



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

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

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

ANSWER ALL THE QUESTIONS

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

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

Question 1.1

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

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

Question 1.2

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

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

Question 1.3

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

- (a) True. The EIR 2000 proved to be inefficient and incapable of supporting the effective resolution of cross-border cases over the years.
- (b) True. As a result, the EIR 2000 lacked the support of major stakeholders such as insolvency practitioners, businesses and public authorities who considered the instrument fruitless.

(c) False. While a number of shortcomings were identified by an evaluation study and a public consultation, the EIR 2000 was generally regarded as a successful instrument by most stakeholders, including practitioners, businesses, the EU institutions and insolvency academics.

(d) False. The EIR 2000 was considered a complete success to support cross-border insolvency cases and, as a result, the wording of the EIR Recast mirrored its 2000 predecessor.

Question 1.4

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

(a) The EIR Recast is a copy of the EIR 2000. Its structure and the wording of all articles are similar.

(b) Although the EIR Recast includes relevant and useful innovations, it has stuck with the framework of the EIR 2000 and mostly codified the jurisprudence of the CJEU.

(c) The EIR Recast has not added any new concept to the text of the EIR 2000.

(d) It is incorrect to say that the EIR Recast has not overhauled the *status quo* at all. On the contrary, the EIR Recast has departed from the text of its predecessor and is a completely new instrument which has rejected all existing concepts and rules.

Question 1.5

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

(a) The EIR Recast is more rescue-oriented because all domestic rescue procedures fall within its scope.

(b) The EIR Recast is more rescue-oriented because it harmonises all substantive aspects of national insolvency laws.

(c) It is incorrect to say that the EIR Recast is more rescue-oriented than the EIR 2000, as the latter was already heavily rescue-focused.

(d) The EIR Recast is more rescue-oriented because its scope was extended to cover pre-insolvency proceedings and secondary proceedings can now also be rescue proceedings.

Question 1.6

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

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

(b) Rules on co-operation and communication between courts were to be refined; the concept of COMI was to be abandoned and a new jurisdictional concept was to be found; the Recast Regulation was to apply to Denmark.

- (c) The Recast Regulation was to apply to private individuals and self-employed; a common European-wide insolvency proceeding was to be added to the Regulation.
- (d) The Regulation was meant to fully embrace the universalism principle by abandoning the concept of secondary proceedings; the Regulation was meant to mostly promote out-of-court settlement and abandon all intervention of a judicial or administrative authority in cross-border proceedings.

Question 1.7

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

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

Question 1.8

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

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

Question 1.9

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

contested payments shall be set aside because Lacroix SARL must have been aware that Fema Srl was facing insolvency at the time the payments were made.

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

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

B was the correct answer.

Question 1.10

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

Assume that:

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

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

- (a) Within two (2) months following the publication date, as guaranteed by the French law (law applicable to the creditor).
- (b) Within one month, as stipulated in the applicable *lex concursus secundarii* (law of the insolvency proceeding at issue).
- (c) Within 30 days following the publication of the opening of insolvency proceedings in the insolvency register of Spain.
- (d) Within the time limit prescribed by the *lex concursus* of the main insolvency proceeding (Irish law).

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks] 1

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 38 of the EIR Recast provides that when a court is requested to open secondary insolvency proceedings, it shall inform the insolvency practitioner of the main insolvency proceeding and give him an opportunity to be heard.
- If the insolvency practitioner in the main insolvency proceeding has given an undertaking according to Article 36 of the EIR Recast, the court shall not open the secondary insolvency proceeding if the court satisfied that the undertaking adequately protects the general interest of local creditors.
- The undertaking by the insolvency practitioner is a unilateral undertaking, which covers assets of the local Member State (where the secondary insolvency proceeding is requested). The undertaking (guarantee) by the insolvency practitioner of the main insolvency proceeding will be such that the local creditors will obtain the same treatment “as if” secondary proceedings had been opened.
- The undertaking by the insolvency practitioner is subject to the approval of “known local creditors”, the approval of which must meet a certain qualified majority as stated in Article 36 of the EIR Recast.
- In short, the insolvency practitioner of the main proceeding can prevent the opening of a secondary proceeding if the undertaking meets the requisite requirements.

