INSOL INTERNATIONAL
FOUNDATION CERTIFICATE
IN INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2B

THE EUROPEAN INSOLVENCY REGULATION

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

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

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

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

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

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6.1 If you selected Module 2B as one of your **compulsory modules** (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is **23:00 (11 pm) GMT on 1 March 2022**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2022. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.

6.2 If you selected Module 2B as one of your **elective modules** (see the e-mail that was sent to you when your place on the course was confirmed), you have a **choice** as to when you may submit this assessment. You may either submit the assessment by **23:00 (11 pm) GMT on 1 March 2022** or by **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. If you elect to submit by 1 March 2022, you **may not** submit the assessment again by 31 July 2022 (for example, in order to achieve a higher mark).

7. Prior to being populated with your answers, this assessment consists of **9 pages**.

ANSWER ALL THE QUESTIONS

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

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

Question 1.1

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

(a) False. The objective of an EU regulation is not legal harmonisation.

(b) True. Since the entry into force of the EIR 2000, the insolvency laws of the Member States are similar.

(c) False. The objective of the EIR 2000 was not to harmonise aspects of national insolvency laws but to provide non-binding guidelines only.

(d) False. While the EIR 2000 attempted to harmonise national insolvency laws, its focus was on procedural aspects of insolvency law, not substantive ones.

D was the correct answer.

Question 1.2

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

(a) False. The EU sought to draft Conventions with a view to harmonising the insolvency laws of EU Member States as early as the 1960s, but these initiatives failed.

(b) False. There was another EU Regulation regulating insolvency law at EU level before the EIR 2000.

(c) True. Before the EIR 2000, the EU has not sought to harmonise the insolvency laws of EU Member States.

(d) False. An EU Directive regulating insolvency law at EU level existed before the EIR 2000.

Question 1.3

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

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

(b) True. As a result, the EIR 2000 lacked the support of major stakeholders such as insolvency practitioners, businesses and public authorities who considered the instrument fruitless.

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

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

Question 1.4

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

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

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

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

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

Question 1.5

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

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

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

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

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

Question 1.6

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

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

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

(c) The Recast Regulation was to apply to private individuals and self-employed; a common European-wide insolvency proceeding was to be added to the Regulation.

(d) The Regulation was meant to fully embrace the universalism principle by abandoning the concept of secondary proceedings; the Regulation was meant to mostly promote out-of-court settlement and abandon all intervention of a judicial or administrative authority in cross-border proceedings.

Question 1.7

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

(a) "Synthetic proceedings" means that for the case at hand, several main proceedings can be opened, in addition to several secondary proceedings.

(b) "Synthetic proceedings" means that when secondary proceedings are opened, these are automatically rescue proceedings, as opposed to liquidation proceedings.

(c) "Synthetic proceedings" means that insolvency practitioners in all secondary proceedings should treat the proceedings they are dealing with as main proceedings for the purpose of protecting the interests of local creditors.

(d) "Synthetic proceedings" means that when an insolvency practitioner in the main insolvency proceedings has given an undertaking in accordance with Article 36, the court asked to open secondary proceedings should not, at the request of the insolvency practitioner, open them if they are satisfied that the undertaking adequately protects the general interests of local creditors.

Question 1.8

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

(a) The rule applied by the court, which has opened insolvency proceedings (originating court), is unknown or does not have an analogue in the law of the jurisdiction, in which recognition is sought.

(b) The judgment, subject to recognition, was passed with incorrect application of the applicable substantive law.

(c) Where the decision to open the insolvency proceedings was taken in flagrant breach of the right to be heard, which a person concerned by such proceedings enjoys.

(d) The court, which has opened insolvency proceedings (originating court), most certainly did not have international insolvency jurisdiction to do so under the EIR Recast.

C was the correct answer.

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 : 6 out of 10.

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks] 2

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

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

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

Statement 1 is related to the provision/concept of "right to give an undertaking". This rule is found on article 36 and article 38 EIR Recast. It has been originated from the EIR Recast judicial innovation. It is also known as "synthetic secondary proceedings", and the objective is avoiding the opening of secondary insolvency proceedings by giving the creditors an undertaking in respect of the assets located in the Member State in which secondary insolvency proceedings could be opened, respecting the distribution and priority rights under national law that creditors would have if secondary insolvency proceedings were opened in that Member State.

Statement 2 is related to the provision/concept of "co-operation and communication between insolvency practitioners". According to article 41 EIR Recast, the main and the secondary proceedings concerning the same debtor shall have insolvency practitioners and courts in cooperation, an important and essential matter for the proper functioning of the internal market.

