



**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2B**  
**THE EUROPEAN INSOLVENCY REGULATION**

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

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

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

## **INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT**

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

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
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- 6.1 If you selected Module 2B as one of your **compulsory modules** (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is **23:00 (11 pm) GMT on 1 March 2022**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2022. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
- 6.2 If you selected Module 2B as one of your **elective modules** (see the e-mail that was sent to you when your place on the course was confirmed), you have a **choice** as to when you may submit this assessment. You may either submit the assessment by **23:00 (11 pm) GMT on 1 March 2022** or by **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. If you elect to submit by 1 March 2022, you **may not** submit the assessment again by 31 July 2022 (for example, in order to achieve a higher mark).
7. Prior to being populated with your answers, this assessment consists of **9 pages**.

## **ANSWER ALL THE QUESTIONS**

### **QUESTION 1 (multiple-choice questions) [10 marks in total]**

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

#### **Question 1.1**

The EIR 2000 substantively harmonised the national insolvency law of the Member States.

- (a) False. The objective of an EU regulation is not legal harmonisation.
- (b) True. Since the entry into force of the EIR 2000, the insolvency laws of the Member States are similar.
- (c) False. The objective of the EIR 2000 was not to harmonise aspects of national insolvency laws but to provide non-binding guidelines only.
- (d) False. While the EIR 2000 attempted to harmonise national insolvency laws, its focus was on procedural aspects of insolvency law, not substantive ones.**

#### **Question 1.2**

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

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

#### **Question 1.3**

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

- (a) True. The EIR 2000 proved to be inefficient and incapable of supporting the effective resolution of cross-border cases over the years.
- (b) True. As a result, the EIR 2000 lacked the support of major stakeholders such as insolvency practitioners, businesses and public authorities who considered the instrument fruitless.

(c) False. While a number of shortcomings were identified by an evaluation study and a public consultation, the EIR 2000 was generally regarded as a successful instrument by most stakeholders, including practitioners, businesses, the EU institutions and insolvency academics.

(d) False. The EIR 2000 was considered a complete success to support cross-border insolvency cases and, as a result, the wording of the EIR Recast mirrored its 2000 predecessor.

#### Question 1.4

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

(a) The EIR Recast is a copy of the EIR 2000. Its structure and the wording of all articles are similar.

(b) Although the EIR Recast includes relevant and useful innovations, it has stuck with the framework of the EIR 2000 and mostly codified the jurisprudence of the CJEU.

(c) The EIR Recast has not added any new concept to the text of the EIR 2000.

(d) It is incorrect to say that the EIR Recast has not overhauled the *status quo* at all. On the contrary, the EIR Recast has departed from the text of its predecessor and is a completely new instrument which has rejected all existing concepts and rules.

#### Question 1.5

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

(a) The EIR Recast is more rescue-oriented because all domestic rescue procedures fall within its scope.

(b) The EIR Recast is more rescue-oriented because it harmonises all substantive aspects of national insolvency laws.

(c) It is incorrect to say that the EIR Recast is more rescue-oriented than the EIR 2000, as the latter was already heavily rescue-focused.

(d) The EIR Recast is more rescue-oriented because its scope was extended to cover pre-insolvency proceedings and secondary proceedings can now also be rescue proceedings.

#### Question 1.6

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

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

(b) Rules on co-operation and communication between courts were to be refined; the concept of COMI was to be abandoned and a new jurisdictional concept was to be found; the Recast Regulation was to apply to Denmark.

- (c) The Recast Regulation was to apply to private individuals and self-employed; a common European-wide insolvency proceeding was to be added to the Regulation.
- (d) The Regulation was meant to fully embrace the universalism principle by abandoning the concept of secondary proceedings; the Regulation was meant to mostly promote out-of-court settlement and abandon all intervention of a judicial or administrative authority in cross-border proceedings.

### Question 1.7

The EIR Recast introduced the concept of “synthetic proceedings”. What are they?

- (a) “Synthetic proceedings” means that for the case at hand, several main proceedings can be opened, in addition to several secondary proceedings.
- (b) “Synthetic proceedings” means that when secondary proceedings are opened, these are automatically rescue proceedings, as opposed to liquidation proceedings.
- (c) “Synthetic proceedings” means that insolvency practitioners in all secondary proceedings should treat the proceedings they are dealing with as main proceedings for the purpose of protecting the interests of local creditors.
- (d) “Synthetic proceedings” means that when an insolvency practitioner in the main insolvency proceedings has given an undertaking in accordance with Article 36, the court asked to open secondary proceedings should not, at the request of the insolvency practitioner, open them if they are satisfied that the undertaking adequately protects the general interests of local creditors.