Statement 2

- Article 65 of the Treaty establishing the European Community provides for judicial cooperation in civil matters having cross-border implications, so far as it is “necessary for the proper functioning of the internal market”. This includes, “improving and simplifying ... recognition and enforcement of decisions in civil and commercial cases”.
- The change from Convention (that requires all member states to approve) to Regulation (it does not require all member states to ratify) makes it easier in the implementation of rules and ensure uniformity of the application of rules by CJEU.

- The regulation (EIR Recast) sets out rules governing the communication and cooperation and between courts and insolvency practitioners, enabling (facilitating) the proper functioning of the insolvency proceedings. **Yes but which provision (article and/or recital) of the EIR Recast deal(s) with this?**

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.

- Under universalism concept, cross-border insolvencies are to be administered via a single insolvency regime – that is there will be one single insolvency officer holder regardless of where the assets (creditors) are located. Pure universalism will involve one court and one law. This is not realistic as different countries have different laws.
- The opposite of universalism is territoriality – that is each territory will administer its own insolvency processes. In the event of insolvency (especially when restructuring is involved), territoriality is likely to adversely impact business value. Restructuring of business entities in different territories are inter-related and breaking them up via different insolvency regimes is likely to negatively impact business value.
- Modified universalism strikes a balance between universalism and territoriality. European Union has taken about 40 years to find the “right” balance (arguably). EIR Recast is based on the concept of modified universalism.
- EIR Recast provides for modified universalism and the application of it can be seen in the following: (a) While the EIR Recast provides for the opening of main insolvency proceedings where COMI is, it allows for the opening of secondary insolvency proceedings covering assets of a local territory where the debtor has an establishment. This means that the secondary insolvency proceedings allow the local courts to administer its insolvency according to the local laws, although it must at the same time coordinate its local processes with the main insolvency proceeding. It also allows for insolvency practitioners of the main proceeding to work with and cooperate with local insolvency practitioners and the courts involved in the secondary proceeding(s).
- Another example of modified universalism is, some entities are excluded from the application of EIR Recast – these entities include insurance, credit institutions, and investment firms. These entities play a significant role in the financial stability of a country and are subjected to the supervisory authorities of that Member State. The insolvency model leans towards territoriality for such entities.
- Other exceptions (modification) to the universal application (universalism) can be seen in provisions of EIR Recast. They include the following:
 - **Third parties’ rights *in rem*** - Article 8 of EIR Recast provides that “The opening of insolvency proceeding shall not affect the rights *in rem* of creditors or third parties ... [assets] belong to the debtor situated within the territory of another Member State ...”. The rationale is set out in Recital 68, which states that “rights *in rem* should therefore normally be determined according to the *lex situs* and not be affected by the opening of insolvency proceeding”.

- **Detrimental acts** – Article 7 provides that “*the law applicable to insolvency proceedings ... shall be ... the State of the opening proceedings*”. This includes *the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors*”: Article 7(2)(m). The exception to the application is found in Article 16 where it provides that Article 7(2)(m) “... shall not apply where the person who benefited from an act detrimental to all the creditors provides proof that ... the act is subject to the law of a Member State ... and the law of that Member State does not allow any means of challenging that act ...”. In other words, if a particular transaction (payment to a creditor, for example) in a Member State (not the State of the opening of the proceeding) is valid in law in that Member State, that transaction cannot be challenged although the law where the insolvency proceeding is open would regard such a transaction (payment to a creditor) void. Where there is *lex causae*, Article 16 “carve out” the application of the law applicable to the insolvency proceeding where it relates to “... voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors”. This is understandable as there is a need to protect legitimate expectations of the parties dealing with the distress debtor.
- **Contracts of employment** - Article 7 provides that “*the law applicable to insolvency proceedings ... shall be ... the State of the opening proceedings*”. This includes “*the effects of insolvency proceedings on current contracts to which the debtor is party*”: Article 7(2)(e) [*lex concursus*]. However, Article 13 “carve out” the application of Article 7, which provides that “*the effects of insolvency proceedings on employment contracts and relationship shall be governed solely by the law of the Member State applicable to the contract of employment ... the courts of the Member State in which secondary insolvency proceedings may be opened shall retain jurisdiction to approve the termination or modification of the contracts referred to in this Article even if no insolvency proceedings have been opened in that Member State*” [*lex contractus*].
- **Effects of insolvency proceedings on pending lawsuits or arbitral proceedings** – Article 18 is another “carve out” from the application of *lex concursus*. It provides that “... *a pending lawsuit or pending arbitral proceedings ... shall be governed solely by the law of the Member State in which the lawsuit is pending ...*”.

