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**.

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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.

D was the correct answer.

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.

C was the correct answer.

Question 1.9

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

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

(a) The insolvency practitioner will always succeed in his claim if he can clearly prove that under the *lex concursus*, the contested payments can be avoided (Article 7(2)(m) EIR Recast).

(b) The contested transactions cannot be avoided if Lacroix SARL can prove that the *lex causae* (including its general provisions and insolvency rules) does not allow any means of challenging the contested transactions, and provided that the parties did not choose that law for abusive or fraudulent ends.

(c) To defend the contested payments Lacroix SARL can rely solely, in a purely abstract manner, on the unchallengeable character of the payments at issue on the basis of a provision of the *lex causae*.

(d) The contested payments shall not be avoided if Lacroix SARL proves that such transactions cannot be challenged on the basis of the insolvency provisions of German law (Article 16 EIR Recast).

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.'

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

Statement 1 - Article 36 of the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) ("EIR Recast"): Right to give an undertaking in order to avoid secondary insolvency proceedings – "synthethic" secondary proceeding

Statement 2 - Article 81 of the Treaty on the Functioning of the European Union (ex Article 65 of the Treaty establishing the European Community). The concept of judicial cooperation can be seen in Article 42 of the EIR Recast in the case of existence of secondary insolvency proceedings and Article 57 of the EIR Recast in insolvency proceedings involving companies within the same group structure.

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.

Modified universalism is an approach where the "main proceeding" can be opened in the State where the centre of main interests ("COMI") has been determined, and ancillary (secondary) proceedings can be opened in another State. This approach is adopted in the EIR Recast. It promotes harmonised procedures with provides assistance in enforcement and recognition, cooperation and communication between Insolvency Practitioners (IPs) and courts.

- Article 3(1) of the EIR Recast states that courts where the debtor's COMI is situated has the jurisdiction to open insolvency proceedings (main). Article 3(2) of the EIR Recast further provides that secondary insolvency proceedings can be opened in a Member State where the debtor has an establishment.
- Article 19(1) and (2) of the EIR Recast states that judgment (made by a Member State) regarding the opening of insolvency proceedings (whether main or ancillary) within the

Article above shall be recognized in all Member States from the moment it becomes effective.

- Article 34 of the EIR Recast states that a main insolvency proceeding (opened in a Member State) where the debtor's insolvency has been examined, the debtor's insolvency will not be re-examined in the opening of a secondary insolvency proceeding in another Member State.

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.

Compared to Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings ("EIR 2000") which only contained provisions under Article 31 for cooperation and communication between IPs (comparable to Article 41 of the EIR Recast), EIR Recast adopted stronger rules for cooperation between IPs and courts. The articles below provide for the cooperation and communication concerning the same debtors between IP of a main proceeding and IP of ancillary proceeding, courts who opened the main proceeding and courts who opened or about to open an ancillary proceeding, and cooperation and communication of same debtors between IPs and courts.

- Articles 42 and 43 provides for cooperation and communication concerning the same debtor between those involved in the main proceedings and those who are looking after secondary proceedings; and
- Articles 57 and 58 provides for rules around cooperation and communication concerning insolvency proceedings in a group structure companies, whereby courts who opened the insolvency proceedings of a member of the groups shall cooperate with courts involved in insolvency proceedings of another company of the same group.

Article 25 of the EIR Recast also provides for mechanism in which a decentralised system shall be set up for access of information and should compose of the insolvency registers and the European e-Justice Portal. This system should also include a search service available to all the official languages of State Members of the Union.

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.

When a court (in a Member State) receives a request to open secondary proceedings, the IP of the main insolvency proceeding must be notified of such request and to allow them to hear the request in accordance with Article 38(1). However, the same Article (38 (2) and 38 (3)) also gives power to refuse the opening of such secondary proceeding:

1. If the IP of the main proceeding satisfied the court that their undertaking contains adequate measures to protect the general interest of local creditors. At first instance, local creditors must be notified of this undertaking and must be approved by majority

of local creditors (rules on qualified creditors to vote and majority quota will depend on the rules of the Member State).

