



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.

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.

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: 7 out of 10.

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks] 1

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."

Article 36 EIR Recast - "Right to give an undertaking in order to avoid secondary insolvency proceedings". Article 38(2) of the EIR Recast provides where the 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 if satisfied that the undertaking adequately protects the general interests of local creditors – ("synthetic" secondary proceedings).

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

[Type your answer here]

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.

Article 3(1) of the EIR Recast provides that the Member State's court, which is within the territory of which the centre of the debtor's main interest is situated, shall have jurisdiction to open insolvency proceedings. However, there is still the option to bring secondary proceedings, which focus on the debtors assets in the specific jurisdiction. This is a compromise between universality and territoriality.

The EIR Recast provides for the immediate recognition of judgments which relate to the opening, conduct and closure of insolvency proceedings, which fall within the scope. However, judgement which are handed down which are not listed in Annex A of the EIR Recast are not automatic recognition. However, while recognition is automatic, enforcement is not and an application for enforcement in the respective state is required as the procedure for enforcement is governed by the law of the Member State.

The EIR 2000 had a notable lack of provisions to address the insolvency of multinational enterprise groups. Accordingly, the EIR Recast introduced Chapter V, which is focussed on the insolvencies of corporate groups. Further, it includes the addition of Recital 53, which provides for the possibility of jurisdictional consolidation.

Question 2.3 [maximum 3 marks] 3

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

Recital 48 – points out the efficient administration of the insolvency estate and the effective realisation of the total assets require proper co-operation between the actors involved in all concurrent proceedings.

Article 42(1) obliges the court before which a request to open insolvency proceedings is pending, or which has opened such proceedings, to co-operate with any other court faced with the issue of opening insolvency proceedings or which has already opened such proceedings.

Article 57 provides the duties of co-operation and communication between Courts in the context of group insolvencies.

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.

Article 38(2) – provides that where 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 open them if the court is satisfied that the undertaking provides adequate protection for the general interests of the local creditors.

Article 38(3) provides for a request from an insolvency practitioner to stay the opening of a secondary proceedings. This stay can be imposed for no longer than 3 months and on the condition that suitable measures are in place to protect the interest of local creditors. These could include the main insolvency practitioner not be allowed to remove or dispose of any assets in the place of the debtor's established business, unless it is done in the ordinary course of business.

Total marks: 9 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.

While the EIR 2000 was considered a success, it was recognized that there were areas which required further amendment. In particular, it addresses the specific areas of need such as broadening the scope to restructuring proceedings, providing stronger rules for cooperation between insolvency practitioners and courts, improving creditor information as well as updating the rules to address a modern world (data-protection).

In the EIR 2000 there was only a single article, which mandated the communication of information between insolvency practitioners in main and secondary proceedings. However, the EIR Recast introduced an entire framework for the co-operation and communication between practitioners, courts and between practitioners and courts.

The EIR Recast has also added an entire chapter (Chapter V) to address the issue of group insolvencies. This includes:

- Recital 53 which provides for the jurisdictional consolidation of companies if their COMI is in the same jurisdiction;
- The requirement for co-operation and communication between insolvency practitioners (Article 56), between the Courts (article 57); and insolvency practitioners and the Court Article 58,
- Introduction of a co-ordination mechanism which aims to improve co-ordination but still respecting the fact each group member is a separate legal personality.

Too many elements are missing in your answer.

- 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.

1. One minor, yet significant change was that the EIR Recast enhanced the application of the COMI presumption for the purpose of reducing abusive insolvency forum shopping (Article 3). The EIR Recast attempted to clarify the COMI to be a place where the debtor regularly administers its interest and which can be ascertained by third parties. Further, the EIR Recast provided additional presumption rules for individuals running an independent business or engage in a professional activity.
2. the EIR Recast has broadened its scope by extending to restructuring and insolvency proceedings which promote the rescue of economically viable but distressed businesses. An additional and crucial improvement of the EIR Recast is the 'group coordination proceedings'.
3. Group Insolvency – There was a completely new framework on the cooperation and coordination of cross-border insolvency proceedings over the estate of members of a group of companies. This provides for insolvency practitioners to be granted the right to be heard in foreign insolvency proceedings. It also provides that an insolvency practitioner may request a stay of any measures under certain conditions and to apply for the opening of group coordination proceedings.
4. It also provides that secondary insolvency proceedings may be opened in other Member States, provided the debtor has an establishment in the jurisdiction with the effect that such secondary proceedings are limited to the debtor's assets in the jurisdiction. Further, the introduction of "synthetic secondary proceedings" where the insolvency practitioner in the main proceeding can make undertakings to creditors that he will comply with the distribution and priority rights under the law of the relevant member state where the assets are located and where secondary proceedings could be opened.

