



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).
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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.

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).

C was the correct answer.

Total: 9 out of 10.

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks] 2

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

Statement 1. "This article introduces a legal regime for the avoidance of secondary insolvency proceedings, based on the unilateral promise given by the main insolvency practitioner to local creditors that they will receive treatment 'as if' secondary proceedings had in fact been open."
– Articles 36/38

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

[Answer:

Statement 1:

Article 36 provides that the insolvency professional in the main insolvency proceedings may give an undertaking to avoid secondary insolvency proceedings. The undertaking will be given to the local creditors in the Member State in which secondary insolvency proceedings could be opened.

Statement 2:

There are multiple provisions/ concepts in the EIR Recast that supports and addressed the statement. Few are mentioned below:

1. Under Articles 41-43, EIR Recast provided a framework for co-operation and communication:
 - a. between insolvency practitioners (Article 41 EIR Recast),
 - b. between courts (Article 42 EIR Recast), and
 - c. between insolvency practitioners and courts (Article 43 EIR Recast).
2. Similarly, under Articles 56-58, EIR Recast specified the duties of co-operation and communication with respect to group insolvencies:
 - a. between insolvency practitioners (Article 56 EIR Recast).
 - b. between courts (Article 57); and
 - c. between insolvency practitioners and courts (Article 58).
3. Also, Recital 48 specifies that for effective and efficient administration of the insolvency and for maximization of asset realization value. It requires proper co-operation between the insolvency professionals and courts involved in all the concurrent proceedings. Co-operation and co-ordination include exchanging key information and key details to other counterparts.]

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.

[Answer:

There are several provisions which highlight EIR Recast as Modified universalism. The three important examples are mentioned below:

1. The Insolvency proceeding can be initiated at the place of Debtor's center of main interest (COMI). The Centre of main interests is the place where the debtor conducts the administration of its interests on a regular basis, and which is ascertainable by third parties. (Article 3)
2. The insolvency proceeding in another member state which has jurisdiction pursuant to Article 3(2) may open a Secondary Insolvency proceeding under Article 34. The secondary proceedings can be opened at all the places of debtor's establishment (upto a maximum of 26 Secondary proceedings).
3. The insolvency practitioner in the main proceedings has the dominant. As per the Article 47 of EIR Recast, insolvency professional in the main proceeding is empowered to propose restructuring plans. But at the same time insolvency professional cannot bind the creditors who are not covered by the proceeding without the consent of all the creditors having an interest.]

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.

[Answer:

In EIR 2000, there was only 1 article (Article 31) that mandates Insolvency professionals in main and secondary proceedings to communicate and inform each other. Whereas EIR Recast introduced a comprehensive framework to deal with co-operation and co-ordination between the courts, insolvency professionals and between courts and insolvency professionals. The said articles of EIR Recast are mentioned below:

1. Co-operation and co-ordination between insolvency practitioners (Article 41 EIR Recast)
2. Co-operation and co-ordination between courts (Article 42 EIR Recast)
3. Co-operation and co-ordination between insolvency practitioners and courts (Article 43 EIR Recast).]

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.

[Answer:

The two examples in EIR Recast to avoid or control the opening, conduct and closure of secondary proceedings are:

1. Article 38(2) of EIR Recast – If the Insolvency professional has given a unilateral undertaking to the creditor as per the Article 36 and then the court upon the request of Insolvency professional grant a temporarily stay on the opening of secondary proceedings. However, the undertaking should adequately protect the general interest of the local creditor and safeguard the rights and legitimate expectation, as if the secondary proceedings had been opened.
2. In case where the restructuring plan is under negotiation with the creditors, opening of secondary proceeding will hamper the whole negotiation process and undermine the business rescue. To avoid the same EIR Recast has given the power to court to grant temporary stay of individual enforcement proceeding in the main insolvency proceeding. Insolvency professional can propose a restructuring plan as per Article 47 of EIR Recast. However, if the member state where the secondary proceedings are to be closed does not have such provision then Insolvency professional has to propose a composition or a comparable measure in secondary proceedings (Article 47(1) EIR Recast).]