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.

- Recital 48 – It states that efficient administration of the debtor’s insolvent estate can be contributed by proper cooperation between actors involved in concurrent proceedings. This implies various insolvency practitioners and the courts involved cooperating closely.
- Recital 50 – It provide for the courts of different Member States to cooperate by coordinating the appointment of insolvency practitioners.
- Recital 52 – It provides that “*Where insolvency proceedings have been opened for several companies of the same group, there should be proper cooperation between the actors involved in those proceedings. The various insolvency practitioners and the courts*

involved should therefore be under a similar obligation to cooperate and communicate with each other as those involved in main and secondary insolvency proceedings relating to the same debtor ...”

- Article 42 – It provides that *“In order to facilitate the coordination ... concerning the same debtor, a court ... shall cooperate with any other court before which a request to open insolvency proceedings is pending ...”*
- Article 43 – It provides for cooperation and communication between insolvency practitioners and courts.
- Articles 57 – It provides for cooperation and communication between courts relating to insolvency proceedings of members of a group of companies.

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.

- The insolvency practitioner in the main insolvency proceedings may give a unilateral undertaking in respect of the assets located in the Member State in which secondary proceedings could be opened, such that the interest of the local creditors will be adequately protected. If the court is satisfied with the undertaking, the court must not open a secondary proceeding: Article 36. The undertaking is such that the local creditors will get the treatment (protection) “as if” secondary proceedings had been opened. The safeguard to the creditors is that (a) the undertaking must specify the factual assumptions that relates to the value of the assets located in the Member State (general description of the assets is not sufficient) and (b) the undertaking must be approved by “*known local creditors*” and the approval meets the qualified majority as stated in Article 36.
- The insolvency practitioner in the main proceedings can request for a temporary stay of the opening of a secondary proceeding on the basis that there is a need for time (breathing space) to allow for negotiations between the debtor and creditors. The court may (not must) grant such a stay for a period not exceeding 3 months provided that “*suitable measures are in place to protect the interest of local creditors*”. The court may require that the insolvency practitioners not to remove or dispose of any assets located in the Member State unless “*it is done in the ordinary course of business*”.

Total marks: 9 out of 10.

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

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

Question 3.1 [maximum 5 marks] 5

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

- Article 46 of EIR 2000 provides that “No later than 1 June 2012, and every five years thereafter, the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Regulation. The report shall be accompanied if need be by a proposal for adaptation of this Regulation.”
- The European Commission (EC) identified several aspects of the EIR 2000 to be considered for amendments. They include the following:
 - a) The EIR 2000 did not include pre-insolvency proceedings.
 - b) The concept of COMI of an insolvent debtor has difficulties in its application.
 - c) The opening of a secondary proceeding in a member has an adverse effect on the efficient administration of the debtor’s estate.
 - d) There is no obligation to publish the insolvency proceeding (for the creditors to lodge claim, creditors need to be aware of the insolvency proceeding to avoid prejudicing the local creditors).
 - e) The EIR 2000 did not have provisions relating to how a group insolvency are to be dealt with.

How they have been introduced in the EIR Recast.

