



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

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

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

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

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

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

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

## **ANSWER ALL THE QUESTIONS**

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

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

#### **Question 1.1**

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

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

#### **Question 1.2**

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

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

#### **Question 1.3**

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

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

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

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

#### Question 1.4

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

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

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

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

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

#### Question 1.5

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

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

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

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

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

#### Question 1.6

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

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

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

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

### Question 1.7

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

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

### Question 1.8

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

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

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).

#### Question 1.10

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

Assume that:

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

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

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

C was the correct answer.

**Total marks: 8 out of 10.**

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

### **Question 2.1 [maximum 2 marks] 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."

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]

**Answer:**

1. **In re Statement 1:** Right to Give an Undertaking ("Synthetic" Secondary Proceedings): Article 36.
- **In re Statement 2:** Recognition and Enforcement of Insolvency Related Judgements: Article 19 **This is incorrect. It could have been Recital 48; Articles 41-43; Articles 56-58**

### **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.

[Type your answer here]

**Answer:**

Article 3(1) EIR 2000: The overarching principle guiding the EIR 2000 was modified universalism, which is also the one guiding the EU Convention. Most significantly, it established that the location of the debtor's centre of major interest, or COMI, might be used to start (main) insolvency proceedings.

Article 4 EIR 2000: Such procedures included all of the debtor's assets in the EU and had a global reach. The EIR 2000 further stipulated that the outcomes of insolvency processes will be governed by the lex concursus of the state in which they are commenced.

Articles 16, 17 and 25 EIR 2000: It allowed for the automatic recognition of judgements initiating insolvency procedures, as well as judgments pertaining to their progression and conclusion. The EIR 2000 system was not entirely global, nevertheless, since it allowed for

the opening of supplementary (territorial) procedures in Member States where the debtor maintained an establishment.

**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.

[Type your answer here]

**Answer:**

**Communication and Co-Operation in European Insolvency Cases**

Insolvency procedures involving two or more members of a group of enterprises are covered in terms of cooperation and communication in Articles 56–59 EIR Recast. Proper cooperation requires close communication and information sharing between the different insolvency practitioners and the participating courts. The efficient and effective use of the debtor's assets and the defence of creditors' rights should be made possible by such a framework.

	<b>Recital</b>	<b>Articles</b>
<b>Communication</b>		"Communication" under Article 79 refers to correspondence with the European Commission.
	Recital 48, 52, 59, 61, 62	Article 25, 36, 41–44, 53, 56–59; 73, 74, 79
<b>Coordination</b>	"Coordination" in Recital 4 alludes to the "need for a Union Act."	. The term "coordination" is used in the review clause of Article 90.
	Recitals 4, 6, 23, 50, 54–63	Articles 41–43; 56, 57, 60–74; 77, 99
<b>Cooperation</b>	Article 81 of the Treaty on the Functioning of the European Union is referred to as "cooperation" in Recital 3.	The term "cooperation" in Article 85 refers to Treaties whose names contain the word "cooperation."
	Recitals 3, 48, 49, 50, 52, 61, 62	Articles 41–44; 56–59; 74 and 85

**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.

[Type your answer here]

**Answer:**

The courts of the Member State whose territory the centre of the debtor's principal interests is located have competence to initiate insolvency proceedings, according to Article 3(1) EIR Recast ("main insolvency proceedings"). These legal actions have a broad reach and are intended to include all of the debtor's assets.

In accordance with the EIR 2000, Recital 23 states that the EIR Recast simultaneously permits the initiation of secondary procedures, which take place concurrently with the main bankruptcy proceedings and have an impact exclusively on assets located within the state of secondary proceedings.

A secondary proceeding's geographical structure protects the diversity of interests, promotes efficient administration of complicated bankruptcy estates, and mitigates challenges brought on by inconsistent national laws, according to Recital 40.

**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] 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.

[Type your answer here]

#### **Answer:**

European Commission, Report from the Commission to the European Parliament, the Council, and the European Economic and Social Committee on the Application of Council Regulation (EC) No 1346/2000 of May 29, 2000 on Insolvency Proceedings, COM(2012) 743 final, published in 2012, proposed changes to the European Insolvency Regulation (EIR) (12 December 2012).

These are as follows:

- a. **Proposed:** While the "centre of main interests" (COMI) of a corporate debtor will continue to serve as the standard for jurisdiction to initiate main insolvency proceedings.  
**Adopted:** In accordance with Article 3(2) of the EIR Recast, a debtor may initiate one or more secondary insolvency actions against it in any Member State in which it has an establishment. The consequences of secondary proceedings are limited to the assets of the debtor located within the territory of the Member State where secondary procedures have been launched, in contrast to main insolvency proceedings, which have a global reach (Recital 23).
- b. **Proposed:** Significant changes will be made to widen the Regulation's scope to encompass pre-insolvency and debtor-in-possession proceedings (Article 1),

**Adopted:** According to Article 2(10) EIR Recast, the definition of an establishment shall be examined as of the filing for the initiation of secondary insolvency proceedings. If the required conditions are not completed at that time, the court must consider whether an establishment existed in the three months before to the filing. This regulation, which is new under the EIR Recast, was put in place to ensure the safety of local creditors in the event that the establishment's activities were to cease or the pre-insolvency forum changed.

