



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

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

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

ANSWER ALL THE QUESTIONS

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

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

Question 1.1

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

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

Question 1.2

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

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

Question 1.3

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

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

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

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

Question 1.4

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

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

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

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

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

Question 1.5

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

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

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

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

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

Question 1.6

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

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

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

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

Question 1.7

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

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

Question 1.8

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

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

Question 1.9

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

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

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

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

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).

Total marks: 10 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 relates to the 'synthetic' secondary proceeding that has been introduced in the EIR Recast and is set forth in Article 36 of the EIR Recast, which stipulates that the insolvency practitioner in the main insolvency proceeding may submit a unilateral undertaking to the local creditors in another Member State¹ where a secondary proceeding can be opened, regarding the assets located in that state, to promise adherence to the distribution and priority rights prevailing in that state, such that the local creditors will receive treatment as if the secondary proceeding is opened there. Article 38(2) of the EIR Recast stipulates that in the event an undertaking in accordance with Article 36 of the EIR Recast has been made, then the court in that state should not open the secondary proceeding, if the court is satisfied that the undertaking provided would protect the general interests of the local creditors.

Statement 2 relates to the principles of co-operation and communication in the EIR Recast that stem from the general idea of mutual trust and sincere co-operation, that is indispensable for a proper functioning of the EU as one internal market. The EIR Recast introduced comprehensive sets of frameworks for co-operation and communication among insolvency practitioners (Article 41 EIR Recast), courts (Article 42 EIR Recast), and between insolvency practitioners and courts (Article 43 EIR Recast).

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 concept of modified universalism, which seek a compromise between universality and territoriality, had underpinned EIR 2000 and was carried over to EIR Recast. The modified universalism can be seen in these EIR Recast provisions;

- Article 3 of EIR Recast concerning the international jurisdiction of insolvency proceedings under the EIR Recast, whereby a court of the Member State within whose territory the debtor's centre of main interest (COMI) is situated, shall have the jurisdiction to open main insolvency proceeding with universal reach (Article 3(1)), while at the same time secondary proceedings with territorial nature can be opened by courts of the other Member State(s) within whose territories the debtor has its establishment(s) (Article 3(2)).
- Article 8 of the EIR Recast concerning the third parties' rights *in rem* which limits the universal reach of the application of the main insolvency proceeding's *lex concursus*, by

¹ Reference to Member States or a Member State in my answers in this assessment, shall mean members or any member of the European Union, with the exception of Denmark.

stipulating the exemption that the main insolvency proceeding shall not affect the rights *in rem* of creditors or third parties over assets located in the other Member State(s).

- Article 19 of EIR Recast concerning the automatic recognition of an insolvency proceeding opened in one Member State by the other Member States, such that the insolvency proceeding will have universal reach (Article 19(1)), however the recognition of main insolvency proceeding shall not preclude the opening of secondary insolvency proceeding(s) with territorial nature in other Member State(s) (Article 19(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.

Recital 48 of the EIR Recast explains the rationale for the new obligation to co-operate and communicate, given that proper co-operation and communication among the actors involved in concurrent proceedings would contribute to the efficient administration of the insolvency estate and effective realisation of the debtor's assets. The EIR Recast thus introduced comprehensive sets of frameworks for co-operation and communication, which can be found in the following provisions;

- Article 41 EIR Recast sets forth the mandatory co-operation and communication between insolvency practitioners in main and secondary proceedings concerning the same debtor;
- Article 42 EIR Recast sets forth the mandatory co-operation and communication between courts in different Member States overseeing insolvency proceedings concerning the same debtor; and
- Article 43 EIR Recast sets forth the mandatory co-operation and communication between insolvency practitioners and the courts in other Member States overseeing insolvency proceedings concerning the same debtor.