Pre-insolvency – There is an emphasis in EIR Recast. The emphasis on restructuring can be seen in Recital 10 and Article 1. Recital 10 provides that “*The scope of this Regulation should extend to proceedings which promote the **rescue** of economically viable but distressed business, and which give a second chance to entrepreneurs. It should ... extend to proceedings which provide for restructuring of a debtor at a stage where there is only a likelihood of insolvency ...*”. Article 1 provides that “*This Regulation shall apply to public collective proceedings ... for the purpose of **rescue**, adjustment of debt, reorganisation, or liquidation ... a **temporary stay** of individual enforcement proceedings ... in order to allow for **negotiations** between the debtor and its creditors, provided that ... the stay is granted to provide for suitable measures to protect the general body of creditors ...*”. An example of a pre-insolvency feature can be seen in Article 36 where the insolvency practitioner of the main proceeding can request for a stay of the opening of a secondary proceeding to provide the debtor with a breathing space to carry out restructuring (rescue) plan [see further explanations below].

Concept of COMI – Under EIR 2000, Recital provides guidance on the meaning of COMI. However, under EIR Recast, Article 3 provides that COMI “... shall be the place where the debtor conducts the administration of its interests on a **regular basis, and which is ascertainable by third parties** ... the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary”. Recital provides guidance and does not have the force of law, as compared to Articles, which has the force of law. By providing (defining) on what COMI is Article 3 of EIR Recast, it clarifies the legal definition for the courts to apply the concept consistently. There have been past legal proceedings on what constitute COMI – what factors to consider in arriving at COMI. Article 3 places the concept (definition) of COMI in statutory footing, and it is welcome.

The opening of a secondary proceeding in a member state has an adverse effect on the efficient administration of the debtor's estate – Under EIR Recast, Article 36 allows the insolvency practitioner in the main proceeding to request the court in the Member State where the secondary proceeding is requested not to open a secondary proceeding. The court must not open a secondary proceeding if it is satisfied with the undertaking and that the interests of the local creditors are protected. Further, the insolvency practitioner in the main proceedings can also request for a temporary stay (up to 3 months) of opening of a secondary proceeding to provide time to allow negotiations between the debtors and creditors. The court may (not must) grant the stay if it is satisfied that measures are in place such that interests of the local creditors are protected.

There is no obligation to publish the insolvency proceeding – All Member States are required to maintain registers of insolvency proceedings that are electronically searchable. These registers must be linked to the European e-Justice Portal: see Articles 24 and 25, providing a central database. Further, creditors may lodge their claims by using the standard forms, which contain certain mandatory information. A safeguard is also put in place for foreign creditors, in that they have the right to file their claim within 30 days after the publication of the opening of the insolvency proceedings: see Articles 53 – 55.

The EIR 2000 did not have provisions relating to how a group insolvency are to be dealt with – Chapter V of the EIR Recast (containing Articles 56 to 77) have dealt with many aspects of group insolvencies. The Chapter, among others, dealt with aspects relating to – (a) cooperation and communication between insolvency practitioners (b) cooperation and communication between courts (c) powers of insolvency practitioners in proceedings concerning members of a group of companies (d) request to open group coordination proceeding (e) choice of court for group coordination proceedings (f) the appointment of office of coordinator and (g) the tasks and rights of the coordinator. They are mostly procedural (not substantive law) in nature.

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.

- **Scope** – The scope of the EIR 2000 has been expanded to include pre-insolvency (restructuring / rescue) proceedings in EIR Recast. For example, it provides for a stay feature (providing a breathing space) to enable the distress debtor to work out a rescue (restructuring) plan.
- **COMI** – The manner of establishing a debtor's COMI has been codified in EIR Recast. Article 3 EIR provides that COMI "*shall be the place where the debtor conducts the administration of its interests on a **regular basis and which is ascertainable by third parties***". It also provides that "*... the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary*". Therefore, it provides for a rebuttable presumption against the registered office as the COMI if it could be proofed that a debtor does not conduct its business on a regular basis, and which is ascertainable by third parties in a particular territory.
- **Synthetic proceeding** – A secondary proceeding may be opened in a Member State where the debtor has an **establishment**. However, an insolvency practitioner can apply

to the court of the Member State to prevent it from opening if the undertaking by the insolvency Practitioner of the main proceeding meets the requirement as set out in the EIR Recast. Under EIR 2000, a synthetic proceeding applies to formal insolvency (winding-up) proceedings. This has been expanded under EIR Recast to include pre-insolvency (restructuring / rescue) proceeding: Article 36. The meaning of **establishment** is also provided for in the Recast.