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.

The modified universalism consists in allowing that one main insolvency proceeding can work together and in parallel with one or a plurality of secondary insolvency proceedings.

The first example can be found on the provision/concept of "International insolvency jurisdiction" under the EIR Recast, because it designates that the courts of the Member State within the territory of which the center of the debtor's main interests is situated, will have jurisdiction to open insolvency proceedings.

On the other hand, the EIR Recast allows the opening of secondary proceedings, running in parallel and producing effects only on assets situated within a state of secondary proceedings. This creates a complex system with one main insolvency proceeding and one or more secondary proceedings working together.

The second example can be found on the provision/concept of "Immediate and automatic recognition" under the EIR Recast, which provides for the immediate recognition of judgments concerning the opening, conduct and closure of insolvency proceedings which fall within its scope. This system is based on principle of mutual trust between Member States.
Here it´s important to note that this EIR Recast concept contrasts with the UNCITRAL Model Law which the recognition does not work automatically.

The third example can be found on the provision/concept of "Insolvency of corporate groups" under the EIR Recast, which has the possibility for a court to open insolvency proceedings for several companies belonging to the same group in a single jurisdiction as long as that court finds that COMIs of those companies are located in a single Member State. This possibility reduces transaction costs arising from multiple insolvency proceedings and enhance the chances for a successful group restructuring.

Yes but no provision (recital and/or article) were provided.

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.

a) Co-operation and communication between insolvency practitioners: when the rules applicable to the respective proceedings are compatible, practitioner in main and in secondary insolvency proceedings concerning the same debtor must cooperate with each other (article 41(1) EIR Recast). The cooperation includes the best and quickly communication addressing any progress related to rescuing or restructuring the debtor, to protecting the creditors rights and to provide the realization or use of debtor´s assets (article 41(2) EIR Recast and article 41(2)(c) EIR Recast).

b) Co-operation and communication between courts: just like the first provision, co-operation and communication between courts is a new provision included by EIR Recast, which predicts that the court before which a request to open insolvency proceedings is pending, or which has opened such proceedings must co-operate with any other court faced with the issue of opening insolvency proceedings or which has already opened them (article 42(1) EIR Recast).
The co-operation between courts before the insolvency proceedings are open prevents forum shopping and ensures better co-ordination. Also, the courts are empowered to co-ordinate the administration and supervision of the debtor's assets and affairs, synchronize the conduct of hearings, the approval of protocols (Article 42(3) EIR Recast), and the requirements concerning the qualification and licensing of the insolvency practitioner (Recital 50 EIR Recast)

c) Co-operation and communication between insolvency practitioners and courts: The court-to-insolvency practitioner duties describes three situations (Article 43 EIR Recast):
   (i) an insolvency practitioner in main insolvency proceedings always need to co-operate and communicate with any court regarding secondary insolvency proceedings;

(ii) the practitioner in territorial or secondary insolvency proceedings must cooperate and communicate with the court regarding the opened or outstanding of the main insolvency proceedings; and

(iii) in the same way, it must happen for practitioner in territorial or secondary insolvency proceedings regarding the opened or outstanding of territorial or secondary insolvency proceedings.

Question 2.4 [maximum 2 marks] 1.5

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.

The first example is the Right to give an undertaking ("synthetic" secondary proceedings): one of the solutions to avoid a secondary insolvency proceeding is the so called "undertaking", which means that the insolvency practitioner in the main insolvency proceedings gives an unilateral undertaking in order to respect the assets located in the Member State in which secondary insolvency proceedings could be opened.

When it happens, the practitioner complies with the distribution and priority rights under national law that creditors would have if secondary insolvency proceedings were opened in that Member State. As a result, creditors were to receive the benefits of the secondary proceedings (such as preferential payments), while such proceedings did not formally exist.

This practitioner conduct allows the control over the major decisions affecting the debtor and the insolvency estate in just one jurisdiction, safeguards the rights, and legitimate expectations of local and preferential creditors. The undertaking system needs the approval by local creditors and needs to be recognized by the court concerned.

The second example is the Stay of the opening of secondary insolvency proceedings: This example is very interesting and pro debtor, because it assures the integrity of the insolvency estate, giving time and space to the debtor to negotiate with creditors and to elaborate a business rescue without the pressure of the start of several secondary insolvency proceedings.