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 EIR Recast empowers the insolvency practitioner in the main insolvency proceeding to stop the opening of the secondary proceeding, by providing an undertaking in accordance with Article 36 of the EIR Recast (which is a unilateral undertaking to comply with the distribution and priority rights under national law of the Member State in which secondary proceedings can be opened, as if secondary insolvency proceedings were opened in that Member State), and requesting the court in which secondary proceeding is pending to not open it (Article 38(2) EIR Recast).
- Article 38(3) of the EIR Recast allows the insolvency practitioner in the main insolvency proceeding (as well as the debtor in possession) to request a stay in the opening of secondary insolvency proceedings for a period not exceeding 3 months, where a temporary stay of individual enforcement has been granted in the main proceeding, and provided that suitable measures are in place to protect the interests of local creditors.

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.

In 2012, the European Commission presented its report with recommendation regarding the application and adaptation of the original EIR 2000, to the European Parliament, the Council and the Economic and Social Committee, as mandated by Article 46 of the original EIR 2000. This report by the Commission eventually resulted in the adoption of the EIR Recast, which departed from the original EIR (2000) in the following specific aspects;

- Broader scope of regulation to cover rescue proceedings and becoming more rescue oriented.

The EIR Recast broadened its scope (as compared to the original EIR 2000), as it extends its application to proceedings that are aimed at restructuring or rescuing the debtor, and the EIR Recast is more rescue oriented than the EIR 2000 that was more liquidation oriented. This broadening of scope and rescue orientation can be seen in various parts of the EIR Recast. Article 1 of the EIR Recast regarding its scope (as compared to Article 1 of the EIR 2000) clearly extends its application to proceedings that are aimed at rescue, adjustment of debt, reorganization or liquidation. The original EIR 2000 on the other hand, limited its scope towards proceedings “which entail the partial or total divestment of a debtor and the appointment of a liquidator” (Article 1 of EIR 2000).

The EIR Recast has also eliminated the requirement previously stipulated in the EIR 2000, that secondary proceedings must be winding up proceedings (Article 3(3) of EIR 2000) which was a serious hindrance for corporate rescue. On communication between insolvency practitioners in main and secondary proceedings, the EIR Recast has now compelled the insolvency practitioners to communicate relevant information concerning measures aimed at rescuing or restructuring the debtor, and explore the possibilities of restructuring the debtor (Article 41 of the EIR Recast). The broadened scope of the EIR Recast is also elaborated in Recital 10 of the EIR Recast.

- Stronger and more comprehensive rules for co-operation and communication.

The EIR Recast expanded the framework and requirement for co-operation and communication between actors involved in an insolvency proceeding. Recital 48 of the EIR Recast explains the rationale for the new obligation to co-operate and communicate, given that proper co-operation and communication among the actors involved in concurrent proceedings would contribute to the efficient administration of the insolvency estate and effective realisation of the debtor’s assets. As opposed to just one article in EIR 2000 (Article 31 of EIR 2000) mandating co-operation and communication between liquidators in main and secondary proceedings, the EIR Recast introduced comprehensive sets of frameworks for co-operation and communication between different actors in an insolvency proceeding, covering co-operation and communication; (i) between insolvency practitioners

in main and secondary proceedings concerning the same debtor (Article 41 of EIR Recast), (ii) between courts in different Member States overseeing insolvency proceedings concerning the same debtor (Article 42 of EIR Recast), and (iii) between insolvency practitioners and courts in other Member States overseeing proceedings of the same debtor (Article 43 of EIR Recast).

- Extensive set of regulation for the insolvency of group companies.

The EIR Recast introduced an extensive regulatory framework dealing with insolvency proceedings of numerous members of a group of companies, that is set forth in a whole chapter (Chapter V of the EIR Recast) consisting of 22 articles (Articles 56 until 77 of the EIR Recast). This extensive set of regulations on the insolvencies of group companies is in stark contrast to the EIR 2000, which did not address the issue at all.

- Improvement in the provision of information to creditors.

