



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.**

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).

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.”

Concept – Main insolvency practitioner has the legal right under EIR recast to prevent opening of secondary insolvency proceedings to ensure more efficient insolvency proceedings.

1. EIR Recast Article 36 - Right to give an undertaking in order to avoid secondary insolvency proceedings
2. EIR Recast Recital 42, 43, 44

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

Concept- To ensure efficient insolvency proceedings, EIR recast creates obligation on the member state courts to cooperate.

1. EIR Recast Article 42 - Cooperation and communication between courts
2. EIR Recast Article 57- Cooperation and communication between courts (group insolvencies)
3. EIR Recast Recital 3, 48, 49, 52

Question 2.2 [maximum 3 marks] 2

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

1. Article 3 – International Jurisdiction
This provision states that the main insolvency proceedings shall be opened in a member state in which debtor’s centre of main interest is situated.
2. Article 34 - Opening of proceedings (Secondary Insolvency Proceedings)
This provision allows for opening of secondary proceedings in member states in which debtor has an establishment.
3. Article 7 – Applicable Law (Main insolvency proceedings)
This provision states that the law applicable to the insolvency proceedings and related actions/effects is the law of the member state in which the main insolvency proceedings

have been opened. The subsequent provisions i.e., Article 8 to 18, are specific matters on which the main insolvency proceedings law.

4. Article 35 - Applicable Law (Secondary insolvency proceedings)
This provision states the law applicable to the secondary insolvency proceedings is the law of the member state in which secondary insolvency proceedings have been opened.
5. Article 21 - Powers of the insolvency practitioner
The power of the insolvency practitioner is derived from the law which are applicable to the insolvency proceedings. The main insolvency practitioner can exercise this power in another member states of EU if no secondary insolvency proceedings are opened in that state. In exercising its powers, the insolvency practitioner shall comply with the law of the Member State within the territory of which it intends to act.

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.

Following are the Articles and Recitals which create obligation under EIR Recast for Cross-border co-operation and communication between courts

1. EIR Recast Article 42 - Cooperation and communication between courts
2. EIR Recast Article 57- Cooperation and communication between courts (group insolvencies)
3. EIR Recast Recital 3, 48, 49, 52

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.

Following are the 2 instruments which are available under EIR Recast to avoid/control the opening, conduct and closure of secondary proceedings –

1. EIR Recast Article 36 - Right to give an undertaking in order to avoid secondary insolvency proceedings
This provision allows the main insolvency practitioner to give an undertaking to the court of secondary proceedings. This undertaking is w.r.t. the assets located in member state where the secondary proceedings are/proposed to be opened. The undertaking should state that the main proceedings will not in any way disadvantage the local creditors of secondary proceeding member state and will comply with distribution and priority rights as per the secondary proceedings applicable law. This undertaking also requires the majority vote from the local creditors before member court can give assent.
2. EIR Recast Article 38 - Decision to open secondary insolvency proceedings
Recital (45)

The court can grant a temporary stay (not exceeding 3 months) on opening of secondary insolvency proceedings basis the request of the main insolvency practitioner to allow negotiations. This stay is subject to suitable measures in place to protect the local creditors.

Total: 10 out of 10.

QUESTION 3 (essay-type questions) [15 marks in total]

In addition to the correctness, completeness (including references to case law, if applicable) and originality of your answers to the questions below, marks may be awarded or deducted on the basis of your presentation, expression and writing skills.

Question 3.1 [maximum 5 marks] 5

In 2012, the European Commission recommended that the European Insolvency Regulation be amended by focusing on specific aspects of the instrument. Explain what these aspects were and how they have been introduced in the EIR Recast.

Following are the 5 major aspects of EIR 2000 which were amended in the EIR recast as recommended by the European commission.