### Question 1.8

In which of the following scenarios may the recognition of a foreign insolvency proceeding be denied under the EIR Recast?

- (a) The rule applied by the court, which has opened insolvency proceedings (originating court), is unknown or does not have an analogue in the law of the jurisdiction, in which recognition is sought.
- (b) The judgment, subject to recognition, was passed with incorrect application of the applicable substantive law.
- (c) Where the decision to open the insolvency proceedings was taken in flagrant breach of the right to be heard, which a person concerned by such proceedings enjoys.
- (d) The court, which has opened insolvency proceedings (originating court), most certainly did not have international insolvency jurisdiction to do so under the EIR Recast.

### Question 1.9

In a cross-border dispute, the main proceedings before the Italian court opposes Fema SrL (registered in Italy) and Lacroix SARL (registered in France). The case concerns an action to set aside four contested payments that amount to EUR 850,000. These payments were made pursuant to a sales agreement dated 5 August 2020, governed by German law. The contested payments have been made by Fema SrL to Lacroix SARL before the former went insolvent. The insolvency practitioner of the company claims that under applicable Italian law, the

contested payments shall be set aside because Lacroix SARL must have been aware that Fema Srl was facing insolvency at the time the payments were made.

Considering the facts of the case and relevant provisions of the EIR Recast, which one of the following statements is the **most accurate**?

- (a) The insolvency practitioner will always succeed in his claim if he can clearly prove that under the *lex concursus*, the contested payments can be avoided (Article 7(2)(m) EIR Recast).
- (b) The contested transactions cannot be avoided if Lacroix SARL can prove that the *lex causae* (including its general provisions and insolvency rules) does not allow any means of challenging the contested transactions, and provided that the parties did not choose that law for abusive or fraudulent ends.
- (c) To defend the contested payments Lacroix SARL can rely solely, in a purely abstract manner, on the unchallengeable character of the payments at issue on the basis of a provision of the *lex causae*.
- (d) The contested payments shall not be avoided if Lacroix SARL proves that such transactions cannot be challenged on the basis of the insolvency provisions of German law (Article 16 EIR Recast).

#### Question 1.10

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

Assume that:

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

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

- (a) Within two (2) months following the publication date, as guaranteed by the French law (law applicable to the creditor).
- (b) Within one month, as stipulated in the applicable *lex concursus secundarii* (law of the insolvency proceeding at issue).
- (c) Within 30 days following the publication of the opening of insolvency proceedings in the insolvency register of Spain.
- (d) Within the time limit prescribed by the *lex concursus* of the main insolvency proceeding (Irish law).

Very good.

## QUESTION 2 (direct questions) [10 marks]

### Question 2.1 [maximum 2 marks] 2

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

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

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

Statement 1: Name of provision / concept: “synthetic” secondary proceedings.

Under Article 36 EIR Recast, the insolvency practitioner in the main insolvency proceedings can give a unilateral undertaking in respect of assets located in the Member State in which secondary insolvency proceedings could be opened, that when distributing those assets or proceeds received from realisation of those assets to creditors, he/she will comply with the distribution and priority rights under the national law of that Member State. Under Article 38(2) EIR Recast, upon receipt of such undertaking in conformity with Article 36, the court that is asked to open secondary proceedings should not open them if it is satisfied that the undertaking is sufficient to protect the general interests of local creditors.

Statement 2: Name of provision / concept: court-to-court cooperation and communication obligations.

Article 42(1) EIR Recast obliges a court presented with a request to open insolvency proceedings or which has opened insolvency proceedings, to cooperate with any other court faced with a request to open insolvency proceedings or which has already opened such proceedings.

### Question 2.2 [maximum 3 marks] 3

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

Example 1: Article 3(1) EIR Recast provides for the main insolvency proceedings to be opened at the place of the debtor’s centre of main interest (COMI), which has universal scope and cover all of the debtor’s assets in the EU.

Example 2: However, the universal scope of the main insolvency proceedings is limited by Article 3(2) EIR Recast, which permits the opening of one or more secondary insolvency proceedings against a debtor in any other Member State where the debtor has an establishment, in parallel with the main proceedings. The effects of secondary insolvency proceedings are limited to the debtor’s assets located in that Member State.