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] 3.5

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.

[Answer:

The European Council adopted EIR 2000 on 29th May 2000. It was binding in its entirety and applicable in all the EU Member states except Denmark. The EIR 2000 and EIR Recast has multiple similarities as the EIR Recast was improvised version of EIR 2000 and it was developed on similar framework. Despite the general acknowledgement of the EIR Success, after 15 years of its existence, it is clear that it needed few adjustments, additions and amendments.

There were various shortcomings with the EIR 2000 and EIR Recast was introduced to address these shortcomings. Few important aspects are mentioned below:

1. The EIR Recast emphasis on rescue and rehabilitation and provides for restructuring of the debtor at pre-insolvency stage. This will give debtor some breathing time and in this scenario the debtor is fully or partially in control of its assets and affairs.
2. The EIR Recast includes new rules providing for co-ordination and co-operation between courts and Insolvency professionals and a new concept of Synthetic secondary proceedings.
3. The Territorial/ Secondary proceedings turned out to be a liquidation proceeding was removed.
4. Harmonization of national substantive law in the European Insolvency regime which was not present in the EIR 2000. **Be more specific here as the EIR Recast specifically**

says that as a result of widely differing substantive insolvency laws across the Member States, it was impossible to introduce an EU-wide regime.

5. EIR Recast provided a clarity on COMI and Establishment. As many courts have given different ruling which leads to multiple interpretation. However, EIR Recast nowhere defined COMI but Judgement such as *Interedil Srl (In Liquidation) Vs. Fallimento Interedil Srl* brought some clarity.
6. In the recast EIR the presumption that a debtor's COMI is in the place of its registered office will not apply if the registered office has shifted in the preceding three months – a measure designed to curb abusive forum shopping.
7. Co-ordination and co-operation for Group insolvency of companies belonging to the same group were absent.
8. EIR Recast provides a method to inform creditors. The need of information such as initiation of insolvency, preferential creditors, if any, of the debtor security rights (security in rem, reservation of title) and any claimed set-off rights.
9. The creation of interconnected insolvency registers will ensure all stakeholders have access to reliable information about ongoing insolvency proceedings in the EU.

Good answer but it would have made it stronger had you more clearly explained what the situation was like under the EIR 2000 before explaining how the EIR Recast 2015 amended each aspect.

Question 3.2 [maximum 5 marks]

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.

[Answer:

EIR Recast introduced new comprehensive legal framework to support the administration of a cross-border case in an efficient manner. The framework talks about the co-operation and co-ordination of cross-border insolvency proceedings over the estate of members of a group of companies.

There are various improvements and innovations introduced in the EIR Recast. Few are mentioned below:

1. To make COMI determination more predictable, EIR recast introduced a concept of Suspect Period that creates a safeguard against the fraudulent manipulation of the insolvency forum. This will protect creditors interest and avoid the Forum shopping by debtors.
2. Another crucial improvement brought by the EIR Recast is the abolition of the requirement that secondary proceeding must be winding-up proceedings.
3. EIR Recast now explicitly equates arbitration with the state court litigation in the matter of assigning the law determining the effect of insolvency on them.
4. Article 32(1) of EIR Recast establishes that the judgements related to the insolvency proceedings must be enforced in accordance with the Article 39-44 and 47-57 of Brussels-I recast.
5. 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 shall be deemed to be a parent undertaking.

