



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).

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 marks: 8 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 1 relates to the concept of “synthetic proceedings” which is addressed in Article 36 EIR Recast.

Statement 2 relates to Article 81 of the Treaty on the Functioning of the European Union (legal basis for the EIR Recast) and is addressed in Recital 3 EIR Recast.

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.

1. Pursuant to Article 8(1) EIR Recast, the opening of insolvency shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets, both specific assets and collections of indefinite assets as a whole which change from time to time, belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.

Under the concept of pure universalism, the lex concursus would govern the rights in rem of creditors or third parties in respect of assets belonging to the debtor.

2. According to Article 13(1) EIR Recast, the effects of insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the Member State applicable to the contract of employment.

Under the concept of pure universalism, the lex concursus would govern the effects of insolvency proceedings on employment contracts.

3. Pursuant to Article 34 et seq. EIR Recast, secondary insolvency proceedings may be opened in a Member State under certain conditions.

Under the concept of pure universalism, there would be only one (main) insolvency proceeding and no 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.

1. Recital 48 EIR Recast explains the need for proper cooperation between the various insolvency practitioners and the courts involved in all the concurrent proceedings in order to ensure the efficient administration of the debtor's insolvency estate.
2. Article 41 EIR Recast governs the obligation of insolvency practitioners of the main insolvency proceeding and secondary insolvency proceedings to cooperate.
3. Article 42 EIR Recast addresses the obligation of the courts of the main insolvency proceeding and secondary insolvency proceedings to cooperate.

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.

1. According to Article 36 EIR Recast, the insolvency practitioner of the main insolvency proceeding can avoid the opening of secondary insolvency proceedings by giving a unilateral undertaking in respect of the assets located in the in the Member State in which secondary insolvency proceedings could be opened, that when distributing those assets or the proceeds received as a result of their realisation, it will comply with the distribution and priority rights under national law that creditors would have if secondary insolvency proceedings were opened in that Member State (see also Article 38(2) EIR Recast).
2. Pursuant to Article 38(3) EIR Recast, the opening of secondary insolvency proceedings may be stayed at the request of the insolvency practitioner or debtor in possession under certain conditions for a period not exceeding three months where a temporary stay of individual enforcement proceedings has been granted in order to allow for negotiations between the debtor and its creditors. This allows the insolvency practitioner or debtor in possession to negotiate a restructuring deal with the creditors which could be frustrated through the opening of secondary insolvency proceedings.

Total marks: 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 recommended that the EIR 2000 be amended by focusing on the following aspects:

- 1) The scope of the EIR should be extended to restructuring proceedings.
The scope of the EIR 2000 did not cover national procedures which provide for the restructuring of a company at a pre-insolvency stage or leave the existing management in place. In order to extend the scope to restructuring proceedings, points b) and c) as well as the clarification that proceedings which are commenced in situations where there is only a likelihood of insolvency are to be presumed restructuring proceedings were added to Article 1 EIR Recast. Furthermore, Recitals 10 and 11 explaining the extension of the scope to restructuring proceedings have been added to the EIR Recast.
- 2) Stronger rules for cooperation between insolvency practitioners and courts should be introduced.
Under the EIR 2000, cooperation was only governed by Article 31 EIR 2000 mandating insolvency practitioners in main and secondary proceedings to communicate with each other. The EIR Recast introduced a comprehensive framework for the cooperation and communication between insolvency practitioners and courts under Articles 41 to 43 as well as specific rules for cooperation and communication in insolvency proceedings relating to two or more members of a group of companies.
Article 41 EIR Recast governs cooperation and communication between insolvency practitioners in the main and in secondary insolvency proceedings. Article 42 EIR Recast regulates cooperation and communication between courts before which the main and secondary insolvency proceedings are pending or have been opened. Article 43 EIR Recast governs cooperation and communication between insolvency practitioners and courts before which the main and secondary insolvency proceedings are pending or have been opened.
- 3) A coordinated approach of insolvencies of members of a group of companies should be introduced.
The EIR 2000 did not contain any rules regarding the insolvency members of a group of companies. The EIR Recast two sets of tools in order to tackle the issues involved with the insolvency of members of a group of companies. The first set of tools, stipulated under Articles 56 to 60 EIR Recast, concerns the cooperation and communication between insolvency practitioners and courts before which insolvency proceedings against members of the group are pending or have been opened. The second set of tools, stipulated under Articles 61 to 77 EIR Recast, concerns a newly introduced mechanism for the coordination of the insolvency proceedings against members of a group of companies under the lead of a group coordinator.
- 4) A decentralised system for the interconnection of all the separate insolvency registers of the EU Member States should be introduced.
In order to enable the interconnection of the separate insolvency registers, Article 24 EIR Recast obligates the Member States to establish and maintain one or several insolvency registers. Article 24 EIR Recast also determines the minimum amount of information to be published in the insolvency registers.

