



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

This is the **summative (formal) resit assessment** for **Module 2B** of this course and is compulsory for all candidates who **qualify for a resit assessment for this module**.

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

## **INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT**

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

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
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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. The final submission date for this assessment is **Tuesday 9 November 2021**. This assessment must be submitted to [David.Burdette@insol.org](mailto:David.Burdette@insol.org) via e-mail no later than 23:00 (11 pm) on **Tuesday 9 November 2021**.
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).

The answer here was D.

Total marks awarded: 9 out of 10.

## QUESTION 2 (direct questions) [10 marks]

### Question 2.1 [maximum 2 marks] 1

The following **two (2) statements** relate to particular provisions / concepts to be found in the EIR Recast. Indicate the name of the provision / concept (as well as the relevant EIR Recast article), addressed in each statement.

Statement 1. "This article introduces a legal regime for the avoidance of secondary insolvency proceedings, based on the unilateral promise given by the main insolvency practitioner to local creditors that they will receive treatment 'as if' secondary proceedings had in fact been open."  
– 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: Article 36 Right to give an undertaking in order to avoid secondary insolvency proceedings. **Yes**

Statement 2: Article 81, Information obligation for better cooperation in cross border insolvencies between the member states. **No. Article 81 of the Regulation states: 'Without prejudice to the information to be given to data subjects in accordance with Articles 11 and 12 of Regulation (EC) No 45/2001, the Commission shall inform data subjects, by means of publication through the European e-Justice Portal, about its role in the processing of data and the purposes for which those data will be processed.' Here Recital 48; Articles 41-43; or Articles 56-58 were expected.**

### Question 2.2 [maximum 3 marks] 2

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.

Ans: The three examples which incorporates modified universalism in EIR Recast are as follows:

1. COMI (centre of main interests) where the main proceedings should be opened where the centre of the debtor's main interests is situated. (Article 3)
2. Secondary proceeding (Article 34). Where main insolvency proceedings are recognised in another Member State.
3. Pre insolvency proceedings- Annex A – **How do pre-insolvency proceedings in Annex A support modified universalism? This is unclear.**

### 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.

Ans: The coordination of parallel proceedings received a lot of legislative attention. The EIR Recast now provides three separate provisions for the coordination

1. Article 42 where courts have to cooperate in a manner which does not become incompatible with the rules applicable to each of the proceedings. The court may, appoint an independent person or body acting on its instructions, provided that it is not incompatible with the rules applicable to them.
2. Article 43 - Cooperation and communication between insolvency practitioners and courts.
3. Article 41 Cooperation and communication between insolvency practitioners

**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.

Ans: The court temporarily stays the opening of secondary proceedings (Article 38 EIR Recast).

the insolvency practitioner in main proceedings can give an undertaking to local creditors in which they are promised that they will be treated as if secondary proceedings had been opened (Article 36 EIR Recast- Synthetic Proceeding).

At the time of closure of the secondary proceeding the liquidator [insolvency practitioner] has to [can] propose a resolution plan as per Article 47 and if in the member state where the secondary proceedings are to be closed does not have such a provision then the liquidator has to propose a composition or a comparable measure.

Article 41 (2)(b) which encourages the administrators to actively explore the possibility of restructuring the debtor and coordinate the elaboration and implementation of a restructuring plan.

Total marks awarded: 8 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] 4.5**

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.

Ans: The 2002 Insolvency Regulation was in force for more than a decade. As per Article 46 EIR, 2002, the European Commission had to present a report on the EU 2002 success not later than 1<sup>st</sup> of June 2012. It is generally regarded as a successful legal instrument on insolvency in the EU, but certain changes need to be incorporated as the fundamental premise adopted by 2002 Insolvency Regulation was that the insolvency law is the matter for each



Member State. This proved to be a major weakness. Other reasons which needed reforms are described as below:

1. The 2000 Insolvency Regulation did not have significant effect on harmonization of national substantive laws in this field.
2. Liquidation [it is not liquidation that was broadened but insolvency proceedings to cover not only liquidation] of the debtor had to be broadened to include the scope for restructuring proceedings. What needed was encouraging viable business to restructure at the early stage to prevent insolvency.
3. COMI and secondary proceedings needed more clarity as many courts gave different rulings on COMI leading to uncertainty with increased costs and time. Conflicts in COMI such as registered office of the Debtor and the shifting of COMI by the debtor for the purpose of forum shopping was consuming consume a considerable amount of time, and result in different courts concluding and reaching differing decisions. Landmark judgements on COMI such as Interedil Srl (In Liquidation) v Fallimento Interedil Srl brought some clarity but a clear provision was needed.
4. Stronger rules for cooperation between insolvency practitioners and the courts
5. Coordination and cooperation between for Group insolvency of companies belonging to the same group were absent.
6. Cross-border coordination of national insolvency proceedings. A new regulation was needed to reduce the risk to banks and financial institutions of enforcement against insolvent companies in EU Member States by enabling cross-border cooperation and increasing certainty in the law applicable on insolvency.
7. Improvement of creditor information. The need of information such as preferential creditors if any of the debtor security rights (security in rem, reservation of title) and any claimed set-off rights.
8. Data protection and the need of information symmetry of all insolvency proceedings conducted in all member states interconnected.
9. the economic crisis which affected European countries in period between 2009 and 2011 and which has led to increase in number of failing businesses, indicated that current insolvency regulation on EU level may not be adequate instrument for dealing with increased number of insolvency proceedings in enlarged EU.

