INSOL INTERNATIONAL
FOUNDATION CERTIFICATE
IN INTERNATIONAL INSOLVENCY LAW

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.

D was the correct answer.

Question 1.2

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

(a) False. The EU sought to draft Conventions with a view to harmonising the insolvency laws of EU Member States as early as the 1960s, but these initiatives failed.

(b) False. There was another EU Regulation regulating insolvency law at EU level before the EIR 2000.

(c) True. Before the EIR 2000, the EU has not sought to harmonise the insolvency laws of EU Member States.

(d) False. An EU Directive regulating insolvency law at EU level existed before the EIR 2000.

Question 1.3

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

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

(b) True. As a result, the EIR 2000 lacked the support of major stakeholders such as insolvency practitioners, businesses and public authorities who considered the instrument fruitless.

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

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

Question 1.4

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

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

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

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

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

Question 1.5

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

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

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

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

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

Question 1.6

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

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

(b) Rules on 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).

C was the correct answer.

Total marks: 7 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.' – Articles 36/38

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

Statement 1 – This statement sets out the concept of 'synthetic secondary proceedings' as set out in Articles 36 and 38 of EIR Recast.

Statement 2 – This statement relates to the requirement on courts to cooperate in parallel insolvency proceedings, see Recital 48 to EIR Recast and the substantial obligations laid down in Article 42 of 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.

Three examples of modified universalism in EIR Recast include:
1 –the exception to the general application of Lex Concursus for rights in rem as set out in Article 8; this isolates right in rem in another jurisdiction from the universalism of the Lex Concursus
2 – Article 7(2)(m) provides that the law of the opening of proceedings shall govern matters relating to voidness, voidability or unenforceability of legal acts detrimental to the creditors; however this universalism is modified by Article 16 which provides 7(2)(m) doesn't apply where the person who benefited from the act shows that the act is subject to the law of a member state which is not the state of the opening of the proceedings and the law of that other member state does not allow a means of challenging the act. This modifies the universalism of the primary member state to protect the expectations of contracting parties in another member state that does not have the rules related to voidness, voidability or unenforceability of the primary member state.

3 – Article 13 EIR Recast makes an exception from the application of the primacy of the lex concursus for employment contracts entered into under the law of another member state. The purposes of this exception is to protect employees from the application of the Lex Concursus where the local legal system differs and is the system under which their expectations to employment are founded.

Question 2.3 [maximum 3 marks] 3

Cross-border 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.

Four provisions that deal with cross-border operation and communication between courts under EIR Recast are:
Recital 48 – this makes the statement that efficient administration of cross-border insolvency estates requires proper ordination between actors in concurrent proceedings. It also refers to best practice in the area of operation and coordination as set out in principals and guidelines in this area as adopted by the European and international organisations working in the area including UNCITRAL.
Article 41 – this provides the framework for operation and communication between insolvency practioners
Article 42 – this provides the framework for operation and communication between courts
Article 43 – this provides the framework for operation and communication between insolvency practioners and courts

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.

Two examples of legal devices that avoid or control the opening, conduct and closing of secondary proceedings are:
Synthetic secondary proceedings – under Article 38(2) EIR Recast, in the situation that the insolvency practioner in the main proceedings has given an appropriate undertaking in accordance with Article 36 the court requested to open a secondary proceedings should not do so if requested not to by the insolvency practioner. That court has to be satisfied that the undertaking given by the insolvency practioner adequately protects those creditors based in the jurisdiction that the secondary proceedings would otherwise be opened.
A stay to the opening of secondary insolvency proceedings – Where there are primary main insolvency proceedings opened and the primary proceedings have granted a stay over enforcement proceedings in order to grant a breathing space to the debtor entity, then the insolvency practioner in the main proceedings or the debtor entity may request the court in which secondary proceedings might be opened to stay the opening of any such proceedings under Article 38(3) EIR Recast. The stay may only be ordered for a period of up to three months and if the request court is satisfied that suitable measures are in place to protect 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.