The EIR Recast introduced co-operation and co-ordination for the Insolvency professionals and courts. The same further rest into two areas:

- I. Under Chapter 5 Insolvency Proceedings of Members of a Group of Companies. (Article 56 – 60 EIR recast)
 - II. Under Section 2, the option of special group coordination proceedings (Article 61 – 77 EIR recast).
 - I. The first pillar consists of specific duties of cooperation and communication between
 - i. the insolvency practitioners appointed in proceedings concerning group members (Article 56 EIR recast),
 - ii. the courts before which insolvency proceedings concerning group members have been opened or are pending (Article 57 EIR recast),
 - iii. All the insolvency practitioners appointed, and all the courts involved (Article 58 EIR recast).
 - II. The second pillar is the option of special group coordination proceedings, which are regulated in section 2 of Chapter V EIR recast (Article 61-77 EIR Recast).
 - i. 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.
 - ii. Article 61- Any court competent for the insolvency proceedings of a group member may open group coordination proceedings upon the request of an insolvency practitioners.
 - iii. 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.
 - iv. 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
6. Article 28(1) of EIR Recast oblige the insolvency professionals or DIP to request publication of the notice on the opening of insolvency proceedings, either main or secondary proceeding. The publication should be at the place of debtors' establishment in accordance with the publication procedures provided in the member state.
 7. The possibility of synthetic secondary proceedings by the giving of an undertaking may also facilitate the coordination of insolvency proceedings relating to members of a group, as it may prevent the opening of multiple proceedings in respect of each member.
 8. The establishment of insolvency registers may also increase transparency in group insolvency processes.

Question 3.3 [maximum 5 marks] 4

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.

[Answer:

EIR Recast was an improvised version of EIR 2000. The recast was welcomed by most stakeholders, however at the same time it was criticized as well. According to me, the major shortcomings are:

1. The Creditors' right and their protection under the regulation was not properly protected. Under Article 45(1) of EIR Recast, creditor may lodge a claim in the main

proceeding and in any secondary proceeding. Subsequently, the EIR recast permits the opening of several insolvency proceedings against the same debtor. As explained, creditors are free to lodge their claim and may satisfy its claim in insolvency proceeding opened in one member state before other creditors in another member state without violating the EIR Recast. The Hotchpot rule was also in place to aim at rebalancing creditors return in situation of plurality of insolvency proceedings.

However, every member state has different approach in ranking the creditor and no harmonisation was achieved in this regard. Since, each member state have different proceeding and governed by its own *lex concusus* or *lex concursus secundarii*, the ranking of the same claim may differ depending upon the respective jurisdiction.

The EIR Recast does not regulate whether the amount of the original claim or the remaining claim (after partially claimed under other proceeding) shall be taken into account in further distribution. To avoid this issue, EIR Recast should uniform the claim registration process and issue a proper standard procedure to admit claims and distribution as per the prescribed mechanism. It will remove the multiplicity and provide a seamless claim filing, efficient claim verification and proceed distribution process.

2. As per Article 36 of EIR Recast, In order to avoid the opening of secondary proceedings, the insolvency practitioner in the main proceedings may give a unilateral undertaking in respect of the assets located in the Member State in which secondary proceedings could be opened, that when distributing those assets or the proceeds received as a result of their realisation, he will comply with the distribution and priority rights under national law that creditors would have if secondary proceedings were opened in that Member State. Subsequently, Insolvency professional shall inform local creditors about the intended distributions prior to distributing the assets and proceeds. If the information does not comply with the terms of the undertaking or the applicable law, any local creditor may challenge such distribution before the courts in which main proceedings have been opened in order to obtain a distribution in accordance with the terms of the undertaking and the applicable law. Unilateral undertaking by Insolvency professional may lead to frivolous applications and opening of secondary proceeding from local creditor will hamper the debtor. This will impact the objective of EIR recast, i.e., to protect the business of debtor. **How would you consider this could be corrected?**

Total: 12.5 out of 15.

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

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

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

Question 4.1 [maximum 5 marks] 2.5

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.

[Answer:

On 29th May 2000, the European council adopted the EIR 2000, and it was binding in its entirety and directly applicable in all EU member state except Denmark. EIR 2000 is the first document after 30 years which helped EU to adopt unified rules on matter such as international insolvency jurisdiction etc. EIR 2000 also defines international jurisdiction for insolvency cases within the EU, it allows member state to open insolvency proceedings.