When the assets of the debtor are realized, the distribution of the assets in terms of the ranking of creditor claims and creditor's rights to the assets shall be administered in the laws in the Member State in which the secondary proceeding could have been opened (Article 36 of the EIR Recast).

2. Stay of individual enforcement proceedings (period not exceeding 3 months) if adequate measures are in place to protect the interest of local creditors. In cases of restructuring procedures, multiple individual enforcement proceedings may frustrate and undermine the efforts made by management as they would have to spend time and energy dealing with those actions. This way, debtor is given some breathing space and focus on negotiations and actions that can assist with successful turnaround.

These must be requested by the IP of the main proceeding.

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 developing the EIR Recast, they ensured that European Union law is applied in the same way in every Member State. In the European Commission's review of EIR 2000, it was concluded that there is a need for the Regulation to:

- Broaden the scope to restructuring proceedings;
- Strengthen the rules for cooperation between IPs and courts;
- Develop proceeding involving insolvent companies in the same group;
- Improvement of creditor information; and
- Modernization of legal rules.

Some of these amendments are discussed below.

Cooperation and Communication

One of the biggest improvements in the EIR Recast from EIR 2000 are the provisions contained surrounding the subject of cooperation and communication. EIR 2000's focus on cooperation and communication was between IPs i.e., cooperation between IPs of the main proceeding and the IPs of ancillary proceedings. EIR Recast further developed this concept by providing rules for cooperation of IPs and courts of main proceedings and those of secondary proceedings. This communication and cooperation must also be done vertically

(from the main to territorial / secondary proceeding) and horizontally (territorial / secondary proceeding to other territorial / secondary proceedings).

Insolvency proceedings whether main or ancillary proceedings concerning the same debtor, the IPs of the main proceeding shall cooperate with the IPs of ancillary proceedings. This is contained in both EIR 2000 and EIR Recast. EIR Recast goes further and provided that:

- The court (Member State) who opened the main proceeding shall cooperate with any other courts (in other Member States) who are in the process of have opened proceedings where the same debtor is concerned and vice versa; and
- IPs of the main proceeding shall cooperate and communicate with any other courts who are in the process of have opened proceedings where the same debtor is concerned; or
- IPs of the ancillary proceeding shall cooperate and communicate with the court who are in the process of have opened proceedings where the same debtor is concerned.

Insolvency of Group of Companies

Modern large businesses size has many affiliates / related companies who operate across the Globe. Each affiliate / related company are its own legal entity therefore when an affiliate / company falls into some sort of insolvency procedure, they are also administered separately. The EIR Recast aimed to provide rules for a more efficient administration (cooperation, communication and coordination) of cross-border insolvencies in a group setting (contained in Chapter V of the EIR Recast).

Similar to above, the EIR Recast also developed better tools for communication and cooperation of IPs and courts of insolvency proceedings within the same group (within Articles 56 – 60):

- An IP appointed to look after the insolvency proceeding (by a court in a Member State) of one company shall cooperate with other IPs appointed to administer other companies within the same group.
- The court (Member State) which opened insolvency proceedings of companies of a group of company shall cooperate with any other courts (in other Member States) who are in the process of have opened proceedings of a company within the same group and vice versa; and
- IPs of the insolvency proceeding concerning a member of a group of companies shall cooperate and communicate with the court who are in the process of have opened proceedings of a company within the same group.

Articles 61 – 77 provides rules around the coordination of insolvency proceedings in a group of companies including a person appointed as the group coordinator. Although certain limitations are present in this procedure whereby participation to the group coordination proceeding is on an voluntary basis therefore those non-participating proceeding is not tied to the tasks and rights of the group coordinator.