1. EIR 2000 regulation scope did not include national procedures which provide for restructuring of the company at a pre-insolvency stage OR debtor-in-possession. This made EIR 2000 more liquidation oriented. This was against the more general trend of promoting tools for financially viable distressed businesses to restructure thereby maximize the value for all stakeholders i.e. creditors, debtors, employees etc.
 - EIR recast is focused more on rescue of viable distressed businesses as evidence by recital 10. The scope of regulation has been expanded by inclusion of various domestic proceedings, which provide for rescue of such businesses, in the Annex A.
2. EIR 2000 did not provide a clear definition of Centre of Main Interest (COMI) in the body of regulation. EIR 2000 did provide some guidance but through recital 13 which is not enforceable. COMI determined where the main insolvency proceedings were to be opened. This allowed for forum shopping which was detrimental for efficient insolvency proceedings.
 - EIR recast moved the guidance of recital 13 EIR 2000 to main body as Article 3(1) without any changes to the wording. However, now this definition is further backed by case law of CJEU i.e. Eurofood IFSC Ltd (Case C-341/04, May 2006). Additionally, EIR recast introduced a suspect period of 3 months (recital 31) to prevent forum shopping. If the debtor changes its registered location within 3-month prior to request for opening of insolvency proceedings, the COMI should be the old location.
3. EIR 2000 allowed for secondary insolvency proceeding to be opened in member states. This created issues with administration of main insolvency proceedings. Since the liquidator lost control on assets of secondary proceedings it became difficult to maintain and sell the debtor as going concern. Additionally, the secondary insolvency proceedings would only be a winding up proceedings creating difficulties to arrive at a restructuring.
 - EIR recast allowed for prevention of secondary insolvency proceedings using 2 instruments i.e. Article 36 and Article 38. Using these articles Main insolvency practitioner could stop opening of secondary insolvency proceeding by giving an undertaking. The insolvency practitioner could also obtain temporary stay for 3 months

to negotiate with the local creditors. Additionally, now the secondary insolvency proceedings could also be rescue proceedings instead of just winding up proceedings.

4. EIR 2000 did not have any mandatory publication or registration of decision in the member states where any proceedings are open. EIR 2000 left it on liquidator to public information on opening of proceedings in other member states. There was no single European Insolvency register where all the information from all member states is available. This created issues for courts, liquidators, creditors as they were unaware of proceedings in another member states. Courts and liquidators not being able to efficiently manage the insolvency proceedings and creditor not being able to file their claim were the issues.
 - EIR Recast Article 28 mandates issuance of notices of the opening of insolvency proceedings and related matters in all member states in which the debtor has an establishment in according to the publication procedure of that member state. Additionally, EIR Recast Article 29 also mandates publishing this matter in the various public registers of each member state wherein the debtor has its assets/establishment.
 - EIR Recast Article 55(6) - Foreign creditors are given 30 days from publication of information in insolvency register to register claim irrespective of the law of the member state.
 - EIR Recast Article 54 mandates the Court/insolvency practitioner to inform all the known creditors of the opening of the insolvency proceedings.
 - EIR Recast Article 86/87 mandates establishment of insolvency registers and interconnection of registers (via e-justice portal) of all member states to ensure availability of information for better conduct of insolvency proceedings.
5. EIR 2000 did not contain any provisions to manage insolvency of a multi-national group. EIR 2000 allowed for separate proceedings for each legal entity of the group independent of each other. This is in contravention to the economic reality of group of companies operating as one.
 - EIR recast contains an entire chapter V dedicated to group insolvencies. It provides for cooperation between courts and insolvency practitioners of each entity in various member states (Article 56-60). Article 61-77 provides group co-ordination proceedings where in a group co-ordinator can be appointed.

Question 3.2 [maximum 5 marks] 5

While the EIR 2000 was considered to work well overall, several innovative concepts and rules were introduced in the EIR Recast to improve the manner in which the Regulation supports the administration of a cross-border case in an efficient manner. Describe **three (3)** improvements / innovations that made their way into the EIR Recast.

1. Suspect period for COMI
EIR 2000 allows for opening of main insolvency proceedings in Centre of Main Interests (COMI) of the debtor. The insolvency law of the member states, in which the main insolvency proceedings are opened, governs the insolvency proceedings of the debtor and is applicable EU-wide. This creates incentive for Debtor to relocate its COMI to a member state with more favourable law before initiation of any insolvency proceedings against the debtor. This is called forum shopping. To discourage forum shopping, EIR recast through recital 31 introduced a suspect period. In case the debtor has relocated its registered office to another member state within 3-month prior to request for initiation of insolvency proceedings, the new registered office cannot be considered as COMI. This period is 6 months for individual not exercising as independent business or professional activity.
2. Main Insolvency Practitioner's Right to give undertaking

Sometimes, secondary insolvency proceedings create difficulties for efficient management of the debtor's estate. EIR recast Article 36 empowers the main insolvency practitioner to prevent opening of secondary insolvency proceedings by giving an undertaking to the court of the member state where secondary insolvency proceedings are proposed to be opened. This undertaking assures the court of fair treatment of local creditors in the main insolvency proceedings. Once approved by majority local creditors, the court can stop opening of secondary insolvency proceedings