In the landmark judgement of *Eurofood IFSC Ltd*, “an application was made to the High Court of Ireland for compulsory winding up proceedings to be commenced against Eurofood and a provisional liquidator was appointed. Despite this, in February 2004 the District Court in Parma (Italy), taking the view that Eurofood’s COMI was in Italy, held that it had international jurisdiction to decide on Eurofood’s insolvency. Later, in March 2004 the Irish High Court confirmed Eurofood’s COMI to be in Ireland and refused to recognise the judgment of the Italian court”. To resolve the jurisdictional conundrum, the CJEU specifies that the autonomous meaning of COMI facilitates legal certainty across the EU as, in principle, its application must be uniform in all Member States. COMI must be identified by reference to criteria that are both objective and ascertainable by third parties, primarily by the debtor’s creditors.

In *Interedil* the CJEU examined the concept and concluded that the fact that the definition connects the pursuit of an economic activity to the presence of human resources, shows that a minimum level of organisation and a degree of stability are required. As the Cardinal Home have all the operational activities in Cork, Ireland and also registered office in Cork, the proceeding can be initiated at Cork, Ireland but as the transactions at Italy do not fall within the purview of Establishment. Even when the EIR have provision to open proceeding at member state. The member state should have COMI but in the current case, the same is not applicable. Hence, the international insolvency jurisdiction is not applicable.

This is incorrect.

- 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] 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.

[Answer:

EIR Recast scope consist of 4 major steps. The scopes address the applicability of EIR Recast. The EIR will applicable if all the 4 steps are satisfied. The scopes are mentioned below:

1. Material Scope:

It defines the proceedings covered under Annex A. Annex A provides a list of names of insolvency proceedings for all 27 countries covered by EIR Recast. Also, 112 procedures have been included in Annex A. As specified in Recital 9 of EIR Recast, in respect of the national proceeding contained in Annex A, it is explained that the EIR Recast should apply without any further examination by court.

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, material scope stands satisfied.

2. Temporal Scope:

EIR Recast replaced EIR 2000. EIR applies from 26th June 2017. As per Article 84(1) EIR Recast, the provisions of the EIR Recast shall apply only to insolvency proceedings opened after the indicated date. Any proceeding opened before 26th June 2017 shall be governed by EIR 2000.

In our case the proceedings commenced on 30th June 2017. Therefore, the temporal scope stands qualified.

3. Personal Scope:

According to Article 1(2) of EIR Recast, the EIR Recast is not appliable to proceeding concerns

- a. Insurance Undertaking
- b. Credit institutions
- c. Investment firms and other firms covered under Directive 2001/23/EC
- d. Collective investment undertaking

In the current scenario, the debtor is a furniture company and do not fall under the definition of any excluded entity mentioned above. Therefore, the personal scope also complies with the EIR's applicability.

4. Territorial Scope:

EIR recast is a binding piece of EU legislation and directly applicable in all member states except for Denmark. In the present case, the proceedings are opened in Ireland which forms part of the European union. Therefore, the territorial scope also falls in the scope of applicability of EIR.

As all the four above stated scope are satisfied and due to which EIR must be made applicable to the insolvency commenced in Ireland.]

Question 4.3 [maximum 5 marks] 5

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

[Answer:

According to the Article 3(2) of EIR Recast, if the debtor's COMI is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open secondary insolvency proceedings against that debtor only if it possesses an establishment within the territory of that other Member State.

Also, under Article 2(10) of 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.

Subsequently, as ruled out in *Interedil Srl, in liquidation v Fallimento Interedil Srl*, Case the term 'establishment' within the meaning of Article 3(2) of the Regulation must be interpreted as requiring the presence of a structure consisting of a minimum level of organisation and a degree of stability necessary for the purpose of pursuing an economic activity. The presence alone of goods in isolation or bank accounts does not, in principle, meet that definition. Basis this in the current case, the requisite minimum level of organisation and a degree of stability is missing.

Also, the facts of the case do not support the finding of an establishment of Cardinal Home in Italy. Therefore, as per EIR Recast, secondary insolvency proceedings cannot be opened in Italy.]

Total: 12.5 out of 15.

*** End of Assessment ***

Total: 44 out of 50.