Information and Data

One of the instruments that was not provided in EIR 2000 but included in EIR Recast is the notion of interconnection of insolvency registers. This is contained in Article 25 of the EIR Recast which provides for mechanism in which a decentralised system shall be set up for access of information and should compose of the insolvency registers and the European e-Justice Portal. This system should also include a search service available to all the official languages of State Members of the Union.

Furthermore, EIR Recast added the rules to processing of personal data and protection of data contained in Chapter VI of the EIR Recast in accordance with the General data protection regulation (at the time the EIR Recast was written, the regulation followed Directive 95/46/EC). Each Member State is responsible for, *inter alia,* ensuring that technical measures are implemented, and they comply with rules regarding data quality and data storage (Articles 78 – 80 of the EIR Recast).

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.

Extension of rules regarding COMI and Establishment

The EIR 2000 definition of COMI has limited presumptions. The EIR Recast offered several presumptions indicating the location of a debtor's COMI. The main presumption of a debtor's COMI is the location where the registered office is. However, the presumption will only be applied if the registered office has not move to another Member State in the 3-months prior to the request to open the insolvency proceeding (Article 3 (1)). This creates safeguard against fraudulent manipulation of the insolvency forum shortly before the filing of opening the insolvency proceeding.

In a similar way, EIR Recast also introduced a "relevant period" for the concept of "establishment". Establishment is any location in the Member State whereby the debtor carries out some of its operations within the 3-months prior to the request to open a main insolvency procedure. Where a debtor has establishment, a local IP can request to open a secondary proceeding. Further amendment was introduced in EIR Recast whereby secondary proceeding does not have to be in relation to winding up of a company.

"Synthetic" Proceeding

Secondary proceedings (where the debtor has an establishment) can be opened and only assets that exist in that Member State is covered in this proceeding. This holds the same both in EIR 2000 and EIR Recast. However, introduce in EIR Recast is this concept of "synthetic" proceeding, covered in Article 36 of EIR Recast, whereby the IP of the main proceeding gives a unilateral undertaking, 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. Explored in *Re Collins & Aikman Europe SA and other companies [2006] EWHC 1343*, the English administrators gave oral assurances to local creditors that their claims will be dealt in accordance with their local insolvency law and the respective ranking of creditors' claims. Thus, the IP will distribute assets as if a secondary proceeding was opened in that Member State. This innovation allows centralized control over major decisions on the debtor's estate and safeguards local creditors' expectation when it comes to their claims.

Communication and Coordination

EIR 2000 only covers coordination and communication between insolvency practitioners. This coordination concept still exists in EIR Recast (Articles 41 and 56). EIR Recast further developed the communication and coordination of main and non-main insolvency proceedings. New articles were introduced which requires cooperation and communication

between courts of different states in which an insolvency proceeding has been opened for the same debtor (Articles 42 and 57) as well as cooperation and communication between IPs and courts (Articles 43 and 58).

Furthermore, communication and cooperation must also be done vertically (from the main to territorial / secondary proceeding) and horizontally (territorial / secondary proceeding to other territorial / secondary 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.

One of the areas that is meant to be achieved with the EIR Recast is to improve coordination of insolvency proceedings. EIR Recast, in comparison to its predecessor (EIR 2000) introduced the concept of coordination of insolvency practitioners of debtors within the same group of companies and their respective courts (group coordination proceeding). This would ensure efficient flow of proceedings while at the same time recognizing that each debtor is a separate legal entity, however this produced a rather modest result.

Article 61 states that the request to open a group coordination proceeding must be accompanied with a proposed individual to be nominated as a "group coordinator". Articles 71 to Article 77 outlines the rules, tasks and administration with regards to the group coordinator. While this process is in place, participation in group coordination proceeding is voluntary in nature. Consequently, actions, tasks and rights of the group coordinator does not extend to any members of the group not participating in group coordination proceeding (Article 72 (4) of the EIR Recast). This has cast doubts on practitioners as the effectiveness and practical value is questionable as well as the high cost of having the group coordination proceeding. Furthermore, the EIR Recast only applies to proceedings opened in a Member State. There are debtors where COMI/establishment is outside the EU, therefore EIR Recast is not binding to courts and IPs in non-Member States.