Under the EIR 2000, the liquidators have discretion on the publication of the information regarding the opening of insolvency proceeding and his/her appointment in other Member States (Article 21 of EIR 2000). Under the EIR Recast, this discretion has been amended to become a duty to publish the information concerning the opening of the insolvency proceeding and the appointment of the insolvency practitioners, in a Member State where the debtor has an establishment (Article 28(1) of the EIR Recast). The EIR Recast also obliges the courts or the insolvency practitioners appointed, to inform all known foreign creditors (whether located in or outside the EU), immediately following the opening of the insolvency proceeding (Article 54(1) of the EIR Recast). The duty to inform foreign creditors under the EIR 2000 was only extended to those creditors “who have their habitual residences, domiciles or registered offices in the other Member States” (Article 40 of the EIR 2000).

The EIR Recast also attempts to establish standardized and interconnected insolvency registers among the Member States, which will greatly improve access to information concerning the insolvency proceedings. Article 24 of the EIR Recast requires establishment and maintenance of insolvency registers and specifies the mandatory information that shall be included and published in these registers. Article 25 of the EIR Recast mandates the establishment of decentralized system for the interconnection of insolvency registers among the Member States, which system is composed of the Member States’ national insolvency registers and the European e-Justice portal, which will be a single and universal search platform for insolvency proceedings and cases taking place across the Member States.

- Simpler enforcement of insolvency and related judgements.

Article 32(1) of the EIR Recast stipulates, by referring to the relevant provisions of Regulation (EU) No 1215/2012 (Brussels I Recast), that a judgement that has been handed down and is enforceable in a Member State, shall be enforceable in other Member States without further formalities. On the other hand, the EIR 2000 still required declaration of enforceability from the court where enforcement is sought.

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.

- The EIR Recast expanded the framework and requirement for co-operation and communication between actors involved in an insolvency proceeding such that the administration of a cross-border case can be carried out in a much more efficient manner under the EIR Recast, as compared to how it could have been conducted under the previous regulation framework under the EIR 2000. Recital 48 of the EIR Recast explains the rationale for the new obligation to co-operate and communicate introduced in the EIR Recast, for the efficient administration of the insolvency estate and effective realisation of the debtor's assets. As opposed to just one article in EIR 2000 (Article 31 of EIR 2000) mandating co-operation and communication between liquidators in main and secondary proceedings, the EIR Recast introduced comprehensive sets of frameworks for co-operation and communication between different actors in an insolvency proceeding, covering co-operation and communication; (i) between insolvency practitioners in main and secondary proceedings concerning the same debtor (Article 41 of EIR Recast), (ii) between courts in different Member States overseeing insolvency proceedings concerning the same debtor (Article 42 of EIR Recast), and (iii) between insolvency practitioners and courts in other Member States overseeing proceedings of the same debtor (Article 43 of EIR Recast).

- The EIR Recast propagates achieving efficient administration of proceedings involving different debtors located in different Member States but belonging to the same group of companies (which is defined in Article 2(13) of the EIR Recast as a parent undertaking and all its subsidiary undertakings). To that end, Recital 53 of the EIR Recast opens up the possibility of jurisdictional consolidation of proceedings involving different members of the group companies, if the court is satisfied that the centre of main interests of these members (assessed individually) is located in a single Member State, and the same insolvency practitioner can be appointed in the different proceedings to administer the insolvency estates of the group. The EIR Recast also regulates the co-operation and communication between insolvency actors involved in the proceedings concerning different debtors that are members of the same group of companies, which greatly facilitate the administration of cross-border insolvencies for such group of companies. The EIR Recast stipulates the co-operation and communication (i) between insolvency practitioners appointed in different proceedings concerning two or more members of the same group of companies (Article 56 of the EIR Recast), (ii) between courts that have opened insolvency proceedings relating to two or more members of the same group of companies (Article 57 of the EIR Recast), and (iii) between an insolvency practitioner appointed in an insolvency proceeding concerning a member of a group of companies and the court(s) presiding over the proceeding(s) concerning the other member(s) of the same group of companies (Article 58 of the EIR Recast).

