



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

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

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

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

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

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

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

## **ANSWER ALL THE QUESTIONS**

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

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

#### **Question 1.1**

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

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

#### **Question 1.2**

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

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

#### **Question 1.3**

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

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

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

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

#### Question 1.4

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

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

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

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

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

#### Question 1.5

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

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

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

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

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

#### Question 1.6

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

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

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

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

### Question 1.7

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

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

### Question 1.8

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

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

### Question 1.9

In a cross-border dispute, the main proceedings before the Italian court opposes Fema SrL (registered in Italy) and Lacroix SARL (registered in France). The case concerns an action to set aside four contested payments that amount to EUR 850,000. These payments were made pursuant to a sales agreement dated 5 August 2020, governed by German law. The contested payments have been made by Fema SrL to Lacroix SARL before the former went insolvent. The insolvency practitioner of the company claims that under applicable Italian law, the

contested payments shall be set aside because Lacroix SARL must have been aware that Fema Srl was facing insolvency at the time the payments were made.

Considering the facts of the case and relevant provisions of the EIR Recast, which one of the following statements is the **most accurate**?

- (a) The insolvency practitioner will always succeed in his claim if he can clearly prove that under the *lex concursus*, the contested payments can be avoided (Article 7(2)(m) EIR Recast).
- (b) The contested transactions cannot be avoided if Lacroix SARL can prove that the *lex causae* (including its general provisions and insolvency rules) does not allow any means of challenging the contested transactions, and provided that the parties did not choose that law for abusive or fraudulent ends.
- (c) To defend the contested payments Lacroix SARL can rely solely, in a purely abstract manner, on the unchallengeable character of the payments at issue on the basis of a provision of the *lex causae*.
- (d) The contested payments shall not be avoided if Lacroix SARL proves that such transactions cannot be challenged on the basis of the insolvency provisions of German law (Article 16 EIR Recast).

#### 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: 9 out of 10.

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

### Question 2.1 [maximum 2 marks] 2

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

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

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

Statement 1 addresses the concept of "synthetic" secondary proceedings or right to give an undertaking provided in Article 36 of the EIR Recast.

Statement 2 addresses the concept of need for judicial cooperation in civil matters having cross-border implication provided in Recital (3) of EIR Recast.

### Question 2.2 [maximum 3 marks] 3

The EIR Recast is built upon the concept of modified universalism, as pure universalism has been deemed idealistic and impractical for the time being. Provide **three (3) examples** of provisions from the EIR Recast, which highlight this modified universalism approach.

Three examples of provisions from the EIR Recast which highlight the modified universalism approach are:

- 1) Article 3(1) of EIR Recast: this provision provides that main insolvency proceedings may be opened in the Member State within the territory of which the debtor's centre of main interest lies.
- 2) Article 3(2) of EIR Recast: allows opening of secondary insolvency proceedings in a Member State, if there is an 'establishment' of the debtor in that State.
- 3) Article 19(2) of EIR Recast: this provision provides that recognition of the main insolvency proceedings by another Member State will not preclude it from opening secondary insolvency proceedings if the debtor has an 'establishment' in that State.

### 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.

Three provisions of the EIR Recast that deal with newly introduced obligation relating to cross-border co-operation and communication are:

- 1) **Article 41** of the EIR Recast requires insolvency practitioner of the main insolvency proceeding and the insolvency practitioner of the secondary insolvency proceeding to co-operate with each other. This provision goes a step ahead from EIR 2000 as it adds that such co-operation may take any form, including conclusion of agreements and

protocols. Moreover, Article 41(2)(a) of the EIR Recast also requires that insolvency practitioners communicate with each other, any information relating to progress made in lodging and verification of claims and all measures aimed at restructuring or rescuing the debtors, which is broader in scope than its predecessor in EIR 2000 and highlights EIR Recast widened scope on rescue of viable firms.

- 2) **Article 42** – Under this article, the EIR Recast makes it mandatory for courts before which an insolvency application is pending or which has already admitted an insolvency application to cooperate with another court before which is either hearing an insolvency application or has already opened one. EIR 2000 did not contain any specific provisions for such co-operation between courts.
- 3) **Article 43** - Under this article, the EIR Recast requires co-operation between court and insolvency practitioners where: (i) insolvency practitioner of main insolvency proceeding should co-ordinate with court facing a request or has already opened secondary insolvency proceedings, (ii) insolvency practitioner of secondary insolvency proceeding should co-ordinate with court facing a request or has already opened main insolvency proceedings, and (iii) insolvency practitioner of secondary insolvency proceeding should co-ordinate with court facing a request or has already opened secondary insolvency proceedings.