The shortcoming of the EU regulations was [were] addressed in the 2015 EU Recast Regulation and The European Commission expects highly from this legislative reform.

### 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.

Ans: There is a completely new detailed legal framework on the cooperation and coordination of cross-border insolvency proceedings over the estate of members of a group of companies. Some of the changes are:

1) Of fundamental importance is, firstly, the definition of the term “group of companies”. Art. 2(13) EIR recast defines it as meaning “a parent undertaking and all its subsidiary undertakings”. The term “parent undertaking” is then defined in art. 2(14) EIR recast as an undertaking which controls, either directly or indirectly, one or more subsidiary undertakings; an undertaking which prepares consolidated financial statements in accordance with the EU Accounting Directive<sup>2</sup> shall be deemed to be a parent undertaking.

- II) The concept of procedural coordination in the EIR recast rests on two pillars:
- (1) group specific duties of cooperation and communication (art. 56 – 60 EIR recast), and
  - (2) the option of special group coordination proceedings (art. 61 – 77 EIR recast).

The first pillar consists of specific duties of cooperation and communication between

- (i) the insolvency practitioners appointed in proceedings concerning group members (art. 56 EIR recast),
- (ii) the courts before which insolvency proceedings concerning group members have been opened or are pending (art. 57 EIR recast), and
- (iii) all the insolvency practitioners appointed and all the courts involved (art. 58 EIR recast).

III) The second pillar is the option of special group coordination proceedings, which are regulated in section 2 of Chapter V EIR recast (art. 61-77).

1. Article 60- Powers of the insolvency practitioner in proceedings concerning members of a group of companies. Insolvency practitioners are granted the right to be heard in foreign insolvency proceedings, to request a stay of any measures under certain conditions and to apply for the opening of group coordination proceedings.

2. Article 61- Any court competent for the insolvency proceedings of a group member may open group coordination proceedings upon the request of an insolvency practitioner.

3. Article 68- The court appoints an independent group coordinator who may propose a group coordination plan and request a stay of national insolvency proceedings for up to six months. If national insolvency practitioners do not comply with the coordinator's recommendations, they must explain their reasons to the coordinator and the persons/bodies according to the respective national insolvency law.

### **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.

Ans: EIR Recast 2015 is a robust legislation which has incorporated the shortcomings of the 2000 EU regulations and incorporated new innovative concepts. However, there are many flaws in the regulation. However, according to me the two major flaws are:

1. The recast EIR provides that secondary insolvency proceedings are no longer required to be limited to winding up proceedings (as were listed in Annex B of the EIR). According to me this frustrates attempts to rescue group companies or divisions located in multiple different member states. **It is the complete opposite. The fact that proceedings are no longer limited to liquidation allows restructuring proceedings to be opened even in secondary proceedings, which was not the case before.**
2. Furthermore, synthetic secondary proceedings are expressly provided for in the recast EIR, whereby the relevant office holder may give a unilateral undertaking to the effect that local creditors, when it comes to distributions, will be treated as if secondary proceedings has been opened. The objective is to limit the cases in which secondary proceedings will be opened, in response to secondary proceedings broadly being seen as disruptive and an impediment to a rescue and/or an efficient realisation strategy. Known local creditors must approve the undertaking, such approval to be obtained in line with the local rules on the adoption of a restructuring plan. According to me it remains a point of potential contention that, as a result, local creditors may enjoy greater rights than creditors in the main proceedings.

The purpose of the EIR Recast is also to prevent insolvencies at the same time treat the ailing company either through rescue or through liquidation. Such flaws may be addressed by limiting the right to request secondary proceedings (to the main administrator and possibly certain, secured creditors), which would lead to in the words of one practitioner the consequence that practically no such proceedings would take place any longer, or by granting Member States' courts the right to reject the opening in cases where secondary proceedings are considered detrimental towards the estate while simultaneously ensuring that the main administrator is given ample chance to convince said court that a secondary proceeding would be needless and wasteful.

Total marks awarded: 12 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] 0

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.

Assume that the EIR 2000 applies. Does the Strasbourg 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.

Ans: From the perusal of the facts, No, the Dublin High Court does not have the jurisdiction to open the Examinership proceedings in Ireland.

According to Article 1(1) of the EU regulations, 2000 applies to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator. In the instant case the safeguard proceedings [???] There are no safeguard proceedings in Ireland. Your answer does not make sense. are like pre insolvency proceedings which does not mean that the debtor has collectively divested the business and there is no need for a liquidator as the proceeding is rescue oriented. The motive of the examinership proceeding is not for liquidation, liquidation might be the last resort. Here, the debtor has come for resolving the debt as there is a likelihood that the debtor in future might become insolvent if the debt fails to get restructured.