- c. **Proposed:** To improve the coordination of insolvency procedures involving members of a group of enterprises and to better assure the coordination of main proceedings with any competing local ('secondary') processes initiated in other Member States with respect to the same debtor (Chapter V).etter [?] secure the coordination of main proceedings with any rival local ('secondary') proceedings opened in other Member States in relation to the same debtor (Chapter III), and to enhance the coordination of insolvency proceedings relating to members of a group of companies (Chapter V).

**Adopted:** Multiple insolvency procedures against the same debtor may be initiated in various Member States under the EIR Recast. The number of proceedings results in increased expenditures (for example, court fees, salaries of IPs, communication and translation costs, time costs). When the primary and secondary procedures are of different types, such as when the primary proceedings are remedial while the secondary proceedings are intended to liquidate the corporation, issues may develop. Rules for collaboration and communication should reduce these hazards.

- d. The extended scope of the recast EIR means that some national restructuring procedures previously excluded from the EIR will now fall within its scope, such that they are subject to its burdens (including its rules on jurisdiction to open proceedings, and on the coordination of proceedings), but eligible for its privileges – including those conferred on main proceedings to ensure EU-wide effectiveness.

### Question 3.2 [maximum 5 marks] 3.5

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.

[Type your answer here]

#### Answer:

The primary goal of the reform was to enhance how the Regulation operated throughout the Member States in order to support the internal market's efficient operation. The reform principally codified the ECJ's case law and included several components of effective national insolvency regimes that had operated admirably over time, such as pre-insolvency, hybrid, and synthetic processes, particularly since the commencement of the world financial and economic crisis.

One of the primary topics discussed during the debate over the Regulation's modification was the increased emphasis on rescue and the requirement to broaden the Regulation's application to pre-insolvency and hybrid actions. It was the first issue the Heidelberg Report raised in 2013, suggesting that the EIR's scope was an area that may use some improvement. Because it emphasises upstreaming rescue—moving the moment at which a firm can take advantage of restructuring processes to a considerably earlier point than the time at which it becomes formally insolvent—the EIR Recast therefore follows in the Restructuring Recommendation's footsteps. Pre-insolvency actions, which attempt to restructure a company in financial distress as soon as practicable, even before the firm is formally declared bankrupt, are now covered under Article 1(1) of the EIR Recast.

New norms for collaboration and communication between courts, insolvency practitioners, and between courts and insolvency practitioners are also introduced by the EIR Recast. In accordance with Article 41, for instance, inter-insolvency practitioner collaboration "may take any shape, including the formation of agreements or procedures." The new rules recognise the necessity to maintain the flexibility and lack of bureaucratic restrictions in court-to-court coordination and provide open contact and the free flow of information between the concerned courts.

The EIR Recast seeks to encourage the rescue of economically viable firms throughout the EU by broadening the scope of the Regulation. The EIR recast, although including pertinent modifications, has stuck to the format of the previous EIR. With few exceptions, the widespread perception is that the EIR recast does not significantly affect the previous position because the majority of modifications just codify the ECJ's case law. Indeed, important components like the fundamental ideas of COMI and secondary processes were kept in the new Regulation. It is significant that it still does not harmonise the core provisions of bankruptcy and rescue laws across Member States. The European Institutions' decision to alter European cross-border bankruptcy law incrementally, baby step by baby step, as illustrated by the EIR recast. It explains why, although going into effect in July 2017, the Proposal for an Insolvency Directive 2016 was previously published in November 2016.

You only discuss two elements of improvement (extension of the scope of the Regulation and cooperation between courts).

### 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.

[Type your answer here]

- A. Both the original and the recast versions provide that the initiation of insolvency proceedings should not impact creditors' in rem rights to property situated in a State other than the State in which the proceedings are commenced. The CJEU most recently examined the clause in *Lutz v. Bäuerle Case C-557/13*. The court ruled that a creditor must be able to exercise their right in rem after the start of insolvency proceedings in order for it to be effective, and that rather than the law of the state where the proceedings were initiated, the specific conditions under the law of the state where the assets are located would apply.
- B. Recital 16 of the EIR Recast also makes it clear that the EIR Recast does not apply to normal company law tools that are not specifically designed for insolvency circumstances. The English Schemes of Arrangement, whose usage as a restructuring instrument has seen a particular surge throughout Europe, appear to be excluded by this phrase. However, because to their adaptability, they fall beyond the RR's purview and are hence devoid of automated action and recognition.
- C. In accordance with Article 26(9) of the EIR Recast, local creditors may file a court application in a member state where secondary insolvency proceedings may have been initiated to ask the court to take preliminary or preventive actions to ensure that the terms of the undertaking are being followed.

You were supposed to explain how these flaws can be corrected.

