



**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.

C was the correct answer.

#### 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.

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: 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."

[Re Statement 1:

- (a) Statement 1 refers to Articles 36 and 38.
- (b) The title of Article 36 is "Right to give an undertaking in order to avoid secondary insolvency proceedings"
- (c) Article 36 is found in Chapter 3 of the EIR Recast. The title for Chapter 3 is "Secondary Insolvency Proceedings".
- (d) The title of Article 38 is "Decision to open secondary insolvency proceedings".
- (e) It is stated in Article 38 that a court may not open secondary proceedings if the insolvency practitioner in the main proceedings if an insolvency practitioner has given an undertaking in accordance with Article 36 and the court in receipt of a request to open secondary proceedings is satisfied that the undertaking given by the insolvency practitioner in the main proceedings adequately protects the general interests of the local creditors in the jurisdiction where secondary proceedings is requested.

Re Statement 2:

- (a) Statement 2 refers to recital 3 of EIR Recast.
- (b) Article 42 (Cooperation and communication between courts) is the provision in EIR Recast that addresses judicial cooperation.
- (c) There is also a broader cooperative regime intended by the EIR Recast which requires cooperation and communications between insolvency practitioners (Article 41) and cooperation and communication between insolvency practitioners and courts (Article

43) and is intended to support the objective of having cross-border insolvency proceedings operative more effectively.

- (d) There are also similar provisions intended to address group insolvencies (Articles 57 and 58)]

**Question 2.2 [maximum 3 marks] 3**

The EIR Recast is built upon the concept of modified universalism, as pure universalism has been deemed idealistic and impractical for the time being. Provide **three (3) examples** of provisions from the EIR Recast, which highlight this modified universalism approach.

[The 3 examples of provisions from the EIR Recast which highlight the modified universalism approach are as follows:

- (a) Chapter 1, titled General Provisions, Article 3 (International Jurisdiction) – this provision specifies for where main insolvency proceedings may be opened (i.e., the territory that is the centre of the debtor’s main proceedings, the definition for what is centre of main interests, the presumption that the place of registered office shall be the centre of main interests). This article also specifies the criteria for secondary insolvency proceedings. With both these concepts, where insolvency proceedings are to be commenced and how each insolvency proceeding should be regarded from a procedural and from the perspective of priority, the application of the laws of each territory.
- (a) Chapter 2, titled Recognition of Insolvency Proceedings, Article 19 (Principle), Article 20 (Effects of Recognition) – both these provisions relate to recognition of judgment opening insolvency proceedings by other member states, when the recognition becomes effective and states that separate formalities are not required to enable or activate recognition.
- (c) Chapter 5, titled Insolvency Proceedings of Members of a Group of Companies, the COMI principles apply to insolvency proceedings of group companies and if there are several group companies located within a member state, then all the insolvency proceedings for these group companies shall be opened and maintain in one jurisdiction, this method provides better structure and efficiencies in terms of the investment of time and expenditure to manage insolvency proceedings.]

**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.

- [(a) Recital 50 – relates to courts in different members states coordinating the appointment of insolvency practitioners
- (b) Article 42 – cooperation and communication between courts in the case of secondary insolvency proceedings
- (c) Article 57 – cooperation and communication between courts in the case of insolvency proceedings involving 2 or more members of a group of companies.]



### Question 2.4 [maximum 2 marks] 3

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.

[(a) Undertaking given by an insolvency practitioner in the main insolvency proceedings.

In Article 36, the insolvency practitioner in the main insolvency proceedings may give an undertaking that assets and proceedings located in a second jurisdiction would be based on the national law of the second jurisdiction.

When such an undertaking is given by the insolvency practitioner in the main insolvency proceedings, the court (in the second jurisdiction) that is being requested to grant opening of secondary insolvency proceedings has discretion decline an application for secondary insolvency proceedings to be opened if the court is satisfied that the scope of the undertaking adequately protects the general interests of the creditors in the second jurisdiction.

(b) stay of opening of secondary proceedings (Article 38(3))

Article 38(3) allows the insolvency practitioner in the main insolvency proceedings or the debtor in possession to request the court in the second jurisdiction to stay the opening of secondary insolvency proceedings to allow for negotiations between the debtor and its creditors if there a suitable measures in place to protect the interests of the local creditors in the second jurisdiction. The opening of the second proceedings may be stayed for a period up to 3 months]

Total: 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.

[These aspects are as follows:

(a) Extending the scope to include restructuring  
It is stated in Article 1 of EIR Recast goes further than the mention of divest of debtor and appointment of a liquidator. It goes on to refer to the purpose of recue, adjustment or debt and reorganisation as being matters that fall within the scope of EIR Recast.