- The effectiveness and efficiency in the administration of cross-border insolvencies are also greatly improved in the EIR Recast by institutionalizing and codifying the 'synthetic' secondary proceeding mechanism, that had existed before in court practices but not previously stipulated in the EIR 2000, allowing the insolvency practitioner appointed in the main insolvency proceeding to centralize control over major decisions over the debtor and its estate by preventing secondary proceeding to be opened in another court, and thus better maintain the universality of the main proceeding and avoid fragmentation of the insolvency estate. The 'synthetic' secondary proceeding is set forth in Article 36 of the EIR Recast, which stipulates that the insolvency practitioner in the main insolvency proceeding may submit a unilateral undertaking to the local creditors in a Member State where a secondary proceeding can be opened, regarding the assets located in that state, to promise adherence to the distribution and priority rights prevailing in that state, such that the local creditors will receive treatment as if the secondary proceeding is opened there. Article 38(2) of the EIR Recast stipulates that in the event an undertaking in accordance with Article 36 of the EIR Recast has been made, then the court in that state should not

open the secondary proceeding, if the court is satisfied that the undertaking provided would protect the general interests of the local creditors.

Question 3.3 [maximum 5 marks] 5

While the EIR Recast was welcomed by most stakeholders, it was also criticised by some as a “missed opportunity” and “modest”. List **two (2) flaws** or shortcomings of the EIR Recast and explain how you consider they could be corrected.

The company law principles of legal separateness of corporations are also reflected in the EIR Recast, and the separate legal personality of each debtor in the same group of companies is respected (Recital 54 of the EIR Recast). This leads to the EIR Recast holding back on prescriptively sanctioning any substantive, procedural or jurisdictional consolidation of insolvency proceedings involving members of the same group of companies, even in cases where the separate members of the group commercially and economically operated as one integrated enterprise with one integrated pool of assets. Instead, EIR Recast provides for the possibility for procedural or jurisdictional consolidation, by way of (i) appointing the same insolvency practitioner in the different proceedings, if the individual group members’ centres of main interest (COMI) are all located in one Member State and provided that the appointment of the same insolvency practitioner is not incompatible with the rules applicable (Recital 53 EIR Recast), and (ii) the non-mandatory (voluntary) co-ordination of parallel proceedings involving group companies, by appointing a group co-ordinator to administer the group co-ordination proceedings (Chapter V, Section 2 of the EIR Recast). However, these less prescriptive and decisive measures are not optimal in addressing the need to administer the insolvencies of members of group companies more efficiently, and have resulted in modest or suboptimal results in their implementation, due to among others the following shortcomings;

- The EIR Recast does not employ a concept of group (enterprise) COMI, and the COMI analysis and determination will have to be done entity-by-entity, which echoed the entity-by-entity approach adopted by the EIR 2000 (although the EIR Recast seems to have been intended to be more rescue-oriented than the EIR 2000). The prevailing entity-by-entity approach is considered to be a major impediment for successful rescue and restructuring of a group of companies as a whole, as one integrated enterprise with one integrated pool of assets, rather than approaching them as separate disconnected constituents. By adopting the entity-by-entity approach, the provisions in the EIR Recast will more likely result in the break-up of a group’s insolvency into separate and parallel insolvency proceedings involving different group member in different Member States, with fragmentation of the group’s insolvency estates, which are difficult to be administered efficiently, which thus more likely to result in suboptimal piecemeal administration of the group’s insolvency estates. This flaw can be rectified by adopting or providing for a possibility of applying a group (enterprise) approach, including a group COMI determination, for insolvency proceedings involving a group of companies.
- The non-mandatory (voluntary) co-ordination, as provided in Section 2 of Chapter 5 in the EIR Recast is also unlikely to have fruitful and effective implementation given that; (i) it is complete voluntary and non-committal in nature (Recital 56 of the EIR Recast), allowing easy opt-outs by any of the insolvency practitioners subjected to the group co-ordination (Article 64 of the EIR Recast), and any recommendation by the group co-ordinator is not mandatorily binding on the insolvency practitioners subjected to the group co-ordination proceedings (Article 70 of the EIR Recast), (ii) there is no prescriptive requirement to consult creditors in the opening of (or opting out from) the group co-ordination proceedings such that such proceedings may end up to be artificial without genuine support by and involvement of the creditors affected, and thus produce unpredictable results (iii) the costs involved in setting up and running group co-ordination proceedings will potentially be substantial, while at the same time the prospects and results are unclear and unpredictable, and (iv) the EIR Recast has its territorial scope within the EU Member