EIR Recast was drafted to acknowledge both areas for improvement in the original Regulation and areas where practice has developed since the regulation was drafted:
Restructuring: the need for a clearer acknowledgement of restructuring as one of the tools in an insolvent situation reflects developments and trends in thinking in insolvency related law across the globe. This gave rise to a number of changes in EIR Recast most importantly the widening of Article 1 to include within the scope of EIR Recast insolvency law which are for the purpose of 'rescue' or 'reorganisation'.
Operation: there was a need to improve the mechanisms for coordination between courts, between insolvency professionals and between IPs and courts. EIR 2000 only contained Article 31 EIR 2000 dealing with cooperation between IPs in main and secondary proceedings. EIR Recast introduces wide reaching frameworks for cooperation between IPs in Article 41, as between courts in Article 42 and as between IPs and courts in Article 43.
Group companies: The modern insolvency context is increasingly grappling with the issues raised by interconnected corporate groups spread over a wide range of jurisdictions (see for example the Groupo Parmalat insolvency proceedings amongst many others). Clearly this involves balancing the needs of the corporate entity against the realities of a group that is interconnected. EIR 2000 did not attempt to deal with issues of group companies. EIR Recast introduces a new chapter V relating to group insolvency. I note that, notwithstanding the fact this was introduced, the fact that IPs are not obliged to participate in the group related provisions in Chapter V is still a major drawback.
Information: Information is key in an insolvency situation and the provisions under the EIR2000, which relied on individual states and their pre-existing insolvency registration systems which had grown up organically, gave rise to imperfect information parity within the EU. Article 24 of the EIR Recast introduces a requirement on Member States to establish insolvency registers and specifies the minimum nature of information that must be available on that register. Article 25 introduces a new system utlisiing the European e-justice Portal to act as a central public access point for national insolvency proceedings.
'Synthetic' secondary proceedings: Article 38(2) of EIR Recast introduced the concept of undertakings given by an IP to a court seized with main proceedings so as to avoid the cost and potential complications of a secondary proceeding. Article 38(2) was built from judicial innovation used in court practice.

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.

As mentioned above, Chapter V was introduced to improve the ways that cross border insolvencies are dealt with within the EU. A number of aspects were introduced within EIR Recast to facilitate better cross group insolvencies.

Recital 53 introduces the concept that, if the COMI of multiple entities within a group are found to be within the same jurisdiction, then the competent seized court in that jurisdiction may appoint a single IP to all proceedings concerned. This reduces costs and increases the chance of a successful group outcome but doesn't go as far as to destroy the 'corporate individuality' of each group member which would be the case were a single proceeding to be the result.

Article 2(13) introduces a definition of 'group of companies' which is an important step to an orderly adoption of group insolvency concepts across the EU. Its broad and focusses on control so looks to economic reality rather than legal structures. Clearly this is a move in the direction of universalism as it ignores the individual legal entity in favour of de facto reality.

Articles 56-58 introduce duties on parties relating to co-operation and communication in the same way that Articles 41-43 do in relation to an individual entity insolvency. Article 56 applies between IPs; Article 57 between courts; Article 58 between IPs and courts.
In the case of IPs, the duty to cooperate and communicate is qualified to where it is 'appropriate' to facilitate effective administration of proceedings, does not conflict with the administration of the proceedings and does not result in conflict of interest i.e. the duty is qualified to where it makes commercial sense. Notwithstanding that, the IPs are under a duty to communicate information that is relevant to other proceedings, consider whether there are sound grounds for ordination of the insolvency proceedings and affairs of group members and consider whether grounds exist for a restructuring of group members and, if so, cooperate to negotiate a coordinated rescue plan.
In the case of courts, duty of cooperation and communication is qualified to the extent that they should cooperate where the cooperation facilitates the administration of proceedings and it specifies situations where the operation may be desirable. Courts are specifically permitted to appoint an independent person to act as an intermediary to improve communication between courts.