Example 3: Article 19(2) EIR Recast provides that the recognition of main insolvency proceedings shall not preclude the opening of secondary insolvency proceedings.

**Question 2.3 [maximum 3 marks] 3**

Cross-border co-operation and communication between courts is now an obligation under the EIR Recast. This was not the case under the EIR 2000. List **three (3) provisions** (recitals and / or articles) of the EIR Recast that deal with this newly introduced obligation.

Recital 50 EIR Recast provides that courts may appoint a single IP for several insolvency proceedings concerning the same debtor provided this is compatible with the rules governing each of the proceedings.

Article 42(1) EIR Recast obliges a court presented with a request to open insolvency proceedings or which has opened insolvency proceedings, to cooperate with any other court faced with a request to open insolvency proceedings or which has already opened such proceedings

Article 42(3) EIR Recast provides that courts may coordinate the administration and supervision of the debtor's assets and affairs, synchronise the conduct of hearings and approval of protocols and agreements.

**Question 2.4 [maximum 2 marks]**

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.

Example 1: Under Article 38(2) EIR Recast, upon receipt of a unilateral undertaking from the IP in the main insolvency proceedings that when distributing assets located in the Member State where secondary proceedings could take place, or proceeds received from realisation of those assets to creditors in that Member State, he/she will comply with the distribution and priority rights under the national law of that Member State, the court that is asked to open secondary proceedings should avoid opening them, if it is satisfied that the undertaking is sufficient to protect the general interests of local creditors.

Example 2: Under Article 41 EIR Recast, an IP in secondary insolvency proceedings must cooperate and communicate with the IP in main insolvency proceedings and vice versa, including by way of protocols or agreements, and provide information that may be relevant to the other proceedings, such as the status of proceedings. Under Article 42, a court before which a request to open insolvency proceedings is pending or which has opened such proceedings, is obliged to cooperate with any other court faced with an application to open insolvency proceedings or which has already opened such proceedings, to ensure better coordination and prevent abusive forum shopping. Under Article 43, IPs, whether in main or secondary insolvency proceedings, must cooperate with courts before which a request is pending to open main proceedings or further secondary proceedings, or which has opened such proceedings. The aim of these regulations is to ensure coordinated asset management and realisation, or where possible business restructuring.

**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.

The European Commission identified the following five aspects of the European Insolvency Regulation (EIR) that were problematic in practice and did not sufficiently reflect EU and national insolvency practice, in particular in promoting restructuring of companies in financial distress.

1. The EIR does not cover national procedures which provide for a restructuring of the company at a pre-insolvency stage or proceedings which leave the existing management in place.
2. There can be difficulties in determining which Member State is competent to open insolvency proceedings.
3. The opening of secondary insolvency proceedings can hamper the efficient administration of the company's estate.
4. It is difficult to obtain reliable information on proceedings in other jurisdictions, in the absence of effective rules on publicity of insolvency proceedings and the lodging of claims.
5. The EIR does not contain specific rules dealing with the insolvency of a multinational enterprise group, despite a large number of cross-border insolvencies involving groups of companies.

The following changes were *inter alia* introduced in the EIR Recast to address the above shortcomings. Broadly speaking, the EIR Recast laid down centralised regulations dealing with matters of international jurisdiction within EU Member States except Denmark, applicable law, enforcement and recognition, and cooperation and communication between IPs and courts.

1. Article 1 extends the provisions of the EIR Recast beyond traditional liquidation procedures, and includes proceedings aimed at rescuing economically viable businesses in financial distress and gives entrepreneurs a second chance to continue their businesses. Recital 10 extends the EIR Recast to proceedings to restructure a debtor at an early stage where there is only a likelihood of insolvency and proceedings which leave the debtor fully or partially in control of its assets and affairs.
2. Article 3(1) provides that the courts of a Member State in which the debtor's COMI is located shall have jurisdiction to open the main insolvency proceedings. A key presumption of COMI is the place of the debtor's registered office. However, this presumption can be rebutted if the registered office has been moved to that Member State within three months prior to the opening of insolvency proceedings, and the court

can disregard the change in registration for the purposes of determining COMI. This creates a safeguard against forum shopping shortly before the filing for insolvency.

3. IPs in main and secondary proceedings must effectively communicate with each other with regards to progress made in lodging or verifying claims, pursuant to Article 41(2) EIR Recast. Article 45(3) provides that IPs in main or secondary proceedings are also entitled to participate in other proceedings on the same basis as a creditor, such as attending creditors' meetings, although they do not have the power to vote on behalf of creditors.