#### **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.

Two examples of legal instruments to avoid or control opening, conduct and closure of secondary proceedings are:

- 1) "Synthetic" secondary proceedings under Article 36 of EIR Recast: Article 36 of EIR Recast provides that in order to avoid opening of secondary insolvency proceedings, insolvency practitioner of the main insolvency proceedings may give a unilateral undertaking in relation to assets present in the State where the secondary insolvency proceedings can be opened, that while distributing and realising the debtor's assets he will comply with the priority and distribution rights under the national law of that State that the creditors would have if secondary proceedings were opened in that State. The undertaking should also specify the factual assumptions on which it is based, particularly in relation to the value of the assets in such State and the modes available to realise such assets.
- 2) Stay on secondary insolvency proceedings according to Article 38(3) of the EIR Recast: According to Article 38(3), in case a stay on enforcement actions has been allowed after the opening of the main insolvency proceedings to give breathing room to the debtor to negotiate with its creditors, the insolvency practitioner of the main insolvency proceeding or the debtor-in-possession may request the court that a stay be imposed on opening of secondary insolvency proceedings. The stay cannot be for a period of more than 3 months and will only be granted on the condition that suitable conditions are in place to protect the interests of local creditors.

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

#### **QUESTION 3 (essay-type questions) [15 marks in total]**



*In addition to the correctness, completeness (including references to case law, if applicable) and originality of your answers to the questions below, marks may be awarded or deducted on the basis of your presentation, expression and writing skills.*

**Question 3.1 [maximum 5 marks] 5**

In 2012, the European Commission recommended that the European Insolvency Regulation be amended by focusing on specific aspects of the instrument. Explain what these aspects were and how they have been introduced in the EIR Recast.

The European Commission identified the following aspects of the European Insolvency Regulations (EIR 2000) which needed to be amended:

1. Scope of the regulations: The Commission observed that EIR 2000's scope did not cover situations where the national procedures allowed for restructuring at a pre-insolvency stage, or where the management of the company continued to be in charge of the debtor. EIR 2000's scope was limited to proceedings involving partial or total divestment of a debtor and the appointment of a liquidator.

EIR Recast has a broader scope and also applies to restructuring proceedings in its Member States. Annex A of the EIR Recast provides a list of proceedings to which the EIR Recast applies, and contains reference to more than 110 procedures.

2. Difficulties in establishing jurisdiction on the basis of centre of main interest (COMI): The Commission noted that there were difficulties in applying the COMI concept in practice in order to establish jurisdiction to open main insolvency proceedings. It noted that companies have been able to forum shop, through abusive COMI-relocation.

The EU Recast has now added further clarity to the concept of COMI by moving the description of what constitutes COMI to the main text of the EIR Recast (as opposed to the recitals in EIR 2000). Moreover, EIR Recast introduced a look-back period (3 or 6 months depending on the nature of entity) prior to request for opening insolvency proceedings, to take into consideration any relocations undertaken by the entity which can be used to rebut the presumption of principal place of business or place of habitual residence while determining the COMI.

3. Inefficacy of secondary proceedings: The Commission observed that opening of secondary proceedings led to inefficiency in administration of the debtor's estate. As soon as secondary proceedings are opened, the liquidator loses control over the assets in the other Member state, which makes the sale of the debtor on a going concern basis tougher. Further, given that the secondary proceedings have to be winding-up proceedings, it was another barrier to successful restructuring of a debtor.

The EU Recast provides to measures to address this concern. First, it allows the possibility of preventing the secondary proceedings from being opened if the insolvency practitioner of the main insolvency proceeding provides an undertaking that while distributing and realising the debtor's assets he will comply with the priority and distribution rights under the national law of that State (before which the secondary insolvency proceeding lies) that the creditors would have if secondary proceedings were opened in that State. Second, the EU Recast allows a temporary stay in the main proceeding to also be applicable to secondary proceedings in order to preserve the efficiency of the stay granted in the primary proceedings if the court is satisfied that suitable measures are in place to protect the general interest of local creditors.

4. Requirement for publicity of proceedings and lodging of claims: The Commission noted that there were no mandatory requirements for publication or registration of decisions of the Member States where a proceeding is opened under EIR 2000. Further, it also noted a lack of a European Insolvency Register which would allow searches in several national registers. Additionally, it noted that there was a need for creditors and potential creditors and judges to be made aware that proceedings have opened in a Member State. The Commission also noted that small creditors and SMEs particularly faced difficulties and cost barriers in lodging claims under the EIR 2000.