EIR Recast introduces rules on the coordination of proceedings in relation to individual members of the same group. This is not a substantive consolidation of the individual insolvency proceedings which remain legal entity by entity proceedings. It creates a coordination mechanism called a 'group ordination proceeding' (a 'GCP'). These are voluntary in nature and can only lead to recommendations from the coordinator of the GCP which are not binding. Under Article 61 these GCPs can be initiated by an IP in any proceeding against any group member. The court presiding over that insolvency GCP can initiate it and that proceeding does not have to be a main insolvency proceeding. Under Article 61(3) any request for a proceeding must be made with a person nominated to be a group coordinator and an outline of the GCP and reasons must be given. The requested court must consider whether the proposal facilitates the effective administration of the different group members and, most significantly, must be satisfied that no creditor of any group member is likely to be financially worse off by that group member becoming a part of the GCP (Article 63(1)). Each IP of a group member is entitled to object to that group member's inclusion in the GCP under Article 64 and there is no requirement for reasons for the objection. Clearly the right to stand outside of a GCP as reflected in Article 65(1), brings into question the viability of a GCP if that objecting IP is IP of a company which is significant in the group. Once the court to which the application is made is satisfied that the tests referred to above are met, the court must appoint a group coordinator, decide on the structure of the ordination, estimate the costs and how they are to be divided across the group companies. Under Article 66(1) two-thirds of the affected IPs have the right to change the coordinating court if another member state would be more appropriate.

Articles 71, 72 and 74 proscribe the nature of the group coordinator and its duties. It cannot be one of the existing group IPs. Article 72 proscribes the duties and obligations of the group coordinator. Its primary duty is to identify and specify recommendations for coordinated

conduct in the various group insolvency proceedings and secondly to propose a group ordination plan. In order to achieve his duties the group coordinator has rights; he can participate in the various group insolvency proceedings; he may mediate between disputes between IPs of group members; present and explain the ordiantion plan to relevant parties in insolvency proceedings; request stays in individual proceedings where that is necessary to ensure an implementation of the plan and be of benefit to the creditors in the stayed proceedings.

Question 3.3 [maximum 5 marks] 2.5

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

In line with general approach of the EU to its legislative scope the EIR Recast applies directly within all the member states (except Denmark). EIR Recast does not contain rules relating to the overlap between insolvencies as between member states and insolvencies between member states and non-member states. This is particularly the case where you have multiple proceedings within member states (to which EIR Recast apples and governs their interactions) and also insolvency proceedings afoot in non-member states with respect to the same company. In this situation you are looking at two different rules as to how the proceedings interact, as between the member states the rules are governed by EIR Recast and coordinated but between the non-member state and any given EU proceeding it is the 'domestic' rules of that member state and the non-member state that will give the effects of each proceeding without reference to EIR Recast. This will lead to effects that are not within the objectives of EIR Recast. This is particularly going to be an issue when dealing with the United Kingdom where their new status as an ex-member state means that contracts were entered into on the basis of the EIR framework but are now governed by the UK law and laws of the relevant seized member states individually. One solution to this problem may be to assert the primacy of the main EU proceedings in decision making *in any EU state with proceedings* when making decisions on the effects of multiple proceedings afoot with the same debtor across the EU boundaries. Clearly the difficulties of these recognition of laws will be even more complicated and consequential in the context of group insolvencies However the EIR Recast provisions on Group insolvencies do not go as far as attempt to harmonize or consolidate so, at present, will amplify the difficulties of successful coordination where you have proceedings afoot in more than just EU members. How do you envision this happening? The EU does not have competence to legislate for non-EU Member States.

