INSOL INTERNATIONAL
FOUNDATION CERTIFICATE
IN INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2B

THE EUROPEAN INSOLVENCY REGULATION

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

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

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

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

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

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

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

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

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

ANSWER ALL THE QUESTIONS

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

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

Question 1.1

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

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

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

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

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

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).

Total marks : 10 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.' – 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 refers to Articles 36 and 38 of EIR Recast and the concepts of "synthetic" secondary proceedings. According to article 38(2), as longs as the insolvency practitioner of main insolvency proceedings gives an undertaking in accordance to article 36, the court handling the secondary insolvency proceedings should not be opened if the undertaking has protected the local creditors' interests adequately.

Statement 2 refers to concept of judicial cooperation for insolvency of multinational companies. There are several articles in EIR Recast addressing this issue. For group insolvencies, Articles 41-43 stated that the courts of main and secondary insolvency proceedings are obligated to cooperated with each other. Cooperation and communication between insolvency practitioners (Article 56 EIR Recast), courts (Article 57) and insolvency practitioner and courts (Article 58).

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.

Modified universalism is demonstrated in Recital 23, 26, 40 and Article 3 of the EIR Recast.

According to Recital 26 of EIR Recast, member states may open insolvency proceedings. Territorial jurisdiction within the member state is established by its domestic law instead of EU Law. In case, an EU member is designated to open an insolvency proceeding, then, its local law will be applicable. This arrangement manifests modified universalism such that domestic law will not be overridden by the EIR Recast.

In article 3(1) of EIR Recast, the member state, where the debtor's COMI located, can open main insolvency proceedings. Meanwhile, pursuant to Recital 23 of EIR Recast, it also allows the opening of secondary proceedings in other member states which is territorial in nature. Modified universalism allowed one main insolvency proceedings and many secondary proceedings in other member states (Recital 40 of EIR Recast) which were dedicated by different national laws to protect diversified interests, promote effective administration and harmonise differences in national laws.

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.

EIR 2000 only contains one provision governing the insolvency practitioners of main and secondary proceedings communicated with each other.

Meanwhile EIR Recast has established new framework for communication between Courts (Article 42 EIR Recast). Under Article 42(1) EIR Recast, the court cooperation goes beyond the time when insolvency proceeding commence for preventing forum shopping. Cooperation covers all kind of proceedings, such as, territorial proceedings, as long as the rules are applicable.

In Article 57(3), EIR Recast has specified the favourable areas for coordination, i.e., appointment of insolvency practitioners, communication of information and supervision of debtor's assets and affairs.

In Article 57(1), the court may appoint an independent body as intermediary to act on their instructions for improving court-to-court communication. In Recital 50 EIR Recast also highlights cooperation can take various forms as appropriate. The court is allowed to appoint a single insolvency practitioner for main and territorial proceedings for the same debtor if the practice is compatible with rules under each proceeding.

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.

The first instrument is "synthetic" secondary proceedings. Pursuant to Article 38(2) EIR Recast, the Court has the power to refuse the opening of secondary proceedings if the insolvency practitioner of the main insolvency has undertaken to protect local creditor interests adequately as required by Article 36. The assurance must be in written and circulated to local creditors in official language of the Member State. Pursuant to 36(5) EIR Recast, the assurance has to be approved by known local creditors under the rules on qualified majority and voting.

The second instrument is stay of opening of secondary proceedings. The courts are allowed to grant a temporarily stay, not more than three months, for the opening of secondary proceedings at the request of insolvency practitioner / debtor in possession. By granting the stay, the court may order protective measures to guard the interests of local creditors. This serves as a simpler procedures for prevention of opening secondary procedure.

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 aspects that EIR Recast focus on three areas namely, insolvency practice, improvement of creditor information and modernisation of the legal rules. All of these aspects are incorporated into specific articles/provisions of EIR Recast.

For insolvency practice, EIR Recast covers restructuring proceedings (Article 1 of EIR Recast and Annex A), mandates cooperation and communications between insolvency practitioners (Article 41, 42 and 43 EIR Recast) and courts and draws up provisions for proceedings with regard to members of the same group companies (Chapter 5 of EIR Recast).