The EIR Recast introduces several measures to enable information distribution and publication of proceedings. Article 28(1) of the EU Recast puts an obligation on the insolvency practitioners to request the publication of a notice opening insolvency proceedings (either main or secondary), in the place of debtor's establishments. Further, Article 54 puts an obligation on the court or the insolvency practitioner appointed by the court to inform any foreign creditors as soon as insolvency proceedings are opened. Article 24 and 25 of the EU Recast also provides for creation, maintenance and updation of national insolvency registers and also an EU-wide decentralised system for the inter-connection of insolvency registers.

5. Lack of rules relating to cross-border insolvencies involving groups of companies: The Commission noted that there was no specific rule dealing with the insolvency of group companies even though a number of cross-border insolvencies involved groups of companies. The EIR 2000 did not allow for consolidating insolvencies of group companies and instead a separate proceeding had to be opened for each individual member of the group which would be independent of other proceedings. This hindered the successful restructuring of the group as a whole.

The EU Recast introduced a dedicated chapter (Chapter V) to group insolvencies. At the first level it prescribed cooperation and communication between courts and insolvency practitioners involved in the insolvency proceedings opened against members of the same enterprise group. Second, it also provides for a specific mechanism where group proceedings can be coordinated by appointment of a group coordinator.

### **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.

Three improvements/innovations in the EIR Recast are:

- 1) **Expansion of scope from conventional liquidation-oriented processes to rescue or restructuring processes for debtors:** One of the biggest improvements in the EIR Recast as opposed to EIR 2000 was expansion of its scope from liquidation-oriented processes to rescue-oriented processes for debtors. This now allows EIR Recast's benefits such as automatic recognition of judgments opening insolvency proceedings to also extend to rescue processes. This will help in aiding and enabling restructuring of distressed but viable debtors.
- 2) **Introduction of suspect period in the presumption relating to centre of main interest:** EIR Recast introduced a look-back period (3 or 6 months depending on the nature of entity) prior to request for opening insolvency proceedings, to take into consideration any relocations undertaken by the entity which can be used to rebut the

presumption of principal place of business or place of habitual residence while determining the COMI. This innovation protects against manipulation of forum by debtors.

- 3) **Innovations in relation to rules on publicity of insolvency registers:** Article 28(1) of the EU Recast puts an obligation on the insolvency practitioners to request the publication of a notice opening insolvency proceedings (either main or secondary), in the place of debtor's establishments. Further, Article 54 puts an obligation on the court or the insolvency practitioner appointed by the court to inform any foreign creditors as soon as insolvency proceedings are opened. Article 24 and 25 of the EU Recast also provides for creation, maintenance and updation of national insolvency registers and also an EU-wide decentralised system for the inter-connection of insolvency registers. These provisions are extremely important as disposal of information relating to insolvency proceedings is critical for carrying out an efficient insolvency process and for ensuring that creditors file their claims on time.

### 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.

Two shortcomings of the EIR Recast are:

1. Ineffective provisions for group insolvency: In terms of the process of group co-ordination proceedings, the EIR Recast allows insolvency practitioners to practically 'opt-out' of the group process merely by raising an objection against the inclusion of their respective insolvency proceedings within the group insolvency proceedings. Notably Article 64 of the EIR Recast does not mandate the objecting insolvency practitioner to provide reasons for their objection. Further, creditors of the group members are also not required to be mandatorily consulted before opting-in or opting-out of group co-ordination proceedings. Once the insolvency practitioner has objected to inclusion of their respective insolvency proceeding within the group co-ordination proceedings, the individual proceeding will be independent and the group proceeding will be precluded from deciding upon any rights with regards to the proceedings in the excluded Member State.

This shortcoming could have been corrected by requiring insolvency practitioners to submit detailed reasons for why they want to opt-out of the group process. Moreover, creditors' approval should have been mandatorily required for such opting out.

2. Ability to enforce against debtor's assets in other States: Another criticism of EIR Recast is the manner in which it deals with the existing *right in rem* of creditors. By not modifying the position under the EIR 2000, and continuing to provide that opening of insolvency proceedings will not affect the rights in rem of creditors over assets located in states, other than the state of the opening of proceedings, may bring inefficiencies in administration of the debtor's State.

Given that the EIR Recast provides for automatic recognition of judgments opening insolvency proceedings in other States, it would greatly benefit from easing the process of getting a stay against enforcement actions in all other States. While a step towards this has been made under Article 38(3) of the EIR Recast, automation of such stay would benefit the entire restructuring process.

**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.

In order to assess whether Dublin High Court has an international jurisdiction to open examinership proceedings, the following needs to be considered:

#### **Whether the insolvency proceedings are conducted in EU's Member States (excluding Denmark)**

The proceedings are being conducted in Ireland which is an EU Member State.

#### **Whether examinership proceedings are covered under EIR 2000?**

According to Article 2(a) of EIR 2000 insolvency proceedings covered by it are listed in Annex A.