The EIR Recast 'crosses the Rubicon' of group interests over individual insolvencies through the introduction of its concept of GCP (see above). Having crossed the Rubicon into the world of group insolvency it protects the creditors in an individual group company insolvency by the test in article 63(1) that the court considering an application for a GCP must be satisfied that the GCP will not result in a creditor in an individual group insolvency proceeding being financially disadvantaged by the inclusion of that member in the GCP. In fact that test results in a requirement that the GCP must result in an increase in the overall estate available to the overall group estate because the costs of the GCP must be borne across the group (though not by every member) and so there must be an increase in the estates of the group members to which GCP costs are allocated in order to achieve the 63(1) test that no creditor must be disadvantaged financially. So far so good, the mechanism is in place to facilitate across group ordination of proceedings and protection is in place to ensure this doesn't result in a diminution of the outcomes for any individual creditor. But the flaw is that Article 64(1) allows the IP in any individual group company insolvency process to object to that process being include within a GCP. Under 65(1) that objecting IP's group member's corporate insolvency is not to be a part of the GCP. This

seems to create a significant flaw in the successful adoptions of GCPs and to be against natural justice. The objection of an IP whose group company is small and not integral to the financial workings of a group of companies need not be fatal to the successful outcome of a GCP; however the exclusion of a company that operates as a group treasury company almost certainly would be fatal to the GCP given the likely interconnections in liabilities between that company, external creditors, internal group members and the general lack of assets beyond intercompany receivables for these types of treasury vehicles. It also seems to be against the concept of natural justice that an IP, whose creditors are protected by the terms of the EIR Recast through the test in 63(1), should be able to refuse to partake in a GCP without reasons given. In my opinion this is a significant flaw in the likelihood of wide spread successful adoption of GCPs under EIR Recast. In my view the objecting IP should only be able to challenge inclusion of its group member in a GCP where it can demonstrate that the test in 63(1) is not met (which it may well be able to do being in possession of all relevant information about the group member) or that it otherwise fails to meet the objectives framed by Recital 51 or would otherwise hinder or obstruct its individual group company process under the laws of the relevant Member State or States.

Total marks: 12.5 out of 15.

QUESTION 4 (fact-based application-type question) [15 marks in total]

Cardinal Home is an Ireland-registered furniture company. The company opened its first store in Cork, Ireland in 2009 and has warehouses across Europe, including in Milan, Italy. In 2010, Cardinal Home entered into a credit agreement with an Italian bank since it was planning to expand its reach to the Spanish luxury furniture market, expected to grow by over 8% annually. It opened a bank account with the bank and started negotiating with local distributors, thus signing some (non-binding) memoranda of understanding with them.

Cardinal Home grew and performed well for several years. However, the impact of the economic and financial crisis of the late 2000s eventually hit the company who suffered financial difficulties from 2016. On 22 June 2017, it filed a petition to open examinership proceedings in the High Court in Dublin, Ireland.

Question 4.1 [maximum 5 marks] **3.5**

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.

Ireland is a member of the EU and subject to the terms of EIR 2000. It is necessary to establish where the centre of main interests (COMI) of CH is in order to understand the effect of EIR Recast on which EU court may carry out what type of insolvency proceedings with respect to CH. The COMI governs where the main insolvency proceedings under EIR Recast can be opened (Article 3(1)). The main proceedings have universal scope whereas secondary or non-main proceedings may be opened but only have effects limited to assets located within that secondary territory. Article 3(1) EIR Recast establishes a presumption in relation to ascertaining COMI that a company's COMI will be presumed to be its place of incorporation (provided it has not been moved within the prior 3 months).

The issue of COMI was considered at depth in the *Interdil Srl v Fallimento Interdil srl* case by the Court of Justice of the EU. In that case the CJEU stated that, where the management and supervision of the debtor are in the same place as the registered office the presumption that

the registered office jurisdiction is the COMI becomes irrefutable. Putting that in reverse, the presumption can be rebutted where it can be shown a company's administration and management was not taking place where its registered office is located. This was put into legislation by Recital 30 of EIR Recast which makes it clear that the presence of assets alone does not rebut the registered office presumption.