The creation of insolvency registers across EU has facilitate the exchange of information between courts, insolvency practitioners and creditors. According to Article 24 of EIR Recast, member states are required to establish and maintain insolvency registers and published information regarding the proceedings as soon as possible. This information can be accessible via a single search platform, the e-Justice Portal across EU (Article 25 EIR Recast). Users can easily identify key information, such as, date and place of opening of insolvency proceedings, type of proceedings and identity of debtors, easily.

For modernization of legal rules, it generally deals with data protection. The importance of data protection arises as a result of flow of information between interconnected insolvency registers. EIR Recast has dedicated a whole Chapter VI on data protection (Article 78 -83).

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 first notable improvement from article 1 of EIR Recast is the inclusion of restructuring and rescuing of distressed enterprises in which EIR 2000 are more liquidation-oriented. This practice is more economical friendly and maximise the value of creditors. To facilitate recognition of proceedings, an Annex A was drawn up in the article. For national procedures that falls within the Annex A, the courts will be automatically recognised without further examination. Although the Annex appeared to be rigid, it provides a clear and efficient way to recognise national procedures among the member states.

The second innovation is the introduction of “synthetic” secondary proceedings in article 38 EIR Recast. For companies has diverse operations in the member states, the opening of secondary proceedings in their own countries will result in additional costs and disrupting the efficiency of restructuring/liquidation. Multiple proceedings also created communication problems, thus, increasing transaction costs for the proceedings. With this innovated concept, secondary proceedings could have been avoided if sufficient undertaking was made to protect local creditor interests as per article 36. With this undertaking, the parties involved in proceedings can spare their best efforts on critical issues, such as, development of restructuring plan. At the same time, the interest of local creditors will be legitimately safeguarded.

The third innovation is the introduction of “suspect period” in the concept of COMI under article 3. The court shall disregard any change of office within the suspected period, normally within 3 months prior to the opening of insolvency proceedings. By this discretion, it creates a

safeguard against manipulation of the insolvency forum. For cases concerning individuals, the suspect period will be six months for the reason that individual may change their habitual residence easily. This also deters individual to take advantage on bankruptcy tourism.

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.

The introduction of "suspected" period is a missed opportunity to curb forum shopping. The period 3 months period is not long enough to stop debtor who are intended to forum shopping. Instead of time-based test, it should use principle-based test, for example, any change of COMI should be disregard if the main objective for changing the COMI is for harming the interests of creditors or employees. In addition, for any change of COMI when the debtor is insolvent should be assumed to harm the interests of creditors or employees unless it was proved the contrary by the debtors.

EIR Recast is modest on introducing on opt-out on Section 2 of Chapter V group coordination proceedings. Given the voluntary nature and the possibility of easy opt-out, it can render the coordination became useless. To improve this situation, it is suggested that reasons for withdrawal should be given and considered by coordinator/members which made the coordination more binding than before. Exchange of information should be encouraged within the group, i.e., more discussions on the possibility of rescue plan should be held, rescue plan should be circulated at early stage with details/options listed out making the coordination more transparent to insolvency practitioners.

Total marks : 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.

Under EIR 2000, the Dublin High Court may not have the international jurisdiction to open insolvency proceedings. To open the proceedings in Ireland, it must show that the COMI of Cardinal Home is located in Ireland.

In EIR 2000, the concept of COMI is not explicitly defined but guidance was provided in Recital 13. It shall be the place where Cardinal Home conducts the administration of its interests on a regular basis and which is ascertainable by third parties.

Although Cardinal Home has registered in Ireland and open first store in Ireland, it does not necessarily mean that Ireland is the COMI. In fact, the company operated EU-wide scale and has warehouse across EU and financing activities in Italy can manifest that the COMI of the company is located in Italy. In addition, it appears that the financing activities maintained by the company is regular and lasting since 2010. Assuming the insolvent company is its Italian subsidiary, the Italian court may have international jurisdiction on this proceeding. The situation exemplifies by Eurofood IFSC Ltd. where Irish and Italian Court both claimed that the COMI of the Eurofood is in their jurisdiction.

This jurisdictional conundrum was only resolved in the introduction of EIR Recast upon settlement of Eurofood IFSC Ltd..

