisdiction in what would later evolve into the EIR Recast.

In this case, proceedings were opened in Ireland due to the fact of the company's registered office was situated in Ireland.

Parmalat, one of the subsidiaries of *Eurofood* was incorporated in Italy.

The dispute arose between Ireland and Italy as to which State held jurisdiction to open main proceedings.

While Ireland granted a decision to commence insolvency proceedings in Ireland, the view held by Italy was contrary to that of Ireland and Italy refused to recognize the Court order of Ireland, finding that it had international jurisdiction to deal with the matter.

In its analysis, the CJEU found that companies could have only one COMI; and, that COMI must be identifiable based on criteria that is objective, and ascertainable by third parties.

The Court did not consider the place of incorporation of the company as the deciding factor, but by the same token, it did not disqualify 'parental control' over a subsidiary as a relevant factor in determining the proper jurisdiction. Its analysis considered the whereabouts of the registered office and operations of the particular subsidiary.¹⁸

The *Eurofood* decision was followed in *Re Crisscross Telecommunications Group (unreported, 20 May 2003), Ch D*. *Crisscross* was also a multinational group facing insolvency and its COMI was on the location of its headquarters.¹⁹

The recognition of the decision opening main insolvency proceedings in one State prevents the courts of other Member States from opening other main proceedings.

Eurofood further found that the Court conferred the function of solving positive conflicts of jurisdiction to Article 16 which lays down "a rule on priority, based on a chronological criterion, in favour of the opening decision which was handed down first.

Eurofood emphasized the point that despite this, a Court may refuse an application for the commencement of proceedings in cases where the decision to open proceedings was taken in flagrant breach of the right to be heard, thereby confirming the principle of the equality of arms.

¹⁷ ECJ 2. 5. 2006-Case C-341/04 (*Eurofood Parmalat*), E.C.R. 2006, 1-3.

¹⁸ I Mevorach, "The 'Home Country' of a Multinational Enterprise Group Facing Insolvency" *The International and Comparative Law Quarterly*. (Apr., 2008) Vol. 57, No. 2, pp. 427-448 at 444.

¹⁹ See also *Re Parmalat Hungary/Slovakia, Municipality Court of Fejer, 14 June 2004* which found that the financial affairs and major decisions of the company were made in Hungary, thereby granting an application to recognize Hungary as the jurisdiction of foreign main proceedings.

Secondly, in its interpretation of Article 16, the Court found that, “the moment in time when the decision opening insolvency proceedings produces its effects in all Member States.... is the same moment when it produces effects in the Member State of origin.”²⁰

According to the decision of *Eurofood* then, the Irish decision of 27 January 2004 qualifies as the decision opening the main insolvency proceedings of Eurofood since it was adopted prior to both the decree of the Italian Ministry of Economic Development appointing the liquidator (dated 9 February 2004) and the judgment of the Parma Tribunal declaring the insolvency (20 February 2007).

Later on in the case of *Christopher Seagon v Deko Marty Belgium NV*, the CJEU expanded on the interpretation of Article 3(1) stating that it must be interpreted as meaning that it also contributes international jurisdiction on the Member State within the territory of which insolvency proceedings were opened in order to hear and determine actions which derive directly from those proceedings and which are closely connected to them.”²¹

APPLICATION OF THE LAW TO THE FACTS

Applying the *Eurofood* decision, the COMI of Cardinal Home may be ascertained as being in Ireland due to its registered office situated in Ireland, as well as its first store opening in Ireland. For these reasons, it is submitted that the Dublin High Court has international jurisdiction to entertain the application for the commencement of liquidation.

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.

ISSUE: Is the EIR Recast applicable to proceedings opened on 30th June 2017?

LAW:

Determining the Scope of the EIR Recast consist of four tests, each of which must yield a positive result.

The Material Scope:

The first step is to consider the material scope of the application. The material scope may be found in Article 1 of the EIR Recast which states:

Scope

1. *This 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, reorganisation or liquidation:*

- (a) *a debtor is totally or partially divested of its assets and an insolvency practitioner is appointed;*

²⁰ G McCormack, “Jurisdictional Competition and Forum Shopping in Insolvency Proceedings” (2009) *The Cambridge Law Journal*, Vol. 68, No. 1 (Mar., 2009), pp. 169-197.

²¹ *Deko Marty* at para 21. See also: S Bariatti, “Recent Case-Law Concerning Jurisdiction and the Recognition of Judgments under the European Insolvency Regulation.” (2009) *Rabels Zeitschrift für ausländisches und internationales Privatrecht / The Rabel Journal of Comparative and International Private Law* Bd. 73, H. 3, The Communitarisation of Private International Law (Juli 2009), pp. 629-659.

- (b) *the assets and affairs of a debtor are subject to control or supervision by a court; or*
- (c) *a temporary stay of individual enforcement proceedings is granted by a court or by operation of law, in order to allow for negotiations between the debtor and its creditors, provided that the proceedings in which the stay is granted provide for suitable measures to protect the general body of creditors, and, where no agreement is reached, are preliminary to one of the proceedings referred to in point (a) or (b).*

The material scope therefore provides the type and nature of proceedings governed by the EIR Recast. Article 1 includes those proceedings not covered by the EIR Recast.