The stay is not automatic, it may be imposed for a period not exceeding three months and on condition that also protects the interests of local creditors. In some conditions, the stay can be lifted, like when the negotiations between the debtor and creditors are successful, When the negotiation is going to fail, and when the insolvency practitioner or the debtor in possession might affect negatively the debtor's assets.

It is important to note that both provisions have their advantages and their proper application. Compared to the provision of an undertaking, the tool of a stay is a weaker form of protection of the main insolvency proceeding. On the Other hand, a stay is much simpler than an undertaking.

Yes but no provision (recital and/or article) were provided.

Total marks : 8.5 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] 1.5

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.

Considering the changes on society and on business on the period of 12 (twelve) years from the EIR 2000 and the recommendation of a new regulation in 2012, it was expected that the EIR Recast might bring amendments that improves the insolvency system.

It contained uniform rules on international jurisdiction, recognition of insolvency judgments, applicable law in insolvency matters, and co-operation/communication between insolvency practitioners.

All the changes still respects the jurisprudence of the Court of Justice of the European Union (CJEU), ensuring that European Union law is interpreted and applied in the same way in every Member State.

This is insufficiently explained.

- The adoption of the EIR Recast in 2015 was an evolution and not a revolution from the EIR 2000. The latter was generally considered to operate successfully in facilitating cross-border insolvency proceedings within the European Union.
- However, a decade after the adoption of the EIR 2000, it has become clear that some revision or fine-tuning was necessary to reflect the current EU priorities and national practices in insolvency law. The European Commission highlighted five (5) major shortcomings of the EIR 2000. A number of them are discussed below.
- The EIR 2000 did not cover some national procedures aimed at restructuring of a company at a pre-insolvency stage ("pre-insolvency proceedings") or proceedings which leave the existing management in place ("hybrid proceedings"). The rise of the rescue culture in Europe (also evident in the Directive on preventive restructuring frameworks 2019/1023 of 20 June 2019) had to be reflected in the insolvency regulation.
- There have been difficulties in applying the concept of COMI in practice. In particular, the issue of pre-insolvency forum shopping (pre-filing COMI-shifts), at times detrimental to the interests of creditors, was not properly addressed in the EIR 2000.
- Problems have also been identified with respect to secondary proceedings. Already at the moment of the adoption of the EIR 2000 it was clear that the opening of secondary proceedings could hamper the efficient administration of the debtor's estate, and impede restructuring attempts or sale of the entire business as a going concern. However, the EIR 2000 did not supply effective tools to solve these problems, arising from multiplicity of insolvency proceedings. Member States were plainly looking to protect national sovereignty.
- Other highlighted shortcoming concerned publicity of insolvency proceedings and the regulation of insolvencies of multinational enterprise groups.

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 EIR Recast brought changes like (i) the scope to restructuring proceeding - in particular, extend to proceedings which provide for restructuring of a debtor at a stage where the insolvency is in the nearly beginning. Or even avoiding insolvency proceedings with the restructure of debtor´s financial problems;

(ii) the inclusion of no less than 112 names of insolvency procedures, listed on Annex A which allows an automatic recognition of the proceedings;

(iii) stronger rules for co-operation and communication between insolvency practitioners and courts, which facilitate all the insolvency proceedings including the possibility of avoiding the opening of a secondary insolvency proceeding (the “right to give an undertaking” or the “stay”), or making the second insolvency proceeding easier for creditors and for the preservation of the debtor´s assets;

The EIR Recast also provides the possibility of opening insolvency proceedings regarding to members of the same group of companies, and the improvement of creditor information (interconnectivity of insolvency registers and data-protection).

Question 3.3 [maximum 5 marks] 2

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.

One point of attention was the Group co-ordination proceedings. The EIR Recast tried to bring efficiency to a group co-ordination while, at the same time, predicts the respect of each group member’s legal personality. It results in a contradictory treatment that brought difficulties to the procedure.

Despite the provision of group co-ordination, there is no practical procedure or clear rules, which brought mixed reception in legal literature, with the majority of authors expressing doubts as to their effectiveness and practical value.

The other point of attention was that there is a possibility of the corporate group has members located in non-Member States, meaning that the EIR Recast will not bind courts and insolvency practitioners in such non-Member State proceedings. In this case, it won´t be possible to the group to be part of the co-ordination proceedings.

Otherwise, the EIR Recast also missed the opportunity to define the concept of a group COMI and didn´t indicate the main court for these cases, which is decisive in performing the tasks of group co-ordination proceedings.

Yes, but the question also asked you to indicate how you consider they could be corrected. This has not been answered.

