INSOL INTERNATIONAL
FOUNDATION CERTIFICATE
IN INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2B

THE EUROPEAN INSOLVENCY REGULATION

This is the **summative (formal) assessment** for **Module 2B** of this course and is compulsory for all candidates who **selected this module as one of their compulsory modules from Module 2**. Please read instruction 6.1 on the next page very carefully.

If you selected this module as **one of your elective modules**, please read instruction 6.2 on the next page very carefully.

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.

2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way**. **DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.

3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).

4. You must save this document using the following format: **[studentID.assessment2B]**. An example would be something along the following lines: 2021122-526.assessment2B. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the word "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked**.

5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words**.

6.1 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.

A was the correct answer.

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 : 6 out of 10.

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks] 2

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

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

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

[Statement number 1 relates to the provision of synthetic proceeding, foreseen in articles 36 and 38 (2), of the EIR Recast;
As for Statement number 2, this one is related to the concept of cooperation and communication between insolvency practitioners, between courts, and between courts and insolvency practitioners, foreseen in articles 41, 42 and 43.]

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.

[One of three examples of the modified universalism approach is the addition of the provision that the recognition of main proceedings shall not preclude the opening of secondary proceedings by a court in another Member States, according to article 19(2);
The second example is that article 3(1) of EIR Recast foresees that the Member State in which the debtor has its COMI is the territory that has jurisdiction to open the main insolvency proceeding. The proceeding will have universal scope and aim at encompassing all the debtor's assets;
Lastly, the third example is the possibility of one or more secondary insolvency proceedings to be opened, that will have its effects restricted to the assets of the debtor, situated in the territory in which the secondary proceeding was opened.] What provision is this?

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.

[Amongst the three articles, introduced in EIR Recast, and that are related to the Cross-border co-operation and communication between courts and insolvency practitioners, we could mention articles 41, 42 and 43, as well as articles 53-59 that, beyond foreseen the communications and cooperation between courts, does it in the scenario relating to two or more members of a group of companies.]

Question 2.4 [maximum 2 marks] 05.

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.

[First example is the provision of synthetic secondary proceedings, that authorise a secondary proceeding not to be opened, ate the request of the insolvency practitioner, if it is shown that the undertaking already protects the rights of creditors located in another State;
A second example that could be mentioned is the provision the secondary proceeding can only follow in time after the opening of the main insolvency, taking into account that the secondary proceeding is an "auxiliary" proceeding for the main insolvency proceeding.] What provisions are governing these?

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] 3

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.

[Amongst the aspects that were amended and modified by the EIR Recast, stronger rules regarding the cooperation between insolvency practitioners and courts were introduced by articles 41, 42 and 43, that regulate the cooperation and communication between insolvency practitioners, between courts, and between courts and insolvency practitioners, respectively, Besides those three articles, regarding the same topic it is also important to highlight the articles 53-59 that, beyond foreseen the communications and cooperation between courts, does it in the scenario relating to two or more members of a group of companies.

Speaking of group companies, the EIR Recast also improved its regulations it regards to proceedings between members of the same group of companies. The EIR Recast now has an entire chapter dedicated to regulating such situations – Chapter V, with over twenty articles

-, and has addressed the possibility of jurisdictional consolidation when it comes to group insolvency.

The EIR Recast also adjusted to improve the creditors information and interconnectivity of insolvency registers, as well as a modernization regarding the data-protection. Such improvements were made clear and applied in the Maxwell case, since the company had operations in the UK and in the USA, being necessary for an alignment to be done between the insolvency practitioners of both jurisdictions, seeking to get the creditors updated throughout the process, as well as aware of the decisions that needed to be made.]

There were other important aspects which were discussed in EU policy documents (drafted before the Regulation was reformed) which would have been worth mentioning. A reference to these policy documents would have made your work stronger.

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.

[First and foremost and as already mentioned in the answer to question 3.1, one of the most relevant improvements was the introduction of a better cooperation system between insolvency practitioners and courts, foreseen in articles 41, 42 and 43. Such innovation, I dare to say, is one of the most important changes made by the EIR Recast, taking into account that the communication between courts and practitioners of several jurisdictions improves, significantly, the quality of the insolvency proceedings (main and secondary ones).

Besides the communication improvement, another one of the improvements that is worth mentioning is the introduction of the concept of a synthetic secondary proceeding, foreseen in article 38(2) of EIR Recast. Such provision seeks to avoid the opening of secondary insolvency proceedings, taking into account the opinion and justification of the insolvency practitioner, allowing him/her to take a unilateral undertaking in respect of the assets located in the member state in which the secondary proceeding would be opened.

The insolvency practitioner would then commit that he will comply, when the right moment comes, with the distribution and priority rights under national law that the creditors of the jurisdiction in which the secondary proceeding could have been opened would have.