The Personal Scope:

The personal scope refers to who the EIR Recast applies to.

Article 1(2) contains the exclusions to the scope of the Recast as follows:

- 2. *This Regulation shall not apply to proceedings referred to in paragraph 1 that concern:*
 - (a) *insurance undertakings;*
 - (b) *credit institutions;*
 - (c) *investment firms and other firms, institutions and undertakings to the extent that they are covered by Directive 2001/24/EC; or*
 - (d) *collective investment undertakings.*

The Temporal Scope:

The Temporal Scope determines when the Recast EIR applies in time.

In the *Staubitz-Schreiber* case, a German national applied for the opening of insolvency proceedings regarding her business assets.

The application had been made to the German court of her residence thus founding COMI in December 2001, but she had moved to Spain shortly afterwards before the EIR came into operation.

In April 2002 the German judge rejected the request for lack of sufficient assets, and in August 2002 it declined jurisdiction since by then the COMI of the debtor was situated in another Member State.

The ECJ ruled that the relevant moment in time for the establishment of jurisdiction is when the request is lodged with the national court.²²

Geographical Scope

The geographical scope refers to the assessment of whether the debtor has a COMI within the European Union ("EU") excluding Denmark.

APPLICATION OF THE LAW TO THE FACTS

1. Cardinal Home has its COMI in Ireland, which is a member of the EU. This satisfies the geographical scope of proceedings.

²² S Bariatti, "Recent Case-Law Concerning Jurisdiction and the Recognition of Judgments under the European Insolvency Regulation." (2009) *Rabels Zeitschrift für ausländisches und internationales Privatrecht / The Rabel Journal of Comparative and International Private Law* Bd. 73, H. 3, The Communitarisation of Private International Law (Juli 2009), pp. 629-659.

2. Cardinal Home is not a bank, or an insurance company, or any “other” excluded entity; therefore the personal scope of proceedings is satisfied.
3. Cardinal Home is subjected to examinership proceedings which fall within the ambit of Article 1 of the EIR Recast in that the debtor will be divested of its assets and a liquidator appointed. This satisfies the material scope.
4. The proceeding is opened after 26th June 2017 (*viz.* 30th June 2017) and thus satisfies the temporal scope.

All four tests have yielded a positive result. It is therefore respectfully submitted that the EIR Recast is applicable.

Question 4.3 [maximum 5 marks] 2

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.

ISSUES: (a) Can secondary proceedings be opened in Italy?
(b) If so, will it secure an Italian insolvency distribution ranking?

LAW:

Main insolvency proceedings are, in terms of Article 3(1) opened in the jurisdiction of the debtor’s COMI.

In terms of Recital 23:

Those [main] proceedings have universal scope and are aimed at encompassing all the debtor’s assets.....

Secondary insolvency proceedings may be opened in the Member State where the debtor has an establishment. The effects of secondary insolvency proceedings are limited to the assets located in that State.

In terms of Article 2(10) Secondary proceedings can only be opened in the Member State in which the debtor has carried out a non-transitory economic activity with human means and assets.²³

Once opened, the effect of the secondary proceedings is thus limited to the assets of the debtor situated within that territory.

However the opening of secondary proceedings may hamper the efficient administration of the insolvent estate.²⁴ To cater for this, the Court may at the request of the Insolvency Practitioner, postpone or stay the proceedings.

In this way, the main proceeding empowers the Insolvency Practitioner to interfere in secondary proceedings so much so that the Insolvency Practitioner may apply for a stay of

²³ Articles 36 and 38 of the EIR Recast.

²⁴ Recital 41 of the EIR Recast

the realization of assets in the secondary proceedings or is the prime mover of a restructuring plan or composition.²⁵

But, where the Insolvency Practitioner gives an undertaking that in the secondary proceeding that

When distributing those assets or the proceeds received as a result of their realization, he 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.

Following the plan text language of this provision means that the Insolvency Practitioner does not restrict the distribution of the assets for the benefit of “local creditors” only, but refers to the “distribution and priority rights that creditors would have” in terms of their local national law. This means that the doctrine of *lex fori concursus* is subverted in favour of the domestic insolvency regime of the Member State which is the subject of secondary proceedings.

APPLICATION OF THE LAW TO THE FACTS

Applying Article 2(10), read with the definition of “establishment” as found in Article 2 of the EIR Recast, Cardinal Home has an establishment in Italy.

Italy, as a Member of the EU satisfies the geographical scope of proceedings.

Reducing costs of parallel proceedings, and facilitating the coordination of a global sale of assets or the orchestration of reorganization on a group scale is the fundamental aim of multi-national insolvencies.

However in consideration of the undertaking by the Insolvency Practitioner to comply with the distribution of national laws, the Italian Bank may be successful in their application.

While your reasoning is sound, you do not provide any reference to CJEU case law and 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: 12 out of 15

*** End of Assessment ***

Total marks: 41 out of 50

²⁵ Recital 48 of the EIR Recast.