Pursuant to the decision of Eurofood IFSC Ltd, when resolving the definition of COMI, it should be noted that COMI carries an autonomous meaning with reference made to criteria that are objective and ascertainable by independent parties.

To enhance the predictability of COMI, the EIR Recast has introduce the registered office presumption, such that, the COMI of the insolvent company is presumed to be the jurisdictions where it was registered. The presumption will only be rebutted in case the registered office is a “letterbox” company. In this case, Cardinal Home is registered in Ireland and has operation in Ireland. It will be presumed that COMI be registered in Ireland.

Ascertainability by third parties related to the time factor. The debtor activities should be regular and lasting to create COMI. Since the first store open by Cardinal Home is in Ireland, it should have the longest among all other places. COMI can be objectively confirmed by a third party.

According to EIR Recast Article 3(1), the presumption of registered office applies if the company has not moved its registered office to another member state with 3 months prior to the opening of the proceedings. In this case, Cardinal Home apparently has not done so. Therefore, the presumption of registered office is still valid.

The concept was further consolidated by the judgement of Interedil Srl v Fallimento Interedil Srl which the concept was captured in Recital 30 EIR Recast. Unless there is evidence showing that the registered office id different from where the company is centrally managed. The presumption of registered office cannot be rebutted. The assessment should be conducted in comprehensive manner and taken into account of all relevant facts. In this case, a mere presence of bank accounts and (non-binding) memoranda of understanding may not be sufficient to rebut the assumption.

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 EIR Recast will be applicable in 30 June 2017 as the EIR Recast was in forced on 26 June 2017. Provisions of the EIR Recast shall apply only to proceedings open after the indicated date (Article 84(1) EIR Recast). “Open of proceedings” means that decision of court to open the proceedings or the decision of a court to appoint an insolvency practitioner. As

both of situation has not occurred before 26 June 2017, the proceeding falls within the temporal scope of EIR Recast.

For material scope, the intended proceeding is examinership proceeding in Ireland. It is a restructuring proceeding in EU member state which fall into the scope of Annex A of Article 1 of EIR Recast. EIR Recast can be automatically applied on the examinership without further examination by the court.

Cardinal Home is not a bank, insurance company or another "excluded" undertaking, therefore, it falls with the personal scope of EIR Recast.

Ireland is a member state. Cardinal Home is presumed to have COMI in Ireland where is the place it registered. It falls with the territorial scope of EIR Recast.

Question 4.3 [maximum 5 marks] 3

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

Under the EIR Recast allows the opening of secondary insolvency proceedings in any member state where it possesses an establishment (Article 3(2) EIR Recast). The reason for Italian creditor is to secure its distribution ranking which falls within rationale of introduction of secondary proceedings, to protect local creditor interests. Secondary proceeding opened in Italy will be restricted to deal with debtor's assets located in Italy.

Under article 2(10) EIR Recast, establishment represented any places if operations where a 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. Non-transitory means degree of continuity and stability of conducting economic activity.

Cardinal Home has banking facilities and warehouse is Italy for its operation back to 2010 which appeared to be non-transitory in nature. It has conducted its operation by human means on having negotiation with distributors and signing of (non-binding) memoranda of understanding. All of these activities demonstrated that the existing of establishment in Italy.

Although the Italian bank can file for opening of secondary proceedings, the court may turn down the request of the opening secondary proceedings if the insolvency practitioner of the main insolvency proceedings gave adequate undertaking to the creditor for protecting its interests in accordance to article 36 (EIR Recast article 38). This is the concept of "synthetic" secondary proceedings derived from the case Collins & Aikman Europe SA.

Cardinal Home has much similarity with Collins & Aikman Group as both of them has extensive operations across EU and local creditors may launch secondary proceedings to protect their interests under their national laws.

The main insolvency practitioner may form a "secondary asset pool" and guarantees the Italian creditors that they will be treated as if secondary proceeding is opened. The "secondary asset pool" will comply with the distribution and priority right under the Italian insolvency law.

In addition, the main insolvency practitioner should adhere to the requirement as set out in Article 36(1), (3), (4) and (5) requirement for proper communication with and approval from local creditors.

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 : 13 out of 15.

*** End of Assessment ***

Total marks : 48 out of 50.