Looking at the facts of the CH situation, CH is registered in Ireland and therefore benefits from the presumption that Ireland is its COMI. The fact that CH has opened bank accounts, entered into contracts and has warehouses across Europe does not rebut that presumption (as shown in the *Interdil Srl* case). What is not clear from the facts given to us is where its management and administration takes place. Before being able to give a categorical answer to the question this needs to be ascertained to ensure that the presumption is not rebutted. On the basis that the management and administration is in Ireland then the Irish courts would be the jurisdiction location in which a primary or main insolvency proceeding can take place. If the COMI is not ion Ireland then any proceedings are secondary in nature and therefore limited to the assets in the jurisdiction in which they are opened and should only be properly opened in Ireland after primary proceedings have been opened.

What about Annex A?

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 scope of EIR Recast must be considered in light of the questions of when does it apply in time, so called 'temporal scope'; to whom does it apply, so called 'personal scope'; what proceedings are covered by it, its 'material scope'; and what geographical areas does it cover, its 'geographical scope'.

One needs to consider a number of questions in establishing scope of EIR Recast to a proceeding:
Firstly is the debtor within the scope of the EIR Recast by having a COMI within the EU (ex Denmark), as CH appears to have an Irish COMI this would be met. (Geographical scope is established)
Secondly, various entities are excluded from the ambit of EIR Recast because of their particular nature, Article 1(2) excludes insurance companies, credit institutions, investment firms and other entities covered by Directive 2001/24/EC and collective investment undertakings. CH is a furniture company and therefore is not excluded on these basis. (personal scope is established)
Thirdly In order for EIR Recast to apply to a proceeding it must be an insolvency proceeding which is set out in Annex A to the EIR Recast. Irish examinership proceedings are within Annex A and so EIR Recast applies to them. (Material scope is established)
Lastly EIR Recast came into force on 26 June 2017 and applies only to proceedings opened after that date, these proceedings were opened after 26 June 2017. (Temporal scope is established)

EIR Recast would therefore apply to the Irish examinership of CH.

Question 4.3 [maximum 5 marks]

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.

As established above the main proceedings for CH are the Irish proceedings and these have universal scope (the lex concursus). The Irish proceedings are universal except to the extent secondary proceedings are opened and only to the extent of the assets located in the jurisdiction of secondary proceedings in which case the law of the place of the secondary proceedings will apply (lex concursus secondarii).

EIR Recast allows the opening of secondary proceedings against a debtor in a member state that is not the main proceedings member state if that debtor has an establishment in the second member state (Article 3(2) EIR Recast).

Article 2(10) EIR Recast provides that 'establishment' means any place of operations where a debtor carries out or has carried out, in the three-month period prior to the request to open a proceedings, a non-transitory economic activity with human means and assets. This was considered in the *Interdil* case referred to above where CJEU came to the conclusion that the definition requires the economic activity to be linked to the presence of human resources. This was held to impute a level of organisation and stability on the part of the debtor and that presence of assets alone does not satisfy the requirements for an establishment. The presence of human means and assets gives a signal of permanence that can be seen by others, it is not merely transitory. It is this presence that is visible to others that is key and not the intention of the debtor per se. On the other hand there is no requirement in EIR Recast for a corporate vehicle or registration to be made in the secondary jurisdiction.

The time for adjudication of the issue of whether there is an establishment is the date of the application to open secondary proceedings and, if not met on that date, was there an establishment within the three month period ending on that date. (See Article 2(10) EIR Recast).

Turning to the case at hand, CH's connections to Italy appear to be the operation and potential ownership of warehouses in Italy and the entering into of a credit agreement with an Italian bank. The entering into a credit agreement with an Italian bank will not of itself create an establishment as it is not carrying out a non-transitory economic activity with human means and assets. The ownership and operation of warehouses in Italy probably would be an establishment as it is non-transitory and uses human means and assets. Its ownership of these warehouses must be on or within the prior three months of the opening of the Italian proceedings in order for the Italian courts to be entitled to open secondary proceedings in Italy.

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: 11.5 out of 15.

*** End of Assessment ***

Total marks: 41 out of 50.