Lastly, the last improvement that I believe is worth mention is the addition of an specific regulation with regards to group insolvency (chapter V of the EIR Recast), that regulates, the once unregulated, complications regarding group insolvencies, being the most relevant matter the determination of a COMI/jurisdiction for the proceeding to be commenced.]

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.

[Amongst the flaws that were highlighted with regards to the EIR Recast is the application of article 13 of the EIR Recast, once it does not satisfactory defines an “employment contract”. The problem arises since there is no understanding if the term should be determined with a

reference to national legal systems of Member States or and autonomous meaning should prevail.

Taking into account the various legal systems of the various Members States in which the EIR Recast applies, the better option would be to standardize an interpretation for all States, without relying in the definitions given by the legislation of each State.

The second flaw/shortcoming that could be mentioned is also related to lack of a standardized definition when it comes to the concept of public policy. Even thought the concept of public policy is foreseen in each and every law system of the Member States, the lack of a general definition in the EIR Recast can create an unsecure environment, considering that what could be considered as a violation of public policy in State A, could not be considered as such in State B.

As well as the solution presented for the problem in the absence of a standardize interpretation for the definition of an "employment contract", the option for the problematic involving the absence of a defined meaning for public policy could also be the elaboration of a fixated definition for the term. That way, the definition would be known by all insolvency practitioners and courts, form all the jurisdictions encompassed by the EIR Recast.

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

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.

[Accordingly to article 3(1) of the EIR 2000 de Dublin High Court would have international jurisdiction to open the insolvency request, taking into account that the concept applied by the EIR 2000 when it came to the topic "jurisdiction" was the modified universalism. The EIR 2000 foresees that the insolvency procedure could be commenced at the place of the debtor's COMI (AKA, Centre of Main Interest).

Once the insolvency procedure is commenced at the Dublin High Court, this proceeding will have universal scope and will encompass all of the Cardinal Home assets, throughout the countries that are member of the EU.]

Your answer is insufficiently drafted.

- 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] 1.5

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.

[In a scenario in which the proceeding is opened on 30 June 2017, the EIR Recast would be applied, considering the provision of the article 84(1) that foresees that the EIR Recast "*shall apply only to insolvency proceedings opened after 26 June 2017*".

It is important to highlight that, the EIR Recast has a slightly modified provision, compared to the EIR 2000, when it comes to the jurisdiction. As well as foreseen in EIR 2000, the EIR Recast, in its articles 26 and 3(1) also grants to the court in which the debtor's COMI is located the authority to commence the insolvency proceeding (in the Cardinal Home's case, Dublin).

However, and, as an improvement to the provisions of the EIR 2000, the EIR Recast allows for the opening of secondary proceedings in the Member States in which the debtor has an establishment – according to article 3(2), that will run parallelly to the main insolvency, and only produce effects regarding the debtor's asset that are located in this secondary jurisdiction (according to article 23).

Insufficient answer –

- The EIR Recast will be applicable. The logical order of the steps to be taken is the following:
- Article 3(1) EIR Recast. COMI of Cardinal Home is in the EU (and not in Denmark), i.e. in Ireland (as stated in the answer to Question 4.1.). YES
- Article 1(2) EIR Recast. Cardinal Home is not a credit institution, insurance undertaking or any other 'excluded' entity. YES
- Article 2(4), Recital 9, Annex A EIR Recast. The opened proceeding '*Examinership*' is listed in Annex A to the EIR Recast. YES

Article 2(7), 84(1), 92 EIR Recast. The proceeding in question was opened on 30 June 2017, i.e. after the EIR Recast has entered into force. The filing date (22 June 2017) is not determinative for the temporal scope. YES

Question 4.3 [maximum 5 marks] 2.5

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

[Cardinal Home has warehouses across Europe, including in Milan, Italy. Consequently, is an understanding that Cardinal Home has assets located in Italy and, therefore would be encompassed by article 3(2), that foresees the possibility of opening a second insolvency proceeding, when necessary,

Another article that could serve as a basis to the opening of a secondary proceeding is article 2(10) of the EIR Recast, that defines establishment as a place in which the debtor, in this case Cardinal Home, carries out a non-transitory economic activity with human and assets. Such situation is the case of the warehouse, owned and operated by Cardinal Home in the Italian territory.

Therefore and, based on the provisions contained in article 3(2) and 2(10) of the EIR Recast, the secondary insolvency proceeding could be opened in Italy, and this secondary proceeding would be restricted to Cardinal Home's assets located in Italy, a procedure that needs to constantly communicate with the Irish courts where the main insolvency procedure was opened, according to articles 41, 42 and 43 of the EIR Recast.]

Incorrect answer –

- According to Article 3(2) EIR Recast, where the debtor's COMI is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if it possesses an establishment within the territory of that other Member State.
- Under Article 2(10) EIR Recast, 'establishment' means any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets.
- Relevant case law: *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: 6 out of 15.

*** End of Assessment ***

Total: 32 out of 50.