The creation of the decentralised system for the interconnection of all the separate insolvency registers is governed by Article 25 EIR Recast. I shall enable creditors to search the separate insolvency registers of all EU Member States (except Denmark) through one access point in the European e-Justice Portal.

- 5) The legal rules of the EIR 2000 should undergo a general modernization. In the EIR Recast, the development of the law since the enactment of the EIR 2000 has been taken into consideration and new rules have been introduced in this respect. For example, under Article 80(1) EIR Recast it has been stipulated that the Commission shall have the responsibilities of controller pursuant to Article 2(d) of Regulation (EC) No 45/2001 for the personal data processed in context with the European e-Justice Portal.

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.

The following three improvements for a more efficient administration of a cross-border case made their way into the EIR Recast:

1. Pursuant to Article 18 EIR Recast, the *lex fori processus* and the *lex loci arbitri* determine the effects of insolvency proceedings on a pending lawsuit or on pending arbitral proceedings. The EIR 2000 did not contain a rule to answer the question which law determines the effects of insolvency proceedings on pending arbitral proceedings, which led to contradictory judgments. The clarification of this question in the EIR Recast avoids legal disputes and, therefore, enables a more efficient administration of cross-border cases.
2. The EIR Recast introduced a possibility for the insolvency practitioner of the main insolvency proceeding to avoid secondary insolvency proceedings, which usually result in additional costs and time.
According to Article 38(2) EIR Recast, the court before which a request for the opening of secondary insolvency proceedings is pending shall, at the request of the insolvency practitioner of the main insolvency proceedings, not open secondary insolvency proceedings when the insolvency practitioner of the main insolvency proceedings has given an undertaking in accordance with Article 36 and the court is satisfied that the undertaking adequately protects the general interests of local creditors.
The undertaking in accordance with Article 36 EIR Recast consists in an obligation towards the potential creditors of secondary insolvency proceedings to grant them, in respect of the assets located in the Member State in which secondary insolvency proceedings could be opened, the same distribution and priority rights in the main insolvency proceeding as they would have in the secondary insolvency proceeding.
3. According to Article 28(1) EIR Recast, the insolvency practitioner or the debtor in possession shall request that the judgment opening insolvency proceedings and, where appropriate, the decision appointing the insolvency practitioner be published in any other Member State where an establishment of the debtor is located. The EIR 2000 left it to the discretion of the liquidator to publish information on the opening of the insolvency proceeding in other Member States.

The obligation to publish information on the opening of insolvency proceedings enables creditors to timely lodge their claims in the insolvency proceedings and facilitates the cooperation and communication between courts and insolvency practitioners of main and secondary insolvency proceedings regarding the same debtor (see Articles 41 et seq. EIR Recast). Such cooperation and communication leads to a more efficient administration of cross-border cases.

Question 3.3 [maximum 5 marks] 4

While the EIR Recast was welcomed by most stakeholders, it was also criticised by some as a “missed opportunity” and “modest”. List **two (2) flaws** or shortcomings of the EIR Recast and explain how you consider they could be corrected.

1. Pursuant to Article 3(1) EIR Recast, the courts of the Member State within the territory of which the debtor’s COMI is situated shall have jurisdiction to open main insolvency proceedings. The debtor’s 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.

It is not clear without clarifying and examining the facts where a certain debtor “conducts the administration of its interests on a regular basis and which is ascertainable by third parties”. Where interpretation and clarification is needed to determine jurisdiction there will be legal disputes about it, which results in additional costs and time for the involved parties.

In order to avoid legal disputes, the EIR 2000 and the EIR Recast contain the presumption that a debtor’s COMI, in case of a company or a legal person, is the place of its registered office in the absence of proof to the contrary.