- **Group insolvencies (Group Coordination Proceeding)** – EIR Recast (Chapter V, Article 56 to 77) introduced a new framework for cooperation and communication for a group of companies involved in insolvency proceedings in different Member States. It provides for cooperation and communication between courts and insolvency practitioners. It also introduced the concept of a group coordinator, coordinating the insolvency proceedings of a group of companies.
- **Register of Insolvencies** – All Member States are required to maintain registers of insolvency proceedings that are electronically searchable. These registers must be linked to the European e-Justice Portal (*by 26 June 2019*).
- **Lodgement of claims by creditors** – Creditors may lodge their claims by using the standard forms, which contain certain mandatory information. A safeguard is also put in place for foreign creditors, in that they have the right to file their claim within 30 days after the publication of the opening of the insolvency proceedings.

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.

- **Restructuring (rescue) regime** – EIR Recast is not designed to be “rescue (restructuring) friendly”. It does not provide for a substantive “EU Rescue Scheme” where the insolvency practitioner of the main insolvency may adopt. Each Member State may develop its own rescue scheme within its own territory. This potentially led to “forum shopping” where insolvency practitioner moves its COMI to another Member State to carry out a rescue (restructuring) plan.
- **Group insolvencies (Group Coordination Proceeding)** – They relate mainly to cooperation and communication, and procedural laws - but substantive laws on rescue (restructuring) scheme. Further, it contains rights of individual insolvency practitioner to object to the inclusion of the group co-ordination proceedings, making it less effective for group insolvency proceedings [see other comments below on group insolvency v entity-by-entity restructuring. See also comments stay and rights *in rem* below.
- **Essential features of rescue (friendly) regime** – It has been argued (accepted) that rescue (restructuring) friendly scheme should include the following features. EIR Recast lacks (some) the following features.
 - a) **Clarity on what binds creditors at EU level** – Rescue scheme typically provides for threshold (majority in number and 2/3 (or ¾) in value of the creditors (classes of creditors) present and voting to vote in favour. If it meets the threshold, it binds all creditors. This is not provided for in EIR Recast, but the features (threshold) of rescue

scheme are left to the Member States to develop its rescue (restructuring) scheme. It lacks harmonisation in relation to rescue schemes of the Member States. While it is understandable that there may be conflict of laws among Member States, these conflicts could be carved out and provided for by insolvency practitioner when developing a rescue scheme. Examples of carve out include priority of debts or employment contracts of Member State.