**Total marks: 11 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.

[Type your answer here]

#### **Answer:**

Art. 3(1) and (2) EU Insolvency Regulation, 2000 form the basis for a judgment to open insolvency proceedings in the EC. Art. 3(1) of the EIR, 2000 provides that the courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. Aforementioned debtor can be a private person, whatever the nature of his or her dealings are, or a company or legal person.<sup>3</sup> In the case of a company or legal person art. 3(1) of the EIR, 2000, first sentence contains the following presumption: the place of the registered office shall be presumed to be the centre of its main interests, in the absence of proof to the contrary.

The court having jurisdiction to open the main insolvency proceedings should be enabled to order provisional and protective measures from the time of the request to open proceedings. Preservation measures both prior to and after the commencement of the insolvency proceedings are very important to guarantee the effectiveness of the insolvency proceedings. In that connection this Regulation should afford different possibilities. On the one hand, the court competent for the main insolvency proceedings should be able also to order provisional protective measures covering assets-situated in the territory of other Member States. On the other hand, a liquidator temporarily appointed prior to the opening of the main insolvency proceedings should be able, in the Member States in which an establishment belonging to the debtor is to be found, to apply for the preservation measures which are possible under the law of those States".

Thus, making it clear that Dublin High Court have jurisdiction to initiate main insolvency proceeding.

#### **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.

[Type your answer here]

**Answer:**

The following points must be addressed in order to determine the extent of the EIR Recast: when does it apply in time (temporal scope), to whom does it apply (personal scope), whatever procedures are covered by it (material scope), and what are its geographical boundaries (geographical scope).

A schematic representation of a step-by-step strategy is as follows:

1. Except for Denmark, the debtor has COMI in one of the EU's member states: YES
2. A bank, an insurance provider, or any "excluded" undertaking is not the debtor. YES
3. The debtor's legal actions are described in Annex A of the EIR Recast.: YES
4. The case was started after June 26, 2017: YES.

Since all four steps have led to a "YES," the EIR Recast will be applicable to the opened insolvency proceeding.

**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.

[Type your answer here]

The following requirements are included in Articles 38, 39, 42, and 43 EIR Recast for courts to examine when a request to commence secondary proceedings is made:

1. The requirement to notify the IOH in the main proceedings and provide this IOH with a hearing opportunity about the request;
2. the requirement that secondary actions not be opened ('must') if the court finds that the undertaking properly safeguards the general interests of the local creditors;
3. the ability to impose protective measures to preserve the interests of local creditors and to postpone the start of the secondary proceedings for a maximum of three months;
4. The possibility to begin a different kind of insolvency process on Annex A than sought, such as one that is more suited to fulfil reorganisation goals, upon the IOH's request in the main proceedings;
5. Before the courts of the Member State where the secondary proceedings have been initiated, the IOH has the right to contest the decision to commence the secondary proceedings;
6. The need to comply with any court that receives a request to start a secondary bankruptcy and determines that the undertaking sufficiently safeguards the general interests of the nearby creditors;
7. The option to stay the opening of the secondary proceedings for a period not exceeding three months, well embedded by the right to order protective measures for protection of the interests of local creditors;
8. The possibility to begin a different kind of insolvency process on Annex A than sought, such as one that is more suited to fulfil reorganisation goals, upon the IOH's request in the main proceedings;
9. The obligation to communicate with and work cooperatively with any court before which a request to open secondary insolvency proceedings is made.

of the IOH to contest the decision to open secondary proceedings before the courts of the Member State in which the secondary proceedings have been opened.

Additionally, the CJEU took into account the court's discretion in its decision to initiate secondary proceedings, which is a matter subject to national law. The CJEU stipulates, however, that this must adhere to (a) EU legislation, (b) specifically its basic principles, such as true collaboration and nondiscrimination, and (c) the EIR. The court must consider the goals supporting the possibility of opening such procedures, including the preservation of local interests (Recital 12 EIR), although such openness may also serve other goals (Recital 19 EIR). Moreover, it must consider the primary proceedings' goals and take into account the EIR's general structure. Furthermore, we think that the court should follow the EIR's overarching goal, which is that cross-border insolvency procedures should function effectively and efficiently, as stated in Recital 2. Therefore, if denying a request to initiate secondary actions is consistent with that goal and ensures the preservation of local interests, it is permissible.

Sine in the instant case the imitation of insolvency is primarily to preserve the rights of Italian Bank for the purpose of securing an Italian insolvency distribution ranking the same can be opened as secondary proceeding.

While your reasoning is sound, the answer has not focused on the right aspect of the question. The facts of the case do not support the finding of an establishment of Cardinal Home in Italy. The presence of assets (leased-out warehouse) in isolation, contractual relations with a local bank (including maintenance of a bank account) and *occasional* negotiations with local distributors do not qualify as 'non-transitory economic activity with human means and assets.' The requisite minimum level of organisation and a degree of stability (see para. 64 in *Interedil*) is missing.

**Total marks: 11 out of 15.**

**\* End of Assessment \***

**Total marks: 39 out of 50.**