



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.

D was the correct answer.

Question 1.2

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

- (a) False. The EU sought to draft Conventions with a view to harmonising the insolvency laws of EU Member States as early as the 1960s, but these initiatives failed.**
- (b) False. There was another EU Regulation regulating insolvency law at EU level before the EIR 2000.
- (c) True. Before the EIR 2000, the EU has not sought to harmonise the insolvency laws of EU Member States.
- (d) False. An EU Directive regulating insolvency law at EU level existed before the EIR 2000.

Question 1.3

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

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

- (b) True. As a result, the EIR 2000 lacked the support of major stakeholders such as insolvency practitioners, businesses and public authorities who considered the instrument fruitless.
- (c) False. While a number of shortcomings were identified by an evaluation study and a public consultation, the EIR 2000 was generally regarded as a successful instrument by most stakeholders, including practitioners, businesses, the EU institutions and insolvency academics.
- (d) False. The EIR 2000 was considered a complete success to support cross-border insolvency cases and, as a result, the wording of the EIR Recast mirrored its 2000 predecessor.

Question 1.4

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

- (a) The EIR Recast is a copy of the EIR 2000. Its structure and the wording of all articles are similar.
- (b) Although the EIR Recast includes relevant and useful innovations, it has stuck with the framework of the EIR 2000 and mostly codified the jurisprudence of the CJEU.
- (c) The EIR Recast has not added any new concept to the text of the EIR 2000.
- (d) It is incorrect to say that the EIR Recast has not overhauled the *status quo* at all. On the contrary, the EIR Recast has departed from the text of its predecessor and is a completely new instrument which has rejected all existing concepts and rules.

Question 1.5

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

- (a) The EIR Recast is more rescue-oriented because all domestic rescue procedures fall within its scope.
- (b) The EIR Recast is more rescue-oriented because it harmonises all substantive aspects of national insolvency laws.
- (c) It is incorrect to say that the EIR Recast is more rescue-oriented than the EIR 2000, as the latter was already heavily rescue-focused.
- (d) The EIR Recast is more rescue-oriented because its scope was extended to cover pre-insolvency proceedings and secondary proceedings can now also be rescue proceedings.

Question 1.6

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

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

- (b) Rules on 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).

B was the correct answer.

Question 1.10

The French Social Security authority asserts to have a social security contribution claim against an Irish company, Cupcake Cottage Ltd. Cupcake Cottage is subject to the main insolvency proceeding (Examinership) in Ireland. In addition, a secondary insolvency proceeding (*Concurso*) relating to the same company has been opened in Spain.

Assume that:

- Under French law, creditors (except employees) must file proof of their claim within two (2) months from the publication in the French legal gazette of a notice of the judgment opening the insolvency proceedings.
- Under Spanish law, the period within which creditors must file their claims is one month, as set in the order opening secondary insolvency proceedings against Cupcake Cottage.

The French tax authority intends to file its claim in the Spanish proceedings. Within which time period can the French tax authority do so?

- (a) Within two (2) months following the publication date, as guaranteed by the French law (law applicable to the creditor).
- (b) Within one month, as stipulated in the applicable *lex concursus secundarii* (law of the insolvency proceeding at issue).

(c) Within 30 days following the publication of the opening of insolvency proceedings in the insolvency register of Spain.

(d) Within the time limit prescribed by the *lex concursus* of the main insolvency proceeding (Irish law).

C was the correct answer.

Total : 7 out of 10.

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks] 0.5

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 – The rule originated from judicial innovation in the case of Collins & Aikman Europe SA, but relates to Article 36 and Article 38 (2) of the EIR Recast. **What is the concept?**

Statement 2 - Recital 3 of the EIR Recast - Article 81. **What is the concept?**

Question 2.2 [maximum 3 marks] 1.5

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.

Recital 23 – This Recital refers to the universal scope that the opening of main insolvency proceedings has in members states within the territory of the centre of the debtor's main interest to protect the diversity of interest and permit secondary insolvency proceedings to be opened (where the debtor has establishment) parallel to the main proceedings.

Article 19 (2) – This article refers to the recognition of main insolvency proceedings (which is described in Article 3(1)) and the fact that it shall not preclude the opening of latter proceedings (secondary proceedings) (which is described in Article 3(2)) by a court in another Member State.

Recital 53 – The Recital refers to the introduction of rules on insolvency proceedings of groups of companies, allowing no limit on the opening of proceedings on the number of companies within the group in one jurisdiction if the centre of main interest are located in a single Member state. The Recital also states that The Court is also authorised to appoint the same Insolvency Practitioner in all the proceedings, if acceptable.

Some more obvious provisions would have been Articles 36, 38, 48, 41-43.

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.

Recital 50– This Recital allows courts in different member states to cooperate by coordinating the appointment of Insolvency Practitioners. Therefore, a single insolvency practitioner may be appointed for several proceedings involving the same debtor or group of companies, once acceptable.