It would be more practical to remove the concept of a group coordinator with the existence of these limitations that exist in both proceedings in a Member State and non-Member State. In Member States, coordination and cooperation is required whether the IPs' proceedings is participating and non-participating in the group coordination proceeding. This should reduce some cost and complexity.

Article 1 (1) of the EIR Recast contains the rules in which type of insolvency proceeding is covered and scoped under EIR. The Article states that the Regulation applies to public collective proceedings, including interim proceedings, which are based on laws relating to insolvency and in which, for the purpose of the rescue, adjustment of debt, reorganisation or liquidation. With further criteria of that constitutes an acceptable insolvency proceeding to be covered under the EIR Recast. Furthermore, Article 1 (2) outlines companies not covered under the Regulation. Covered proceedings is covered under Annex A of the EIR Recast.

Once an insolvency proceeding type of included in Annex A, there is no further examination to be done by courts of another Member State to test whether the EIR Recast should apply to those proceedings. However, the Regulation also States that any proceedings not listed in Annex A should not be covered by the EIR Recast. For example, the UK's scheme of arrangement is not listed in Annex A and therefore does not enjoy the benefits under the EIR Recast of automatic recognition.

Guidelines contained in Article 1 is somewhat redundant because any proceeding that meets the definition under Article 1 but is not listed in Annex A is not covered under the EIR. In order to fix this limitation, insolvency proceeding not listed in Annex A should be reviewed and courts be able to grant recognition and enjoy the rules and guidelines under EIR Recast if the proceeding meets, *inter alia*, the requirements under Article 1.

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.

The question of whether a court in a certain State have the jurisdiction to open an insolvency proceeding whether main or secondary proceeding lies with where the debtor has its COMI and where the debtor has establishment.

COMI is defined generally as the place where the debtor conducts the administration of his interests on a regular basis as ascertainable third parties. The presumption is that the debtor's registered office, the principal place of business and the habitual residence are the centre of main of interests, however this can be rebutted in cases where the central administration is located in a Member State other than the State in which the debtor has been registered.

The concept of COMI was explored in *Eurofood IFSC Ltd* ("Eurofood"), a company registered in Ireland with the principal objective of providing financing facilities for companies in the Parmalat group (the owner of Eurofood). A winding up application was brought to the Irish High Court however the Italian court argued that it had international jurisdiction on the outcome of Eurofood insolvency. The Irish District court refused to recognise the judgment of the Italian court. The CJEU highlight that the meaning of COMI should be looked at objectively and ascertainable by third parties. Furthermore, to make COMI more predictable, the COMI is an insolvent company is the country in which the company was registered.

In this case, Cardinal Home (the "Company" or "debtor") was registered in Ireland, similar to Eurofood. Unlike the Eurofood case, the company only has warehouses across Europe including Italy. Upon the decision of the company to expand its reach to the Spanish market, the company entered into a credit agreement with an Italian bank. Furthermore, the company also entered into memoranda of understanding with Italian distributors.

The first question is whether COMI exist in Ireland or in Italy.

The question does not provide enough information to establish whether the central administration is conducted in Ireland or in Italy. Assuming the only decisions made in the company is what is described above then we do not have sufficient evidence to conclude that Italy is where the company performs central administration. In the absence of other evidence, it can be assumed that the company has COMI in Ireland as this is the State in which the company was registered in (Article 3(1) of EIR 2000), similar judgment to the Eurofood case.

The next question is whether Dublin High Court have international jurisdiction to open examinership proceedings.