3. Temporary stay on opening of secondary proceedings
EIR Article 38 allows the court to grant temporary stay on opening of secondary proceedings so that negotiations can take place between debtor/insolvency practitioner and creditors.
4. Abolition of secondary proceedings being winding-up proceedings
EIR 2000 mandated that the secondary proceedings could only be winding-up proceedings. This proved to be value destructive for all stakeholders. EIR recast now allows the secondary proceedings to either be restructuring/ rescue proceedings or winding up proceedings.
5. Improvement of creditor information –
EIR Recast Article 86/87 mandates establishment of insolvency registers and interconnection of registers (via e-justice portal) of all member states to ensure availability of information for better conduct of insolvency proceedings.
6. Emphasis on restructuring -
EIR recast is focused more on rescue of viable distressed businesses as evidence by recital 10. The scope of regulation has been expanded by inclusion of various domestic proceedings, which provide for rescue of such businesses, in the Annex A

Question 3.3 [maximum 5 marks]

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. Voluntary nature of the group co-ordination proceedings under EIR Recast
EIR recast has an entire Chapter V which deals with group insolvencies and provides for group co-ordinator who can propose a co-ordination plan. However, these proceedings are not mandatory in nature. Insolvency practitioner of various group entities and different jurisdiction can easily opt-out of these group insolvencies proceeding by making a simple application (Recital 56 and Article 64). Additionally, implementation of the co-ordination plan is also voluntary.

Suggestion – While opt-out provisions are necessary to address cases wherein it does not make sense to have group insolvency proceedings, the application should be detailed and should be approved by the court on the basis of merits of the rationale. Additionally, the implementation of the co-ordination plan should be made compulsory unless it is deemed by the court to have issues.

2. Creditors are not consulted about opt-in or opt-out decision in group proceedings
The decision to be part of the group proceedings is left only to the insolvency practitioner with appropriate approval as required by local member state law. Creditors are not party to this decision.

Suggestion - Creditor are normally in a better position to take an economic view of the group insolvency hence should be involved in the decision making.

3. Applicability of regulation to non-EU jurisdiction

EIR recast tries to address cross border insolvency issues within the member states. However, it does not make any attempt to address these issues w.r.t. non-member states. This is contrary to the economic realities of today wherein there are many global co-operations operating in multiple geographies.

Suggestion- This is a very difficult issue to tackle considering lack of any single insolvency global law or any global regulation on co-ordination between various jurisdictions. Co-ordination provisions of UNCITRAL Model law could be used to partially address these issues. This would be in-line with the principle of EIR recast just extended to non-EU states.

4. Avoidance of main insolvency proceedings by insolvency practitioner in secondary proceedings

EIR Recast empowers the main insolvency practitioner to stop secondary proceedings which might be detrimental for the debtor's insolvency proceedings. However, there could be cases of group insolvencies wherein initiation of Main Insolvency proceedings against one of the entities is detrimental for the group insolvency.

Suggestion – To manage variety of situations, right of undertaking should also be allowed for insolvency practitioners of secondary proceedings of various group entities.

Total: 15 out of 15.

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

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

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

Question 4.1 [maximum 5 marks] 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.

As per the facts of the case, Cardinal Home is an Ireland-registered furniture company with warehouses and operations across Europe. Considering it is assumed that EIR applies, COMI is in the member state. Ireland is a member state of EU.

EIR 2000 Recital 12 states “This Regulation enables the main insolvency proceedings to be opened in the Member State where the debtor has the centre of his main interests. These proceedings have universal scope and aim at encompassing all the debtor’s assets.”

EIR 2000 Recital 13 defines Centre of Main Interests as “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.”

EIR 2000 Article 3(1) states “The courts of the Member State within the territory of which the centre of a debtor’s main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.”

Case law – Eurofood IFSC Ltd, Case C-341/04, ECLI:EU:C:2006:281 (May 6, 2006)

In the case the CJEU clarified further on the COMI. In its judgement CJEU stated the following in para 34.

“It follows that, in determining the centre of the main interests of a debtor company, the simple presumption laid down by the Community legislature in favour of the registered office of that company can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect.”