- b) **Debtor-in-possession or independent third-party professional driving the rescue scheme** – Rescue scheme is (arguably) best driven by the management who has the knowledge and experience of the business. This is especially so if the distress was caused by external factors (not due to management integrity or capability). It is noted that in some cases where trust (in the management or shareholders) is an issue, it may be better than both the management and development of a rescue scheme be placed in the hands of a third-party independent professionals (insolvency practitioners). EIR Recast has not provided for it. It may be that EIR Recast (if amendments are to be considered) to consider having two rescue schemes - (i) one where the management of the company continues to be placed in the hands of the debtor (board of directors/debtor-in-possession) and (ii) the other where the management is placed in the hands of a third-party professionals (insolvency practitioner), while developing a rescue scheme.
- c) **Rescue financing (protection of new funding)** – It is likely that new funding would be required in a rescue scheme. Given the risks involved in such a funding, the new money (rescue financing) from the funder (white-knight) is likely to require higher return (interest rates) and with good (adequate) security. The law relating to rescue scheme ought to provide for - (i) rescue financing to be valid and is not in violation of avoidance (preference) transactions rule and (ii) new funder may take security or super-priority security subject to certain safeguards and approval of the courts. EIR Recast has not provided for this; it is a feature that the EIR Recast can consider incorporating if amendment is considered.
- d) **Court-order stay (automatic statutory stay)** – It is expected that creditors will pressure the distress debtor for payments by exerting commercial pressure or resorting to court proceedings when they suspect that the debtor has difficulty paying its debts. For the debtor to be able to work out a rescue scheme, a breathing space (a temporary stay order by the court or automatic statutory stay) will be required. EIR Recast provides that the court may order for a short stay (up to 3 months). The time it takes to properly develop a rescue scheme is likely to require more than 3 months. Further, an automatic (interim) statutory automatic stay can be considered provided safeguards are in place. Beyond the interim period, the debtor-in-possession or insolvency practitioner must justify to the court on why moratorium should be extended. Where need be, the extension of moratorium can be subjected to approval of creditors meeting with approval by creditors with a certain threshold (1/2 or 2/3 in value voting in favour of extending the moratorium). The right of the creditors *in rem* ought to be suspended to allow the debtor breathing space to work out a rescue scheme. It is noted that the creditors' right to enforce rights *in rem* are protected under EIR Recast, and this (potentially) makes a rescue (restructuring) plan difficult or impossible.
- e) **Ability of the court to cram down dissenting creditors** – Rescue scheme is normally done by dividing creditors in classes, and each class ought to vote in favour of the scheme that meets a requisite percentage. The rationale for dividing them into classes are the rights may differ and ought to be placed in separate classes to enable a more equitable (practical) scheme to be done. However, this may create a situation where one class is holding out (holding other classes to ransom). For example, if Class A creditors are put in a separate class and the amount owing to them (Class A) is

relatively small as compared to other creditors, they can hold other classes to “ransom” and demand that the amount owing to them (Class A) are fully paid. In such a situation, the court should be empowered to “cram down” the dissenting class, after considering the interests of all creditors. EIR Recast may want to consider adopting (tweaking) this feature.

- f) **Good guidelines on classification of creditors** – As explained above, guidelines (or legal definition) ought to be developed on how creditors are to be placed in different classes. Without clear (clearer) guidelines, a rescue scheme can be caught in court litigations fighting over whether classes are be categorised correctly. There has been many legal cases dating back over 100 years in the UK relating to proper classification of creditors.
- g) **Minimal court involvement** – There will be legal issues and it is inevitable that matters will be brought to court of decisions. However, rescue scheme is broadly about commercial and financial matters. It is best that rescue scheme provisions provide for minimal court’s involvement. While court involvement is essential, but it ought to be kept to the minimum. If EIR Recast would consider an EU wide Rescue Scheme(s), minimal court involvement approach should be considered.
- h) **Role of insolvency practitioner as monitor (supervisor)** – While it is advocated that a rescue scheme should be debtor driven, it is also important to counterbalance it with an independent third party (insolvency practitioner) having an oversight of the rescue scheme. His fiduciary duties ought to be towards the creditors. In Chapter 11 (USA) the court is active in the process to ensure that stakeholders’ interests are protected. It is noted that rescue scheme in Canada provides for the appointment of “monitor” to have an oversight over the rescue scheme. EIR Recast does not provide for such an oversight feature by an independent third-party professional (example – insolvency practitioner).
- i) **Group restructuring feature (as opposed to entity-by-entity restructuring)** – as seen the in case of *Eurofood* by CJEU – Entity-by-entity restructuring is costly and is not consistent with the economic reality of the business. An EU wide rescue scheme could consider (a) opt-in and (b) opt-out features. The opt-out feature allows Member States (other than the Member State of the main proceeding) to opt-out from the EU wide rescue scheme. If the Member States want to opt-out from the EU wide rescue scheme (done at the main proceeding), they (the insolvency practitioners or debtors-in-possession) must provide justifications to the courts of the Member States on the rationale of the opt-out. These features would push all Member States to work together – the insolvency practitioner of the main proceeding need to take steps to ensure that the EU wide rescue scheme is acceptable to other Member States. At the same time, other Member States must ensure that they have reasons to opt out if they want to opt-out. An additional feature to prevent an “irrational” opt-out is by providing the court with the power to require the Member States that want to opt-out to obtain creditors voting (to opt-out) (if the court is of the view that creditors decision is needed) that meets the majority of creditors in value.
- j) **Cross-border recognition of insolvency proceeding** – EIR Recast does not provide for cross-border recognition of proceedings outside Member States. This makes it difficult to carry out a rescue scheme where the rescue scheme involves Member States and non-Member States. EIR Recast may want to consider this in future amendments. The UNCITRAL Model Law on Insolvency could be considered as a model for EU Member States.