States (with the exception of Denmark) and thus is not applicable on proceedings in non-Member States, which therefore curtail the effectiveness of group co-ordination proceedings where there are members of the group located outside the EU. These shortcomings may be alleviated by adopting a more prescriptive regulation, mandating and sanctioning group co-ordination with non-voluntary and binding nature, including a requirement for the appointed group co-ordinator, where necessary, to seek co-ordination with and co-operation from insolvency practitioners and courts that are located outside the EU (such as by entering into agreements or protocols with the relevant counterparties outside the EU).

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.

Following the assumption that the EIR 2000 applies, the Dublin High Court would have the international jurisdiction accorded by the EIR 2000, to open the main insolvency proceeding. Article 3(1) of the EIR 2000 stipulates that “the courts of the Member State within the territory of which the centre of a debtor’s main interests is situated shall have jurisdiction to open insolvency proceedings”, and 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.” Whereas, Recital 13 of the EIR 2000 elucidates that centre of main interest (COMI) “should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties”, and Article 3(2) of the EIR 2000 explains that courts in the other Member States in which the debtor has establishments, would have jurisdiction to open secondary proceedings that would be restricted to the assets situated in their respective territory.

As such, for a debtor that is a company and a legal entity, there is a presumption that the debtor’s centre of main interest is located in the country where the debtor is registered, which for the case of Cardinal Home, is Ireland. Therefore, unless the presumption that Cardinal Home’s COMI in Ireland can be refuted by proofs to the contrary that are ascertainable by third parties, the Dublin High Court shall have the jurisdiction to open the main insolvency proceeding.

The relevant jurisprudence consists of the judgements by the European Court of Justice (which, since 2009, became known as the Court of Justice of the European Union (CJEU)) in

(i) *Eurofood IFSC Ltd* (C-341/04, 2 May 2006), and (ii) *Interedil Srl (in liquidation) v Fallimento Interedil Srl and another* (C-396/09, 20 October 2011). In *Eurofood*, and also reiterated in *Interedil*, the CJEU clarified that;

- The concept of COMI is peculiar to the regulation, should have an autonomous meaning, and must be interpreted in a uniform way, independently of national legislation (paragraph 31 of *Eurofood*, and paragraph 43 of *Interedil* judgement); and
- COMI must be identified using criteria that are both objective and ascertainable by third parties (paragraph 33 of *Eurofood* and paragraph 49 of *Interedil*).

In its *Eurofood* judgement, the CJEU further clarified that the COMI presumption stipulated in Article 3(1) of the EIR 2000 can only be refuted by demonstrating that the actual fact and situation are contrary to the prescribed presumption (paragraph 34 of *Eurofood* judgement). Subsequently in *Interedil*, the CJEU went on to further clarify that the COMI presumption can be refuted in cases “where, from the viewpoint of third parties, the place in which a company’s central administration is located is not the same as that of its registered office” (paragraph 51 of *Interedil* judgement).

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.

The EIR Recast will be applicable based on the following analysis of all of the pertinent scope;