This legal presumption was misused for forum shopping under the EIR 2000 by moving the registered office to a more favourable insolvency jurisdiction before the commencement of insolvency proceedings. Against that such unwanted forum shopping, the EIR Recast introduced the restriction that the presumption of the COMI at the place of the registered office shall only apply if the registered office has not been moved to another Member State with the 3-month period prior to the request for the opening of insolvency proceedings.

The need for the introduction of such a restriction to the presumption of the COMI at the place of the registered office made it obvious that in many cases the COMI of a company is determined only based on its registered office because it is not clear where the company conducts the administration of its interests on a regular basis in a way which is ascertainable by third parties.

Therefore, as a basic rule, the court at the place of the registered office of a company should be internationally competent for insolvency proceedings against that company. Exceptions of this basic rule should be made, when the registered office has been moved to another jurisdiction before the commencement of insolvency proceedings with the sole intention to profit from a more favourable insolvency jurisdiction (forum shopping) or when the COMI of the company (ascertainable by third parties) is clearly located in a different jurisdiction.

The introduction of the three months suspect period for forum shopping before the commencement of insolvency proceedings with the EIR Recast was somewhat arbitrary and leaves the door wide open to fraudulent forum shopping. Under the EIR Recast, the debtor has now clear guidelines how to profit from abusive forum shopping. The debtor can change its registered office to a more favourable insolvency jurisdiction and just has to wait three months and one day prior to the filing of the request for the opening of insolvency proceedings. With the rule that any changes to the registered office with the sole intention of forum shopping for the insolvency proceedings,

irrespective of a suspect period, shall be disregarded for the determination of international jurisdiction, abusive forum shopping could have been made more difficult.

2. The EIR Recast did not introduce important substantive law in order to enable effective rescues and restructuring of companies in the EU. For example, the EIR Recast does not contain a rule that new financing agreed upon in a restructuring plan may not be subject of an avoidance claim. Another example is that EIR Recast does foresee an automatic stay for a certain period in support of restructuring proceedings. Furthermore, the recognition of a stay of enforcement proceedings is excluded for the enforcement of rights in rem (see Recital 69 and Article 8 EIR Recast).

The lack of harmonisation of such substantive law could seriously jeopardise the restructuring of companies and may be seen as a shortcoming of the EIR Recast.

How would you propose to correct this in an instrument which is only focusing on procedural harmonisation? The Directive 2019/1023 which came out in 2019 has introduced substantive harmonisation rules, notably in relation to the stay and new financing.

Total marks: 14 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.

Given that the question to answer implies that examinership proceedings is an insolvency proceeding, it is to be assumed that international jurisdiction for examinership proceedings is to be determined based on the EIR 2000.

In the EIR 2000, international jurisdiction is governed by Article 3. According to Article 3(1) EIR 2000, the court of the Member State within the territory of which the centre of a debtor's main interest ("COMI") 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.

Hence, the first question to ask in order to determine international jurisdiction of the Dublin High Court is if Cardinal Home's COMI is situated in Ireland. The EIR 2000 does, however, not contain a definition of COMI. Under Recital 13 EIR 2000, it is only mentioned that 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. In Eurofood IFSC Ltd, the CJEU clarified that the concept of COMI has an autonomous meaning and must therefore be interpreted in a uniform way, independently of national legislation (para. 31). The CJEU also confirmed that COMI has to be identified by reference to criteria that are both objective and ascertainable by third parties (para. 33).

In the case at hand, there is not sufficient information to determine where Cardinal Home’s COMI is situated. It is only mentioned that Cardinal Home has stores and warehouses in Ireland and across Europe and a banking relationship with an Italian bank. Furthermore, Cardinal Home was negotiating with local distributors. It is, however, not mentioned where Cardinal Home conducted the administration of its interests on a regular basis, ascertainable by third parties.

If the actual COMI can not be determined the presumption of COMI at the registered office of the debtor applies according to Article 3(1) EIR 2000. In Interedil Sr. v Fallimento Interedil Srl, the CJEU ruled that the presumption of COMI can be rebutted when, from the viewpoint of third parties, the place in which the company’s central administration is located, does not coincide with the jurisdiction of its registered office. This decision also clarified that the mere presence of some assets will not be sufficient to rebut the registered office presumption (para. 53).