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.

Whether Dublin High Court has the jurisdiction to open the insolvency proceeding depends on whether Cardinal Home has its COMI in Ireland.

What constitute COMI was provided by the Recital to EIR 2000, but not defined in the Articles of EIR 2000. Having regard to the Recital, the court [then European Court of Justice (“ECJ”)] in the case of *Eurofood IFSC Ltd* [2006] held that in determining COMI, regards must be had to the objective criteria ascertainable by third parties (Para 33 of EIR 2000).

Ascertainable by third parties (parties who do business with Cardinal Home) is closely related to the time factor. In this case, Cardinal Home started its business in Ireland with its first stores in 2009 and has warehouses across Europe. In 2010 (a year later), it secured financing from an Italian bank and planned to reach out to the Spanish market. It has also started signing some (non-binding) MOU. It is not clear on the facts where the bulk of the business (creditors) are – whether it is in Ireland or elsewhere. In another words, it is not clear on the facts whether Cardinal Home can claim that its COMI is in Ireland based on the principle of “ascertainable by third parties”.

If it could be shown (proofed) that third parties would regard Ireland as the centre of its main interests (business), Dublin High Court will have jurisdiction. If not, Dublin High Court does not have the jurisdiction.

Question 4.2 [maximum 5 marks] 5

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

To determine whether EIR Recast applies, the following steps are to be confirmed in the affirmative (yes).

- a) Does the debtor (Cardinal Home) have its COMI in a Member State?
- b) Is the debtor a non-excluded entity [excluded entity includes a bank, insurance company etc]?
- c) Is the proceeding opened against a debtor listed in Annex A of the Recast?
- d) Is the proceeding opened from 26 June 2017 (when EIR Recast takes effect)?

As to (a) – Article 3 provides that COMI “... shall be the place where the debtor conducts the administration of its interests on a regular basis, and which is ascertainable by third parties”. It also provides that “... 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 ...”. Cardinal Home place of registered office is Ireland and on the basis that it is not proofed to the contrary (on factors which is ascertainable by third parties), Ireland shall be its COMI.

As to (b) – Cardinal Home falls outside the excluded entities as it is not a “a bank, insurance company, etc).

As to (c) – The examinership proceeding falls within Annex A.

As to (d) – The proceeding opens on 30 June 2017, after the EIR Recast has taken effect.

In short, EIR Recast is applicable as all the factors above are confirmed yes (in the affirmative).

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.

- Article 3(2) of EIR provides that a secondary proceeding can be opened “*Where the centre of the debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if it possesses an **establishment** within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State*”
- On the facts, the question is whether Cardinal Home has an establishment in Italy. Article 2(10) of EIR provides that “*‘establishment’ means any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets*”.
- The facts provides that Cardinal Home “... started negotiating with local distributors, thus signing some (non-binding) memoranda of understanding with them. The facts do not indicate whether the business took off, such that it qualifies as having an “establishment”. To qualify for “establishment”, it must meet the requirements of the business being carried out “*in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets*”.

- On the facts, it is not clear whether Cardinal Home meets the requirement of “3-month period prior to” and “non-transitory economic activity with human means and assets”. On the basis (assumption) that Cardinal Home meet the criteria, a secondary proceeding can be opened in Italy.
- However, the secondary proceeding will only have effects on assets in Italy. The secondary proceeding serves to protect the local creditors, that is the Italian Bank – it enables the Italian bank to protect its position by securing the “distribution ranking”.

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: 46 out of 50.