Total marks : 8.5 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] 1

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.

Cork and Dublin are located in Ireland. Dublin High Court may have international jurisdiction to open the requested insolvency proceeding if one of these places is the COMI of the Cardinal Home, as article 3(1) EIR 2000).

Then, this will be the main insolvency proceeding (article 4 EIR 2000). On the contrary, if, for some reason, despite the Ireland registration of Cardinal Home, the COMI is located in another state, it is possible for the company to open a secondary insolvency proceeding in Ireland (articles 16, 17 and 25 EIR 2000).

On the other hand, the EIR Recast contains a registered office presumption, namely that the insolvent company's COMI is presumed to be the jurisdiction (of the country) where such company has been registered. This presumption makes the COMI´s definition easier and prevent conflicts on this matter.

Despite this presumption, EIR Recast also analyze the activity of the debtor in a Member State to define the COMI in order to prevent practice of abusive forum shopping.

So what is the definite answer here? You only say that the High Court '**may**' have jurisdiction.

- The Dublin High Court has international insolvency jurisdiction to open insolvency proceedings against Cardinal House.
- Under both the EIR Recast (Article 3) and the EIR 2000 (Article 3), the determination of international jurisdiction to open main insolvency proceedings is linked to the debtor's centre of main interest (COMI). According to Article 3 EIR Recast, COMI shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties (see also Recital 28). In the EIR 2000, similar statement was only provided in a recital (Recital 13). In the case of a company, the place of the registered office shall be presumed to be the COMI in the absence of proof to the contrary.
- Relevant case law: *Eurofood IFSC Ltd*, Case C-341/04, ECLI:EU:C:2006:281 (May 2, 2006) and *Interedil Srl, in liquidation v Fallimento Interedil Srl*, Case C-396/09, ECLI:EU:C:2011:671 (Oct. 20, 2011).

- Cardinal Home is registered in Ireland and operates from there. The fact that Cardinal Home owns some assets (i.e. warehouse) in Italy and has entered into contracts for the financial exploitation of those assets cannot be regarded as sufficient factors to rebut the presumption laid down in Article 3(1) (see para. 52 in *Interedil*).

The plans to expand to the Italian luxury market and ongoing negotiations with local distributors (with whom some non-binding memoranda of understanding have been signed) also cannot rebut the strong presumption in favour of the jurisdiction of the registered office, which resulted from the *Eurofood* judgement. Besides, it must have been obvious to such local distributors that the debtor conducted the administration of its interests from Ireland (actual centre of management) and it did so on a regular basis, since Cardinal Home's Italian presence was rather incidental, marginal and limited in time and purpose.

Question 4.2 [maximum 5 marks] 5

Assume that the Dublin High Court opens the respective proceeding on 30 June 2017. Will the EIR Recast be applicable? Your answer should address the EIR Recast's scope and contain **all** steps taken to answer the question.

According to the EIR Recast, provisions of the EIR Recast shall apply to insolvency proceedings opened after 26 June 2017 (article 84(1) EIR Recast). The "time of the opening" of insolvency proceedings means the time at which the decision of any court to open insolvency proceedings or to confirm the opening of such proceedings, or the decision of a court to appoint an insolvency practitioner (article 2(7 and 8) EIR Recast).

This is exactly the case, so, the EIR Recast will be applicable.

Considering that the proceeding was opened on 30 June 2017, it meets the *temporal scope* of EIR Recast.

Also, it is necessary to define the Cardinal Home´s COMI, which can be every Member State of the European Union except Denmark (*geographical scope*).

Then the *personal scope* needs to be correct. As Cardinal Home is an Ireland-registered furniture company and not a bank, insurance company or another "excluded" undertaking, this scope is correct for being part of EIR Recast.

And last, it´s important to check if the insolvency proceeding is listed in Annex A to the EIR Recast (*material scope*).

Question 4.3 [maximum 5 marks] 1

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

This second insolvency proceeding can be opened if the bank, as a creditor, can prove that the debtor has an established in Italy. Which means any place of operations where the debtor carries out or has carried out in the three-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets.

The EIR Recast also provides some alternatives to avoid the opening of a secondary insolvency proceedings, such as the “right to give the undertaking” (article 36 and 38 EIR Recast), and the “stay” (recital 45 EIR Recast).

This is insufficiently answered. You were required to provide your entire line of reasoning and provide reference to relevant CJEU jurisprudence.

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 : 7 out of 15.

*** End of Assessment ***

Total marks : 30 out of 50.