- (b) Cooperation between insolvency practitioners to be enhanced

Article 41 states that cooperation between insolvency practitioners may take any form, including conclusion of agreement or protocols and goes on to mandate that cooperation includes communication relating to any information that is relevant to proceedings, measures relating to rescue or restructuring, exploring the possibility of restructuring, coordinating the process for realisation or use of the debtor's assets.

- (c) Addressing insolvency proceedings involving companies within the same group

Provisions relating to group insolvencies are addressed in Chapter 5.

- (d) Access to information

Creation of insolvency registers (Article 24) that will be linked throughout the member states and establishing access to the registers through the European e-Justice portal (Article 25)

- (e) Data protection

Following through on the concept of having insolvency registers which would contain personal data, it becomes necessary to formally mention or recognise that collection, storage, access and security of the data must adhere to data protection standards that are applicable to member states.]

### 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.

- [(a) Provisions relating to the establishment of insolvency registers (Article 24) which will contain specified data points, connection of insolvency registers and the role of the European e-Justice Portal as a central access point for information in the insolvency registers (Article 25) and publication of information in insolvency registers upon request by an insolvency practitioner (Article 29).
- (b) Provisions relating to group insolvency (Chapter 5), in particular, the concept of a group coordinator who is responsible to oversee and coordinate insolvency exercises across the group. Although group proceedings do not have mandatory power, the creation of this framework intended to cater to companies within a group provides structure, transparency and certainty on all sides and its use is likely to be more frequent or welcomed overtime as the efficiencies of a framework and its advantages may outweigh the old ways of dealing with multiple proceedings and competing interests that operate outside a coordinated framework.
- (c) Provisions relating to secondary proceedings (Chapter 3) - this refines the provisions in EIR 2000 with respect to secondary proceedings. The aim is to avoid creation of secondary insolvency proceedings in another jurisdiction. The insolvency practitioner in the main insolvency proceedings may give an undertaking with respect to assets that are located in another jurisdiction (where such jurisdiction meets the criteria to be eligible to commence secondary insolvency proceedings) to commit to the application of the national law of that secondary jurisdiction when it comes to

distribution and priority rights. The undertaking has to be approved by the creditors in the other jurisdiction and these creditors can participate on matters require approval of creditors such as restructuring plans. Other provisions are administrative or procedural in nature such as creation of the right to open secondary proceedings, how to deal with requests to open secondary proceedings, judicial review of decisions made with respect to requests to open secondary proceedings, cooperation and communication]

**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.

- [(a) The introduction of a group coordination proceedings in EIR Recast. In Article 64, an insolvency practitioner who objects inclusion in group coordination proceedings will be excluded from group coordination proceedings. It is currently worded as a voluntary concept and not mandatory. There is no criteria specified for what type of factors deserve consideration under these circumstances. This leaves room for insolvency practitioners to stay away from the group coordination framework and does not fully do justice to the extension of the scope of the EIR Recast to address insolvency proceedings involving members of the same group of companies that operate within the member states.
- (b) Also in the case of group insolvencies, the obligation to cooperate and communicate as detailed in Articles 56-58 currently applies to group companies that are within Member States. The concept of cooperation and communication does not extend to countries that are not member states. This concept should be extended to countries that are not member states given that it is acknowledged that there are significant benefits and efficiencies to be enjoyed when there cooperation and communication demonstrated by courts and insolvency practitioners and considering that there is caselaw such as the Maxwell case to evidence that such cooperation and communication has been done before.]

Total: 15 out of 15.

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

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

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

**Question 4.1 [maximum 5 marks] 3**

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.

- [(a) For the Dublin High Court to have international jurisdiction, the court has to determine that the COMI of Cardinal Home is Ireland. In EIR 2000, an elaboration as to the elements that constitute COMI is located in recitals. In the case of Eurofood IFSC Ltd (Case C-341/04), the presiding judge referred to the 13<sup>th</sup> Recital of EIR 2000 which states that the 'centre of main interests' should correspond to the place where the debtor conducts the administration of this interests on a regular basis and is therefore ascertainable by third parties.
- (b) The fact that Cardinal Home entered into a credit agreement with an Italian bank, opened a bank account with the bank, started negotiating with local distributors and signing non-binding memoranda of understanding presumably with distributors in Italy, warrants consideration and a more comprehensive assessment to ascertain whether these elements are sufficient grounds to advance an argument that the Dublin High Court does not have sufficient international jurisdiction.
- (c) In particular, additional information would be required to show that the management decisions of Cardinal Home were taken in another jurisdiction, as this would constitute legitimate grounds to refute the presumption that the COMI is in the same jurisdiction as the registered office. In the case of *Interedil Srl v Fallimento Interedil SRL* (Case C-396/09, ECLI: EU:C:2011:671) it was decided that when the bodies responsible for management and supervision of a debtor are carried out in the same place as the registered office and the management decisions of a company are taken in the same jurisdiction as the registered office, these elements represent an irrefutable presumption that the COMI is the jurisdiction of the registered office.]