[Type your answer here]

Question 3.3 [maximum 5 marks] 2.5

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, or attempt, to improve the co-ordination of group proceedings has been considered to lead to modest results. The group co-ordination proceedings are voluntary and lead to non-binding actions. This has led to mixed reaction in legal literature. However, the majority opinion appears to doubt whether this is effective or has any practical value. This can be compounded where a group member is located in a non-Member State and cannot form part of the group co-ordination proceedings. I think that the issue here, is that the voluntary nature and the non-binding nature. If the Courts could direct that group members enter into the proceedings which lead to binding actions, it could make it far more efficient with a view to the entire group.

You were requested to list and discuss **two** flaws.

Total marks: 9 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] 1.5

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.

Yes, the EIR 2000 was more set towards modified universalism. It established that the main insolvency proceedings could be initiated at the place of the debtor's COMI, these proceedings had universal scope and encompassed all the debtor's assets throughout the EU.

The EIR 2000 did not define COMI, however there was some guidance in Recital 13, which has been reflected almost identically in EIR Recast. The case of *Eurofood IFSC Ltd C-341/04* (May 2, 2006) stated that COMI has an autonomous meaning and must therefore be interpreted in a uniform way, independently of what a similar term may mean in national legislation.

Under the EIR 2000, Ireland would have been the COMI.

This is insufficiently explained.

- 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.

Whether the EIR Recast applies requires me to address the following questions: When does it apply (temporal scope); to whom does it apply (personal scope), which proceedings are covered by it (material scope) and what are its geographical limitations (Geographical scope).

A step-by-step plan is as follows:

1. The debtor has a COMI in a Member State of the EU, except Denmark?

Under the EIR Recast, COMI defined per Article 3(1) as corresponding with "*place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties*".

Further, there is a presumption that in the case of a company the place of the registered office shall be the place of the COMI (if it hasn't been moved to another member state within 3 months prior to the request for the opening of the insolvency proceedings)

Yes, Cardinal Home is an Ireland-registered furniture company. The company opened its first store in Cork, Ireland in 2009.

2. The debtor is not a bank, insurance company or another "excluded" undertaking?

No, Cardinal Home is not an excluded entity. Article 1(2) provides that the EIR Recast does not apply to proceedings that concern:

- a) insurance undertakings;
- b) credit institutions;
- c) investment firms and other firms, institutions and undertakings to the extent that they are covered by Directive 2001/24/EC; or
- d) collective investment undertakings.

3. The proceedings opened against Cardinal Home is listed in Annex A to the EIR Recast?

Yes, the EIR Recast applies public collective proceedings which are based on the laws relating to insolvency for the purpose of, *inter alia*, rescue, reorganisation or adjustment of debt or liquidation.

4. The proceedings were opened after 26 June 2017?

Yes, the proceedings were opened on 30 June 2017 once the EIR Recast was in force.

Yes – it applies.

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.

The EIR Recast allows for secondary proceedings to be opened against a debtor in any Member State where it possess and establishment. Article 2(10) of the EIR Recast provides that an "establishment" means any place of operation where a debtor carries out or has carried out in the three-month period prior to the request to open the main proceedings a non-transitory economic activity with human means and assets.

The case of *Interedil* the concept of "establishment" was considered and the CJEU concluded that the definition connects the pursuit of an economic activity to the presence of human resources and that a minimum level of organisation and degree of stability is required. Accordingly, the presence alone of goods in isolation or a bank account does not, in principle, satisfy the requirements for classification of "establishment".

Further, the requirement that it be "*non-transitory economic activity with human means and assets*" suggests that the character of the debtor's activities must have a degree of continuity and stability. This suggests that temporary place of operations would not satisfy the requirement of "establishment".

Further, there is no requirement under the EIR Recast for the secondary proceedings to be winding-up proceedings. Accordingly, there is no issue with the above proceedings.

It does not specify when the warehouse in Milan was opened. The Italian bank accounts would be insufficient. However, a warehouse by its nature generally holds assets and requires a certain level of human presence. Accordingly, in this case, Cardinal Home has an establishment in Italy and secondary proceedings could be opened.

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: 9.5 out of 15.

*** End of Assessment ***

Total marks: 34.5 out of 50.