Article 42 – The Article allows for courts handling the main, territorial and secondary insolvency proceedings (against the same debtor) to coordinate. This article allows for information to be shared and assistance to be requested directly from each court once it is within the rights of the various confidentiality agreements.

Article 57 – The Article refers to proceedings involving group of companies. The court whose proceedings has commenced shall cooperate with the court where a request has been made to open proceedings against the same group in order to assist in the effective administration of the proceedings, once acceptable.

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.

Article 36 – Right to give an undertaking in order to avoid Secondary insolvency proceedings.

The Insolvency Practitioner in the main insolvency proceedings, may give a unilateral undertaking to the Court requesting to open secondary proceedings. The court therefore requesting for secondary proceedings to be open, should not do so if they agree that the undertaking protects the general interest of the local creditors according to Article 38(2).

Recital 45 – Stay of the opening of secondary insolvency proceedings

The Court in the main insolvency proceedings may request a temporary stay to the opening of secondary insolvency proceedings in order to preserve the efficiency of the stay that has been granted in the main insolvency proceedings. The stay shall be made with suitable conditions to protect the general interest of local creditors.

Total : 7 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.

Based on the report presented on the proposal for the EIR the aspects that required adjustments included 1) various insolvency practice areas, 2) creditor information and 3) general modernisation for the legal rules. **Good but reference to that report would have been welcomed.**

The various insolvency practice areas that adjustments were made to included broadening the scope to restructuring proceedings which co-exists with newly introduced (2019) rules on the topic. It suggests a set of minimum standard of procedures that can be assist debtors in Restructuring matters across the Members states, gives debtors guidance on how to be reactive and in the early stages of restructuring, how to keep their business alive during this period and how to reduce costs whilst doing so.

Another insolvency practice area includes the implementation of stronger rules for the cooperation between insolvency practitioners and courts, which also include matters relating to groups of companies and not only individuals. The enhance rules provided on this topic makes it simpler for courts and IP's to communicate with each other using the prescribed guidelines, in practice of the idea of modified universalism. The articles to refer to on this matter are Articles 42 and 57 of the EIR Recast.

Enhanced creditor information is another area of the EIR that saw adjustments. Adjustments were made specifically to the Insolvency Registers, in that it has become more efficient for use in cross border insolvencies. Both courts and creditors have to be able exchange information relating to the same debtor in a timely and efficient manner and the adjustment to the EIR allowed for this to happen. The EIR Recast made it mandatory for a minimum amount of information to be published in the insolvency registers along with making it mandatory for registers to be published. The information that should be published include the name of the debtor, the registration number, the registered office and the name, postal address/email of the Insolvency Practitioner.

The EIR also saw the general modernisation of legal rules, which saw a whole Chapter added to the EIR (Chapter 6).The Articles in this chapter cover data protection rules, personal data published in the insolvency register and rules on the obtaining and storage of personal data. This Chapter covers the responsibilities of the Member States and Commission in regard to the personal data held in the insolvency registers.

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.

The EIR saw various improvements introduced in the EIR Recast, which included the following:

1. Improvement of creditor information: Duty to inform creditors. The EIR 2000 did not expressly gives instructions to IPs on how creditors in Member States should be informed of insolvency proceedings, it was left to the Ips discretion to publish information they saw fit and in which jurisdictions they saw fit. The EIR Recast on the other hand, expressly states how creditors should be notified. Article 28 of the EIR Recast states that notice should be published in any other Members State where the

debtor has an establishment and should include the following information: The name of the IP and jurisdiction, and whether the proceedings that have been open are main or secondary proceedings. The EIR Recast also expressly states that once proceedings have been opened by the Court, foreign creditors are to be immediately notified and this is covered in Article 54 of the EIR Recast.

2. Restructuring – The EIR 2000 only referred to proceedings involving the appointment of a liquidation and the sale of debtor’s assets. The EIR Recast broaden the scope in making reference to effective restructuring tools to assist creditors in maximizing their value and increasing their investments. This allows entrepreneurs to obtain a second chance and refers to opportunity to propose restructuring plans. Article 47 of the EIR Recast explains the general powers that are vested in the IP to propose those plans, whilst Article 56 covers this in relation to cooperation and communication between Ips and Article 60 covers this in relation of group of companies.
3. COMI presumptions – Introduction of the suspect period. The suspect period is the 3-month period prior to the date of a request to open insolvency proceedings. This suspect period was introduced to decrease all chances of fraudulent manipulation in insolvency forums occurring before an insolvency filing is made. Recital 31 of the EIR Recast refers to this matter. It is explained that the COMI will be presumed as the place of the registered office at the individual’s principal place of business or habitual residence but will not apply when the debtor has relocated the registered office of principal place of business to another Member state during the suspect period. The Court will therefore disregard the change as if no change had indeed occurred.

Question 3.3 [maximum 5 marks] 3.5

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.