- **Material Scope**
Article 1(1) of the EIR Recast stipulates that the EIR Recast shall apply to public collective proceedings enumerated in the Annex A of the EIR Recast. The Dublin High Court’s examinership proceeding is included in the list of public collective proceedings enumerated in the Annex A of the EIR Recast, and as such the proceeding satisfies the material scope of the EIR Recast.
- **Temporal Scope**
Article 84 of the EIR Recast stipulates that the EIR Recast shall apply to insolvency proceedings opened after 26 June 2017, whereas the time of the opening of insolvency proceedings refer to the time “at which the judgment opening insolvency proceedings becomes effective, regardless of whether the judgment is final or not” (Article 2(8) of the EIR Recast). As such, the timing of the opening of the Dublin High Court’s proceeding satisfies the temporal scope of the EIR Recast.
- **Personal Scope**
The EIR Recast is applicable on public collective proceedings enumerated in the Annex A of the EIR Recast, whether the debtor is a natural person or legal person, a trader or an individual (Recital 9 of the EIR Recast). However, there are certain types of entities that are excluded from the personal scope of the EIR Recast, as enumerated in Article 1(2) of the EIR Recast, consisting of (i) insurance undertakings, (ii) credit institutions, (iii) investment firms and others that are covered by Directive 2001/24/EC, and (iv) collective investment undertakings. As the debtor (Cardinal Home) is not any of the excluded entities, the Dublin High Court’s proceeding satisfies the personal scope of the EIR Recast.
- **Territorial Scope**
Recital 25 of the EIR Recast clarifies that the EIR Recast only applies to proceedings concerning a debtor whose centre of main interest (COMI) is located in the EU (with the exception of Denmark). As the debtor (Cardinal Home) has its COMI in the EU, the Dublin High Court’s proceeding also satisfies the territorial scope of the EIR Recast.

Question 4.3 [maximum 5 marks] 5

An Italian bank files a petition to open secondary insolvency proceedings in Italy with the purpose of securing an Italian insolvency distribution ranking. Given the facts of the case, can such proceedings be opened in Italy under the EIR Recast? Your answer should contain references to the applicable law and the relevant CJEU jurisprudence.

Article 3(2) of the EIR Recast stipulates that, once it is established that the debtor's centre of main interest (COMI) is within a Member State of the EU (with the exception of Denmark), the court in another Member State in whose territory the debtor has an establishment, may open a secondary proceeding with limited territorial reach, to deal with assets located in that state. Article 2(10) of the EIR Recast defines an 'establishment' as "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 presence of an establishment is therefore essential in determining whether the secondary proceeding can be opened in Italy under the EIR Recast. The relevant jurisprudence is the judgment by the CJEU in *Interedil Srl (in liquidation) v Fallimento Interedil Srl and another* (C-396/09, 20 October 2011). In *Interedil*, CJEU clarified that "the existence of an establishment must be determined, in the same way as the location of the centre of main interests, on the basis of objective factors which are ascertainable by third parties" (paragraph 63 of the *Interedil* judgment). CJEU also explained that a "minimum level of organisation and a degree of stability are required" for an establishment to exist, and that the presence alone of goods in isolation or bank accounts will not satisfy the requirement of this minimum level of organisation and degree of stability (paragraph 62 of the *Interedil* judgment).

It is said that the debtor (Cardinal Home) has a warehouse in Milan, Italy, and also had entered into credit agreement with Italian Bank (which implies that the debtor would have opened bank accounts in Italy). However, as clarified in *Interedil*, the mere presence of goods in isolation or bank accounts would not meet the establishment criteria unless there is a minimum level of organisation and a degree of stability of presence and activity in Italy. On the other hand, having a warehouse suggests that the debtor has some degree of stability of presence and activity, as a warehouse in the debtor's line of business (furniture) suggest that the debtor is engaged in non-transitory activities with its customers or suppliers in Italy, which would be ascertainable by third parties. If this is the case, the debtor would have had an establishment in Italy and therefore the opening of secondary proceeding is possible.

Article 3(4) of the EIR Recast stipulates that the secondary proceedings shall be opened only after their relevant main proceedings are opened, save for certain prescribed exceptions. The secondary insolvency proceeding petitioned by the Italian bank shall therefore only be opened after the main insolvency proceeding is opened, except where;

- The main proceeding cannot be opened due to conditions laid down by the law of Ireland where the COMI is located (Article 3(4)(a)); or
- The Italian bank's claim "arises from or is in connection with the operation of" the debtor's establishment in Italy (Article 3(4)(b)(i)).

Total marks: 15 out of 15.

*** End of Assessment ***

Total marks: 50 out of 50. Well done!