The EIR Recast abolished the requirement that secondary proceedings must be winding-up proceedings, which significantly hindered attempts to restructure businesses with several establishments located in different Member States.

4. EIR Recast contains mandatory rules on creditor notification and establishment of insolvency registers. To promote the smooth administration of cross-border insolvencies, Article 28(1) EIR Recast obliges IPs to request the publication of a notice on the opening of main or secondary insolvency proceedings at the place of the debtor's establishment in accordance with the publication procedure in place in that Member State. Article 28(2) provides that IPs may request publication in any other Member State, if the debtor has a number of creditors or assets there.

The aim of EU-wide interconnection of Member States' national insolvency registers through the European e-Justice Portal (Portal) was to be achieved by mid-2019, which will contain mandatory information on insolvency proceedings opened in the EU. Currently not all Member States have made their insolvency registers available on the Portal.

5. EIR Recast contains a whole new chapter V dedicated to group insolvencies. There are two sets of provisions: Articles 56-60 provide duties of cooperation and communication between IPs and courts involved in insolvency proceedings opened against members of a group of companies. Articles 61-77 introduced a mechanism for a group coordination proceeding including a group coordinator, who must be eligible to act as an IP but not acting as an IP for any of the group members, for reasons of impartiality.

In particular, IPs must:

1. communicate with each other as soon as possible and provide information that may be relevant to other proceedings;
2. consider whether possibilities exist for coordinating the administration and supervision of the affairs of group members and if so, to effect them; and
3. consider whether possibilities exist for restructuring group members and if so, coordinate with other IPs to propose and negotiate a coordinated restructuring plan.

**Excellent answer.**

### **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.

Innovations introduced in the EIR Recast supporting the efficient administration of cross-border insolvencies include:

1. Emphasis on restructuring (Article 1 EIR Recast), in line with EU insolvency practice and needs, to maximise value for creditors and increase investment and employment opportunities. Mandating an evaluation of whether a company can be restructured at an early stage when insolvency is only a likelihood (but not a certainty) improves the chances of a successful restructuring, helps to preserve jobs and ultimately increases returns to creditors.

1. Predictability in determining where a debtor's COMI is, by including presumptions such as the registered office presumption for businesses (Article 3(1) EIR Recast), and minimising fraudulent forum shopping by allowing such presumption to be rebutted if the registered office has not moved to a different Member State in the last 3 months prior to the request for opening of insolvency proceedings. Should the registered office presumption be rebutted, the court will disregard the change of registration in determining COMI.
2. The concept of "synthetic" secondary insolvency proceedings was introduced in Article 36 EIR Recast to try and avoid the costs and disruption caused by additional proceedings for the IP in the main insolvency proceedings and the courts, which may delay the process to the detriment of creditors and potentially hinder any restructuring efforts.

The insolvency practitioner in the main insolvency proceedings can give a unilateral undertaking in respect of assets located in the Member State in which secondary insolvency proceedings could be opened, that when distributing those assets or proceeds received from realisation of those assets to creditors, he/she will comply with the distribution and priority rights under the national law of that Member State. Under Article 38(2), upon receipt of such undertaking in conformity with Article 36, the court that is asked to open secondary proceedings should not open them if it is satisfied that the undertaking is sufficient to protect the general interests of local creditors.

3. To improve the coordination of insolvencies of different member companies of a group and allow for coordinated restructuring of these members, Article 61 EIR Recast provides that at the reasoned request of an IP, a court before which insolvency proceedings are being conducted in respect of any member company of a group, may open a group coordination proceeding if it is satisfied that opening such a proceeding would facilitate the efficient administration of insolvency proceedings relating to the group members. The court must also be satisfied that no creditor would be financially worse off by the inclusion of the relevant member in the proceeding. The request is supported by the IP's proposal of *inter alia* the name of the proposed group coordinator, the reasons for the request and an outline of the proposed group coordination, which can form the basis for a detailed group coordination plan.

Excellent answer.

### 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.

1. The EIR Recast does not address variants of forum shopping considered outside of its scope, such as the use of the UK scheme of arrangement by European companies (Annex A to the EIR Recast does not include -schemes of arrangement). Such procedural forms of forum shopping can therefore take place without affecting the location of COMI as they are outside the scope of EIR Recast.

Perhaps this issue could be addressed by clarifying and strengthening the regime for schemes of arrangement, and ideally including them in Annex A so that they fall within the scope of EIR Recast.