Article 3(1) of EIR 2000 states that courts of the Member State within the territory of which the debtor's COMI is situated shall have jurisdiction to open insolvency proceedings. As answered in the first question above, the debtor's COMI is situated in Ireland. However, the next assessment is whether the Dublin High Court falls under the definition of "court" within Article 2 of EIR 2000. Article 2 (d) defines court as the judicial body, or any other competent body of a Member State empowered to open insolvency proceedings or to take decisions in the course of such proceedings. In Ireland, examinership process is opened by the presentation in the High Court of a petition for the appointment of an examiner (Section 509 of the Companies Act 2014 in Ireland ("2014 Act")) and provided that the court is satisfied that:

- The company is, or is likely to be, unable to pay its debt;
- No resolution subsists for the winding up of the company; and
- No order has been made for the winding up of the company.

Assuming the Dublin High Court is satisfied that the above applies to the company, the Dublin High Court has the jurisdiction to open the insolvency proceeding as defined in Section 509 of the 2014 Act and Article 3 (1) of EIR 2000. This proceeding shall be considered as the main insolvency proceeding.

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 assessment whether EIR Recast can be applied to the insolvency proceeding in the Dublin High Court should be assess under the following:

- Material scope;
- Temporal scope;
- Personal scope; and
- Territorial scope.

Material scope

According to Article 1 of the EIR Recast, the regulation can be applied to public collective proceedings, including interim proceedings, which are based on laws relating to insolvency and in which, for the purpose of the rescue, adjustment of debt, reorganisation or liquidation.

a) A debtor is totally or partially divested of its assets and an insolvency practitioner is appointed;
b) The assets and affairs of a debtor are subject to control or supervision by a court; or

c) A temporary stay of individual enforcement proceedings is granted by a court or by operation of law, in order to allow for negotiations between the debtor and its creditors, provided that the proceedings in which the stay is granted provide for suitable measure to protect the general body of creditors, and, where no agreement is reach, are preliminary to one of the proceedings referred to in point (a) or (b).

In answering the questions above, relevant sections of the 2014 Act were used:

a) Upon the High Court granting the petition for placing the debtor into examinership, an examiner is appointed (section 509 of the 2014 Act) by the court who is responsible to perform activities towards the survival of the debtor;
b) Upon appointment of the examiner, the debtor is under the protection of the court for a period up to 70 days from the date the petition was presented (i.e., from 22 June 2012) (section 520 (1) and (2) of the 2014 Act).
c) From 22 June 2017, the debtor is immune from creditor action unless approved by a court or upon application made by the examiner. The examiner can also, by application, apply for a stay to the High Court (section 520 (4) and (5) of the 2014 Act).

Further, these proceedings must be listed in Annex A of the EIR Recast.

The Dublin High Court granted opening of examinership, which is listed in Annex A of the EIr Recast.

Temporal Scope

The EIR Recast entered into legal force on 26 June 2017 ("effective date"). Provisions of the EIR Recast can only be applied only to insolvency proceedings opened after the effective date.

The petition for examinership was filed to the Dublin High court on 22 June 2017. The Dublin High Court opened examinership process on 30 June 2017, therefore EIR Recast is applicable on date alone. Even though the petition for examinership of the debtor was filed prior to the effective date, the opening was after the effective date.

Personal scope

Article 1 (1), the EIR Recast does not apply to the following companies in accordance with Article 1 (2):

- Insurance undertakings;
- Credit institutions
- Investment firms and other firms, institutions and undertakings to the extent cover by Directive 2001/24/EC; or
- Collective investment undertakings

The debtor operates in (luxury) furniture industry therefore the debtor is not restricted to the rules above.

Territorial scope

The EIR Recast is a binding piece of EU legislation and it directly applicable to all Member States except for Denmark. Furthermore, EIR Recast shall apply to insolvency proceedings in respect of a debtor whose COMI is located in the EU.

As discussed in the question above, Cardinal's COMI is in Ireland, therefore it meets the criteria under territorial scope.

In conclusion, the insolvency proceeding of Cardinal opened in the Dublin High Court on 30 June 2017 meets all four criteria above therefore the EIR Recast applies to this proceeding.

Question 4.3 [maximum 5 marks] 4

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.