There are no factors mentioned in the case which can be used to rebut the argument of COMI of Cardinal Home being its location of registered office. In view of the above, it is clear that COMI of Cardinal Home is in Ireland. Thus the Dublin High Court have international jurisdiction to open the requested insolvency proceeding as per EIR 2000 Article 3(1).

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.

Following are the 4 questions that need to be answered to check if EIR recast applies

1. Geographical Scope – Does the debtor has COMI in a member state of EU, except Denmark?
Cardinal Home has its registered office in Ireland which is a member state of EU. There are no factors mentioned in the case which can be used to rebut the argument of COMI of Cardinal Home being its location of registered office (EIR Recast Recital 30). Thus COMI of Cardinal home is Ireland.
2. Personal Scope – Is the the debtor is not a bank, insurance company or another “excluded” undertaking?
Yes. Cardinal Home is a furniture company
3. Material Scope - The proceeding opened against the debtor is listed in Annex A to the EIR Recast
Yes. The examinership proceedings in the High Court in Dublin, Ireland are part of Annex A.

4. Temporal Scope - The proceeding is opened after 26 June 2017
Yes. The proceeding is opened on 30 June 2017 i.e. post 26 June 2017.

Since answer to all of the above question is “Yes”, EIR recast is applicable to this proceedings.

Question 4.3 [maximum 5 marks] 3

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

EIR recast Recital 23 states that secondary insolvency proceedings may be opened in the Member State where the debtor has an establishment. The effects of secondary insolvency proceedings are limited to the assets located in that State.

EIR recast Recital 24 states that it should be possible to open secondary insolvency proceedings in the Member State of the registered office, provided that the debtor is carrying out an economic activity with human means and assets in that State, in accordance with the case-law of the Court of Justice of the European Union.

EIR Article 2 (10) defines ‘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.

EIR Recast Article 3 (2) states Where the centre of the debtor's main interests 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. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.

EIR Recast Article 34 states “The effects of secondary insolvency proceedings shall be restricted to the assets of the debtor situated within the territory of the Member State in which those proceedings have been opened.”

Case Law - Burgo Group SpA vs Illochroma SA, CASE C-327/13

CJEU in para 31 stated “the fact that that definition links 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. It follows that, conversely, the presence alone of goods in isolation or bank accounts does not, in principle, satisfy the requirements for classification as an ‘establishment’ “

Cardinal home has operations in Italy considering it has a warehouse in Milan, Italy for quite sometimes. Thus, it can be concluded that Cardinale home has human means, assets and some level of organisation in Italy and this falls under the EIR Recast definition of having establishment in Italy. EIR recast allows for the opening of secondary insolvency in member states which has debtor’s establishment.

Therefore, Italian bank can open secondary insolvency proceedings in Italy. However, these proceedings will have limited scope and will be restricted to the assets of Cardinal Home in Italy.

However, the main insolvency practitioner might give an undertaking under EIR Recast Article 36 guaranteeing Italian bank its ranking in the main insolvency proceedings. This undertaking if accepted by majority of lenders in Italy, will prevent the opening of secondary proceedings.

The Italian court could also put a temporary stay of 30 days on opening of secondary proceedings under EIR Recast Article 38 and Recital (45). This stay will allow for negotiations between debtor/insolvency practitioner and creditors.

Good reasoning, however –

- According to Article 3(2) EIR Recast, where the debtor's COMI is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if it possesses an establishment within the territory of that other Member State.
- Under Article 2(10) EIR Recast, 'establishment' means any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets.
- Relevant case law: *Interedil Srl, in liquidation v Fallimento Interedil Srl*, Case C-396/09, ECLI:EU:C:2011:671 (Oct. 20, 2011), *Burgo Group SpA v Illochroma SA*, Case C-327/13, ECLI:EU:C:2014:2158 (Sep. 4, 2014).
- The facts of the case do not support the finding of an establishment of Cardinal Home in Italy. The presence alone of assets (leased-out warehouse) in isolation, contractual relations with a local bank (including maintenance of a bank account) and occasional negotiations (whether individual or collective) with local distributors do not qualify as 'non-transitory economic activity with human means and assets'. The requisite minimum level of organisation and a degree of stability (see para. 64 in *Interedil*) is evidently missing.
- Therefore, under the EIR Recast, secondary insolvency proceedings cannot be opened in Italy.

Total: 13 out of 15.

*** End of Assessment ***

Total: 47 out of 50.