1. Equal treatment of creditors in insolvency proceedings: The EIR Recast allows for insolvency proceedings to be opened against the same debtor, and creditors are free to submit claims in both the main and secondary insolvency proceedings. However, if a creditor has received distribution from one insolvency proceeding, they can benefit from the second insolvency proceeding, once creditors of the same ranking or category in the second insolvency proceeding has obtained an equivalent dividend. However, the issue is that Member States have different approaches to ranking of creditors and this is not set out in the EIR Recast. Therefore, the ranking of the same claim pay differ in different Member states and may be unfair for some creditors if they are ranked higher in one insolvency proceedings over another. There is also the case of whether distributions received in one insolvency proceeding can be taken into account in the matter of the creditor receiving a further distribution in another insolvency proceeding against the same debtor. **How would you consider this could be corrected?**
2. Group co-ordination: One of the areas in group co-ordination has been referred to as “one of the weakest points in the EIR Recast” and specifically in the group co-ordination regime”. That area is the right given to every insolvency practitioner that is concerned with the subject matter the opportunity to object against the inclusion within the group co-ordination proceedings of the insolvency proceedings that they have been appointed, which is covered in Article 64 and 65 and the EIR Recast. The issue is that even though the insolvency practitioner are given the right to object, the EIR Recast does not mention that any reasonings have to be provided for the objections, which can be an issue. Therefore, this issue can be resolved if IP’s are required to provide their reasonable objections to proceedings.

Total: 13 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.

In the above scenario, the Dublin High Court does have international jurisdiction to open the requested insolvency proceedings in Ireland. The EIR 2000 did not explicitly provide a definition for determining the COMI of the Company but Article 13 of the EIR 2000 states "The 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties." Therefore, the COMI of Cardinal Home, if we were to base our answer from referencing the EIR 2000, is Italy, as this is where they entered into a credit agreement as they were planning to expand their market.

A well-known case referencing this scenario would be the case involving Eurofood IFSC Ltd where the registered office was in Ireland but owned a subsidiary in Italy, who later on tried to open proceedings in Ireland, however the court in Italy took the view that Eurofood's COMI was based in Italy and approved for proceedings to be opened in Italy. Unfortunately, the Irish Court later on confirmed that Eurofood's COMI was Ireland and judgement was not recognised in the Italian Court regardless of the fact that it was providing financing facilities for companies of the Parmalat SpA Group, who was incorporated in Italy.

Therefore, in the above scenario, regardless of the jurisdiction that Cardinal Home was operating or had entered into agreements with individuals from, the COMI would still be Ireland, and therefore insolvency proceedings can be opened there.

Some elements missing here –

- 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.

Yes, the EIR Recast will still be applicable if respective proceedings were opened on 30 June 2017. The EIR Recast came into effect on 26 June 2017, replacing the original EIR 2000.

Temporal Scope - As stated in Article 84 of the EIR Recast "The provisions of this Regulation shall apply only to insolvency proceedings opened after 26 June 2017. Acts committed by a debtor before that date shall continue to be governed by the law which was applicable to them at the time they were committed". Therefore, as these proceedings would have been opened 4 days after this EIR Recast came into effect, it would be applicable. Therefore, it has passed the Temporal Scope test.

Material Scope – The EIR Recast does not only apply to traditional liquidation procedures, but also to proceedings aimed at helping distressed businesses. Therefore, as Cardinal Home had started to suffer from both economic and financial crisis, they would qualify for the EIR Recast to applied in the proceedings. Also, Ireland is one of the jurisdictions listed in Annex A, which highlights all the jurisdictions and proceedings that are allowable and since this procedure falls under Annex A, it automatically falls with the scope of EIR Recast. Therefore, it has passed the Material Scope test. A

Personal Scope – The EIR Recast only applied to proceedings that are adopted in the Member states and that have been included in Annex A. Therefore, it does not apply to proceedings including insurance, credit institutions, investment firms and firms that are covered by Directive 2001/24/EC or collective investment undertakings. These proceedings are considered special, and as Cardinal Home was a furniture store, it does not fall within the scope of these proceedings and therefore has passed the personal scope test.

Territorial Scope – The EIR Recast is applicable to all Member States (except Denmark). However, when the debtor's COMI is not located in the EU, the EIR Recast does not apply. However, in this instance, the COMI is in the EU (Ireland) and therefore has passed the Territorial scope test.

Question 4.3 [maximum 5 marks] 1

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.

Italy is listed as one of the 27 countries where the EIR Recast could be applicable, as listed in Annex A of the EIR Recast. Compulsory administrative liquidation is also listed as one of the procedures that can be allowed in Italy under the EIR Recast, and since these procedures fall under that category it is automatically within the scope of the EIR Recast.

Therefore yes, proceedings can be opened in Italy under the EIR Recast. This will allow for creditors in Italy to file proof of debt claims in their jurisdiction as Cardinal Home has a presence there.

Your answer is incorrect –

- 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 : 35.5 out of 50.