Even though by virtue of Article 3(1) of the EU Regulation 2000, the COMI lies in Ireland as COMI defined in the article is where the debtor has its registered office. Also, The debtor is not a bank, insurance company or any other excluded entity and therefore, Article 1(2) gets satisfied.

**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.

Ans: There are broadly 4 steps involved in addressing the applicability of EIR Recast 2015. If all the 4 steps namely, Temporal scope; Material Scope; Personal scope; Territorial scope are satisfied then it proceedings qualify to be governed by EIR Recast.

1. Temporal Scope which identifies the commencement of proceedings. EU recast will be applicable from 26/6/2017. In our case the proceedings commenced on 30/6/2017. Therefore, the first step stands qualified.
2. Material Scope defines the proceedings covered under Annex A. In the present matter, the proceedings are opened for Examinership which is listed under the Ireland's list of permitted proceedings under Annex A. Therefore, the second step stands satisfied.
3. Personal Scope defines who all are allowed In the EIR. The debtor is not a bank, insurance company or any other excluded entity. Therefore, the third step also complies with the EIR's applicability.
4. Territorial Scope defines the geographical limits. In the present case, the proceedings are opened in Ireland which forms part of the EU(Denmark not covered). Therefore, the last step also falls in the scope of applicability of EIR.

All the four above stated scope are satisfied and hence EIR must be made applicable to the insolvency commenced at Ireland.

**Question 4.3 [maximum 5 marks] 2.5**

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.

Ans: Yes, the Italian Bank may open the secondary proceedings in Italy. In the present case the Italy Bank wants to secure its ranking in the distribution of proceeds. This concern is well explained in the Virgos-Schmit Report which states that:

*“the secondary proceedings make sense for creditors who cannot rely on the recognition of their rights (or their preference rank) in proceedings in another...state.”*

For opening a secondary proceeding,

- Firstly, the secondary proceedings can only open after the opening of the main proceeding. From the perusal of the facts of the case, the main proceedings have already been commenced. Article 3(4) EIR Recast.
- Secondly, as per Article 2(11), local creditor' means a creditor whose claims against a debtor arose from or in connection with the operation of an establishment situated in a Member State other than the Member State in which the centre of the debtor's main interests is located. The Italian bank is a local creditor as the operation of the debtor

were conducted in Italy and Ireland is the member state where the main proceedings are being carried out.

- Thirdly, as per Article 3(4)(b)(i), the opening of territorial insolvency proceedings is requested by “a creditor whose claim arises from or is in connection with the operation of an establishment situated within the territory of the Member State where the opening of territorial proceedings is requested”.

In our present case, the secondary proceedings are requested by the creditor of the debtor which the Italian Bank in the territory of Italy itself where the request has been made to open the secondary proceeding.

- Fourthly, Establishment of the Debtor must exist in Italy for the secondary proceeding to open as per Article 3(2) EIR Recast. The definition of establishment is as per Article 2(10) which reads as “*‘establishment’ means any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets*”

We must look at the following essentials to establish the establishment

- i) Place of operations of the debtor or a place of business carried out *in the 3-month period prior to the request to open main insolvency proceedings*
- ii) *a non-transitory economic activity with human means and assets*

From the facts of the case, the debtor has a warehouse in Italy and. In Italy the debtor runs a bank account which means that the creditor here i.e Italian Bank identifies the business of the debtor at Italy. The debtor also started negotiations with local distributors and some (non-binding) memoranda of understanding have been signed for expanding its business in Italy suggests that there was in fact a non-transitory economic activity with debtors asset the warehouse and human means deployed by the debtor to expand in the gaming industry in Italy.

In the case of *Interdil* the CJEU examined the concept of Establishment and held that the definition of establishment shows that there is some human activity and some degree of organisation and stability is required. Merely, a bank account presence of goods in isolation will not satisfy the definition of establishment.

But, in our case, there is a presence of the debtor business in Italy and the debtor was putting in efforts to enter into the industry in Italy shows that the debtor’s establishment was not a letter box office.

Hence, the Italian Court can open the secondary proceeding in Italy.

While some of your reasoning is sound, this is not the correct answer.

- According to Article 3(2) EIR Recast, where the debtor’s COMI is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if it possesses an establishment within the territory of that other Member State.
- Under Article 2(10) EIR Recast, ‘establishment’ means any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets.
- Relevant case law: *Interdil Srl, in liquidation v Fallimento Interdil Srl*, Case C-396/09, ECLI:EU:C:2011:671 (Oct. 20, 2011), *Burgo Group SpA v Illochroma SA*, Case C-327/13, ECLI:EU:C:2014:2158 (Sep. 4, 2014).

- The facts of the case do not support the finding of an establishment of Cardinal Home in Italy. The presence alone of assets (leased-out warehouse) in isolation, contractual relations with a local bank (including maintenance of a bank account) and occasional negotiations (whether individual or collective) 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 evidently missing.
- Therefore, under the EIR Recast, secondary insolvency proceedings cannot be opened in Italy.

Total marks awarded: 7.5 out of 15.

**\* End of Assessment \***

Total marks awarded: 36.5 out of 50.

Resit mark capped at 50% - Course Leader