The opening of examinership in the Dublin High Court (on 30 June 2017) was opened and considered as the main insolvency proceeding. According to Article 19 of the EIR Recast, this shall be recognized by all other Member State (including Italy).

The ability for any court (in a Member State) to open a secondary insolvency proceeding lies on whether the debtor has an establishment in the Member State in question in accordance with Article 3 (2) of EIR Recast. Establishment can be defined as any place where a debtor has carried out its operations in the 3-month period prior to the request to open main insolvency proceedings.

In *Interedil Srl (in Liquidation) v Fallimento Interedil Srl* ("Interedil case"), further explores the concept of COMI as well as establishment. The CJEU defined the term establishment as any place of operations where the debtor carries out non-transitory economic activity with human means and goods. The CJEU further stated that the presence alone of goods in isolation or bank accounts does not, in principle, satisfy that the place is an establishment but must also consist of a minimum level of organisation and a degree of stability necessary for the purpose of pursuing an economic activity.

The Italian bank must satisfy the Italian court that the debtor has establishment in Italy prior to 30 March 2017. The case study stated that the debtor has been operating in Milan, Italy since 2010. The case study mentions that the debtor has suffered financial difficulties in 2016, but no information whether any of the operations, including the warehouse/stores in Italy. therefore, I assume that the debtor was operating in Italy prior to 30 March 2017. In order to gain access of the Spanish luxury furniture market, the debtor opened a bank account with the Italian bank. As mentioned above in Interedil case, it is not sufficient to have presence of goods and a bank account in a country to define establishment but rather a minimum level or organisation and a degree of stability for an economic activity. Another information mentioned in the case study is that the debtor entered negotiation with local distributors and signed memoranda of understanding with them. Though the memoranda of understanding is non-binding, the debtor shows that some sort or organisation was established in Italy for an economic activity i.e. entering into the Spanish market. The conclusion is that the debtor has establishment in Italy in the same ideas explored in Interedil case.

Any proceedings opened after the examinership in the Dublin High Court shall be considered as secondary insolvency proceedings in accordance with Article 3 (3) of the EIR Recast.

The opening of secondary insolvency proceedings shall be restricted to the assets of the debtor situated within the territory of the Member State in which those proceedings have been opened i.e. assets that are located in Italy and any collateral within the credit agreement if it is located in Italy.

Thus far, the Italian court can open secondary insolvency proceeding if the Italian bank file for the relevant petition. However, the purpose of such opening is for security around the distribution ranking. For this sole purpose, this may not be in the best interest of the Italian creditors to open the secondary insolvency proceeding as it will dilute the returns in the proceeding with extra time and cost to be spent.

Under Article 36 of the EIR Recast, IP of the main insolvency proceeding may decide to obtain approval from majority of creditors in a jurisdiction in which a secondary insolvency proceeding can be opened ("local creditors"). The IP may be able to obtain approval if they can satisfy local creditors that the undertaking is to protect the general interest of local creditors. When the assets of the debtor are realized, the distribution of the assets in terms of the ranking of creditor claims and creditor's rights to the assets shall be administered in the laws in the Member State in which the secondary proceeding could have been opened.

This concept was also explored in *Re Collins & Aikman Europe SA* ("C&A case"), whereby the IP recognized the possibility that up to 24 proceedings across a number of Member States may be opened. The IP adopted the concept of co-ordination in their approach to the insolvency proceeding. In order to avoid opening of secondary proceedings, the IP provided oral assurances to local creditors that their claims will be dealt with their local insolvency law (including the ranking of creditors) as if secondary proceedings have been opened.

As provided in Article 36 of the EIR Recast and the C&A case, there is no need for the Italian bank to request opening of a secondary proceeding to secure distribution of ranking. The Irish examiner can seek and satisfy the Dublin High Court of the undertaking. The Italian bank can provide consent to the examiner so long as their interest is being looked after and they receive similar treatment in terms of distribution ranking as if a secondary proceeding was opened 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: 14 out of 15.

*** End of Assessment ***

Total marks: 46 out of 50.