Good reasoning however:

- The Dublin High Court has international insolvency jurisdiction to open insolvency proceedings against Cardinal House.
- Under both the EIR Recast (Article 3) and the EIR 2000 (Article 3), the determination of international jurisdiction to open main insolvency proceedings is linked to the debtor's centre of main interest (COMI). According to Article 3 EIR Recast, COMI shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties (see also Recital 28). In the EIR 2000, similar statement was only provided in a recital (Recital 13). In the case of a company, the place of the registered office shall be presumed to be the COMI in the absence of proof to the contrary.
- Relevant case law: *Eurofood IFSC Ltd*, Case C-341/04, ECLI:EU:C:2006:281 (May 2, 2006) and *Interedil Srl, in liquidation v Fallimento Interedil Srl*, Case C-396/09, ECLI:EU:C:2011:671 (Oct. 20, 2011).
- Cardinal Home is registered in Ireland and operates from there. The fact that Cardinal Home owns some assets (i.e. warehouse) in Italy and has entered into contracts for the financial exploitation of those assets cannot be regarded as sufficient factors to rebut the presumption laid down in Article 3(1) (see para. 52 in *Interedil*).

The plans to expand to the Italian luxury market and ongoing negotiations with local distributors (with whom some non-binding memoranda of understanding have been signed) also cannot rebut the strong presumption in favour of the jurisdiction of the registered office, which resulted from the *Eurofood* judgement. Besides, it must have been obvious to such local distributors that the debtor conducted the administration of its interests from Ireland (actual centre of management) and it did so on a regular basis, since Cardinal Home's Italian presence was rather incidental, marginal and limited in time and purpose.

**Question 4.2 [maximum 5 marks] 2.5**

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

[To ascertain whether the EIR Recast is applicable, the following factors must be considered:

- (a) Whether Cardinal Home has its COMI in a Member state of the EU, except Denmark – yes it does. Cardinal Home is registered in Ireland
- (b) Whether Cardinal Home is a bank, insurance company or any other excluded undertaking – it is not. If it was, then EIR Recast would not apply.
- (c) The proceedings opened against Cardinal Home is listed in Annex A of EIR Recast – yes it is. Examinership proceedings are listed down in Annex A in the section titled “Eire/Ireland”
- (d) The proceedings were opened after 26 June 2017 – yes it was.]

**Name these scopes (temporal, individual etc.)**

**Question 4.3 [maximum 5 marks] 3**

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

- [(a) Article 3(2) of EIR Recast provides that secondary proceedings can be opened in any country where the debtor has an establishment.
- (b) In Article 2(1) of EIR Recast, “establishment” refers to a place of operations where a debtor carries out or has carried out in the three month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets.
- (c) In the case of Case C-327/13, Burgo Group SpA v Illochroma SA, ECLI:EU:C:2014:2158 (Sept 4, 2014) it is necessary for the debtor to be carrying out an economic activity with human means and assets before it is possible to open secondary proceedings.
- (d) It's also not clear from the facts provided for this question, whether Cardinal Home has its establishment in Italy during the 3 month period prior to the request to open main proceedings in Ireland.
- (e) If the action of management and supervision of Cardinal Home is carried out from Ireland and not Italy, the Italian bank would not have sufficient grounds for the Italian court to be eligible to be considered as the jurisdiction for opening of secondary proceedings (Interedil Srl v Fallimento Interedil Srl Case C-396/09, ECLI:EU:C:2011:671 (Oct. 2-, 2011)).
- (f) Assuming that the Italian bank meets the criteria to open secondary proceedings, Article 36 provides that the insolvency practitioner in the main proceedings may give

an undertaking that it will comply with Italian laws with respect to the distribution and priority rights of assets located in Italy.

- (g) If there are negotiations between Cardinal Home and its creditors, Cardinal Home may also request for a stay in the opening of secondary proceedings. Article 38(3) allows the insolvency practitioner in the main insolvency proceedings or the debtor in possession to request the court in the second jurisdiction to stay the opening of secondary insolvency proceedings to allow for negotiations between the debtor and its creditors if there a suitable measures in place to protect the interests of the local creditors in the second jurisdiction. The opening of the second proceedings may be stayed for a period up to 3 months]

Good reasoning and knowledge. However –

- 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: *Interedil Srl, in liquidation v Fallimento Interedil 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: 8.5 out of 15.

**\* End of Assessment \***

Total: 40.5 out of 50.