2. Other criticisms of EIR Recast are three-month period prior to a request to open insolvency proceedings during which the debtor's registered office (presumed to be the COMI) may not be moved (i.e. the suspension period), which appears a little arbitrary for 2 reasons.

Firstly, a debtor could move its head office (and not its registered office) to a different Member State during this time, and avoid the application of the suspension period; and secondly, the registered office could be moved sometime prior to the three-month period, for example six months and also fall outside the suspension period. These steps may amount to forum shopping not caught by the EIR Recast.

This issue could potentially resolved by tightening up and clarifying the definition of COMI and when the suspension period starts and ends.

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.

Pursuant to Recital 13 of EIR 2000 as interpreted by the European Court of Justice (as it was then known) in the 2006 case of *Eurofood IFSC Ltd*, the leading case on interpretation of EIR 2000, Cardinal Home's COMI is the place where it conducts the administration of its interests on a regular basis and which is ascertainable by third parties. As Cardinal Home is a company registered in Ireland, it can be presumed that Ireland is Cardinal Home's COMI unless there are objective factors demonstrating that the administration of its interests occurs elsewhere than in Ireland.

The fact that Cardinal Home has warehouses across Europe including Italy, opened a bank account in Milan and signed a credit agreement with an Italian bank for the purposes of expanding into the Spanish luxury furniture market do not appear sufficient to create an establishment in Italy as they do not indicate that the regular administration of Cardinal Home's

interests took place in Italy, given that its registered office is in Ireland and it has furniture stores in Ireland.

Accordingly, the Dublin High Court has international jurisdiction to open an examinership proceeding as petitioned by Cardinal Home.

**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.

The following factors need to be considered to determine whether EIR Recast applies to the examinership proceeding opened by the Dublin High Court:

1. The EIR Recast came into force on 26 June 2017. Although Cardinal Home petitioned to open an examinership proceeding 4 days prior to that date, the relevant date for the application of EIR Recast is the date when the Dublin High Court opened the proceeding on 30 June 2017, after the EIR Recast came into force.
2. Article 1 of EIR Recast clarifies that the Regulation extends not only to traditional liquidation proceedings but also encompasses proceedings aimed at restructuring and rescuing economically viable but financially distressed companies, such as Cardinal Home.
3. Annex A of EIR Recast expressly includes examinership proceedings for Ireland.

Taking all these factors into consideration, EIR Recast is applicable to the examinership proceeding opened by the Dublin High Court.

**Question 4.3 [maximum 5 marks] 4**

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.

The Italian bank has a credit agreement with Cardinal Home which is presumably secured by the warehouse(s) in Milan. If, under Italian law, this credit agreement is equivalent to a lien or mortgage on the warehouse(s), the bank may be considered the holder of a right *in rem*, which, under Article 8 of EIR Recast, provides an exception to the general rule of application of the *lex concursus* (Irish law). Although the EIR Recast does not define a right *in rem*, examples of such right are found in Article 8(2) and include the right to dispose of assets and obtain satisfaction from the proceeds, in particular by virtue of a lien or mortgage.

Under this exception, the opening of insolvency proceedings in Dublin does not affect the right *in rem* of the Italian bank which was obtained prior to the opening of such insolvency proceedings. The bank may exercise its right to foreclose on the credit agreement and sell the warehouse(s) if necessary to satisfy its claim.

In these circumstances, the bank need not petition to open secondary proceedings in Italy to secure its rights as a creditor.

However, should it wish to do so, it would have to establish that Cardinal Home possesses an establishment in Italy, pursuant to Article 3(2) EIR Recast. Applying Article 2(10), an establishment means any place of operations where Cardinal Home has carried out in the three-month period prior to the filing of the petition “a non-transitory economic activity with human means and assets”. The Court of Justice of the EU (CJEU) in *Interedil Srl v Fallimento Interedil Srl* established the presence of goods alone or a bank account is in principle insufficient to create an establishment. The bank would normally have to demonstrate to the Italian court that there was stable economic activity supported by human resources in the three months preceding the petition. Cardinal Home had financial difficulties from 2016 and may have ceased overseas activities in Italy and elsewhere in Europe by end of March 2017. If so, the Italian bank may not be able to prove that Cardinal Home has an establishment in Italy within the three months preceding its petition, and the Italian court may reject its petition to secondary proceedings, especially if the bank is considered to have a right *in rem* as set out above.

**Good reasoning –**

- 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: 14 out of 15.

**\* End of Assessment \***

Total: 49 out of 50.