Company examinership in Ireland is listed in Annex A of EIR 2000. Therefore, it is covered under EIR 2000.

#### **Whether Cardinal Home has a centre of main interest and consequently can "main insolvency proceedings" be commenced in Ireland?**

In order to ascertain, whether Cardinal Home had its COMI in Ireland, the following provisions and case laws need to be considered:

- a) Recital 13 of EIR 2000 which provides that COMI should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.
- b) Article 3(1) of EIR 2000 which provides that the place of registered office of a company will be presumed to be its COMI, in the absence of evidence to the contrary.
- c) In the case *Eurofood IFSC Ltd*, the court stressed the autonomous meaning of the term COMI and that it must be identified by criteria that is objective and ascertainable by third parties.

Cardinal Home is registered in Ireland and opened its first store in Ireland. Given the presumption of COMI being the place of registered office and there being no evidence to show that Ireland is not its COMI, Ireland should qualify as Cardinal Home's COMI. Even though the company has warehouses and creditors in other parts of Europe, that may not be enough to establish those jurisdictions as its COMI and therefore Ireland should qualify to be Cardinal Home's COMI

Therefore, the Dublin High Court has an international jurisdiction to open examinership proceedings as the main insolvency proceeding under EIR 2000.

**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.

In order to determine whether EIR Recast will be applicable, the following factors need to be examined:

- (a) Geographical scope of EIR Recast: Whether the centre of the debtor's main interest is located in a Member State of EU. In the present situation, Cardinal Home is incorporated in Ireland, and has also opened its first store in Cork, Ireland. In the absence of any rebuttable presumptions to the contrary, the COMI of Cardinal Homes would then be assumed to be Ireland, which is a member of the European Union. Therefore, the geographical requirements under the EIR Recast are fulfilled in the present case.
- (b) Personal scope of EIR Recast: Whether the debtor is not one of the 'excluded' entities such as a bank, insurance company etc, as provided under the EIR Recast. Cardinal Home is neither a bank, an insurance company or any of the 'excluded entities which ousts the scope of the EIR Recast. Therefore, the debtor falls within the scope of the EIR Recast;
- (c) Material scope of EIR Recast: Whether Annex A of the EIR Recast recognizes the type of proceeding to be opened against the debtor. The examinership proceedings which has been opened by the Dublin High Court, has been listed as a proceeding in Annex A. Therefore, this proceeding will be within the scope of the EIR Recast.
- (d) Temporal scope of EIR Recast: Whether the proceedings against the debtor was opened after 26 June, 2017. Given that the proceedings are opened on June 30, 2017, the condition under the EIR Recast in relation to the timing of opening of proceedings has also been met.

Therefore, given that the above conditions required under the EIR Recast have been met, we can conclude that the EIR Recast will be applicable to the insolvency proceedings opened against Cardinal Home.

**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.

In order to assess whether secondary insolvency proceedings can be opened in Italy, the following needs to be considered:

### **Whether secondary insolvency proceedings can be initiated in Italy?**

Article 3(2) of the EIR Recast: According to Article 3(2), insolvency proceedings may be opened in a Member State which has an 'establishment' within the territory of that Member State. However, effects of those proceedings will be limited to the assets situated in such Member State.

Therefore, it will need to be assessed whether Cardinal Home has an establishment in Italy.

### **Does Cardinal Home have an 'establishment' in Italy?**

Article 2(10) of the EIR Recast: An 'establishment' is defined under Article 2(10) of the EIR Recast, as any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets.

Interedil case: In the case *Interedil SRL v. Fallimento Interedil SRL*, the court held that the mere presence of a bank account or goods in isolation is not sufficient to show an establishment in a Member State. The court noted that the fact that the definition of an 'establishment' connects the pursuit of economic activity to a presence of human resources which shows that a minimum level of organisation and a degree of stability is required. The elements under the definition in Article 2(10) must be ascertainable by third parties.

Conclusion: In the given fact scenario, Cardinal Home has a warehouse in Italy, a credit agreement with an Italian bank, a bank account with the Italian bank and has negotiated with some local distributors there and entered into (non-binding) memoranda of understanding with them.

While the mere presence of a bank account in Italy is not sufficient to prove an 'establishment', the fact that the company has a warehouse, a creditor and a local ascertainable presence in Italy should be enough to show the presence of an 'establishment'.

Therefore, Italy may open secondary insolvency proceedings under Article 34 read with Article 3(2) and Article 2(10) of the EIR Recast with the purpose of securing an Italian insolvency distribution ranking, in accordance with the abovementioned provisions of EIR Recast.

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: 47 out of 50.**