In the case at hand, Cardinal Home has its registered office in Ireland. Therefore, Cardinal Home’s COMI is to be presumed in Ireland and international jurisdiction to open insolvency proceedings against the company is, therefore, also in Ireland pursuant to Article 3(1) EIR 2000. The existence of warehouses of the company in other jurisdictions are not sufficient to rebut the registered office presumption. The banking relationship with an Italian bank and negotiations with local distributors of other jurisdictions are also not sufficient to rebut the registered office presumption. Even if these facts were sufficient to rebut the registered office presumption they would only do so if they were ascertainable by third parties. There are, however, no indications that third parties knew about the banking relationship of Cardinal Home with the Italian bank or the negotiations of the company with local creditors.

Hence, the High Court of Dublin had international jurisdiction to open insolvency proceedings against Cardinal Home.

Question 4.2 [maximum 5 marks] 3.5

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 questions have to be answered affirmative in order to determine if the EIR Recast is applicable:

1. Is the debtor’s COMI situated in a Member State of the EU, except Denmark (see Article 3 and Recital 88 EIR Recast)?
2. Is it true that the debtor is not an insurance undertaking, credit institution, investment firm or other firm, institution and undertaking to the extent that they are covered by Directive 2001/24/EC or collective investment undertaking (see Article 1(2) EIR Recast)?
3. Is the proceeding opened against the debtor listed in Annex A to the EIR Recast (see Article 1(1) EIR Recast)?
4. Is the proceeding opened after 26th June 2017 (see Article 84 EIR Recast)?

Good but how are these elements called? (Material scope, temporal scope, etc.)

As outlined in the answer to question 4.1 above, Cardinal Home's COMI is situated in Ireland. Ireland is a Member State of the EU. Cardinal Home's COMI is, therefore, situated in a Member State of the EU, except Denmark.

Cardinal Home is a furniture company. Hence, it is true that Cardinal Home is not an undertaking exempt from the scope of application according to Article 1(2) EIR Recast.

Examinership, the insolvency proceeding opened against Cardinal Home, is one of Ireland's proceeding which is listed in Annex A to the EIR Recast.

If the proceeding against Cardinal Home is opened on 30 June 2017 is opened after 26 June 2017.

Hence, all requirements for the applicability of the EIR Recast are fulfilled and the EIR Recast, therefore, applies to the proceeding opened by the Dublin High Court.

Question 4.3 [maximum 5 marks]

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.

According to Article 3(2) EIR Recast, secondary insolvency proceedings shall only be opened in Member States where the debtor possesses an establishment. Pursuant to 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.

The CJEU clarified in *Interedil* that the fact that the definition of "establishment" connects the pursuit of an economic activity to the presence of human resources, shows that a minimum level of organisation and a degree of stability are required. Hence, the presence alone of good in isolation or bank accounts does not, in principle, satisfy the requirements for classification as an "establishment" (para. 62). In line with *Interedil* is the decision of the CJEU in the case *Burgo Group SpA V Illochroma SA* where the CJEU decided that where main insolvency proceedings concerning a legal person have been opened in a Member State other than that of its registered office, it should be possible to open secondary insolvency proceedings in the Member State of its registered office, provided that in that state the debtor is carrying out an economic activity with human means and assets in that state.

In the case at hand, Cardinal Home has a warehouse in Milan, Italy, and entered into a credit agreement with an Italian bank. It also opened a bank account with the bank.

In order to operate the warehouse in Milan, Cardinal Home will also need to have human resources present in this warehouse. It is unclear when Cardinal Home opened the warehouse in Milan but it seems to have been before 2016 when Cardinal Home got into financial difficulties.

Therefore, the conditions for an establishment of Cardinal Home in Italy non-transitory economic activity with human means and assets for more than three months prior to the request to open main insolvency proceedings, are fulfilled. Secondary insolvency proceedings against Cardinal Home can, therefore, be opened in Italy.

The insolvency practitioner of the main insolvency proceedings could, however, avoid the opening of secondary insolvency proceedings in Italy if he or she gives an undertaking in accordance with Article 36 EIR Recast (see Article 38(2) EIR Recast). In this case, the Italian bank would also have its Italian insolvency distribution ranking secured.

While your reasoning is sound, the answer is incorrect because the facts of the case do not support the finding of an establishment of Cardinal Home in Italy. The presence of assets (leased-out warehouse) in isolation, contractual relations with a local bank (including maintenance of a bank account) and *occasional* negotiations 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 missing.

Total marks: 11.5 out of 15.

*** End of Assessment ***

Total marks: 43.5 out of 50.