



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.**

A was the correct answer.

Question 1.3

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

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

- (b) True. As a result, the EIR 2000 lacked the support of major stakeholders such as insolvency practitioners, businesses and public authorities who considered the instrument fruitless.
- (c) False. While a number of shortcomings were identified by an evaluation study and a public consultation, the EIR 2000 was generally regarded as a successful instrument by most stakeholders, including practitioners, businesses, the EU institutions and insolvency academics.
- (d) False. The EIR 2000 was considered a complete success to support cross-border insolvency cases and, as a result, the wording of the EIR Recast mirrored its 2000 predecessor.

Question 1.4

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

- (a) The EIR Recast is a copy of the EIR 2000. Its structure and the wording of all articles are similar.
- (b) Although the EIR Recast includes relevant and useful innovations, it has stuck with the framework of the EIR 2000 and mostly codified the jurisprudence of the CJEU.
- (c) The EIR Recast has not added any new concept to the text of the EIR 2000.
- (d) It is incorrect to say that the EIR Recast has not overhauled the *status quo* at all. On the contrary, the EIR Recast has departed from the text of its predecessor and is a completely new instrument which has rejected all existing concepts and rules.

Question 1.5

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

- (a) The EIR Recast is more rescue-oriented because all domestic rescue procedures fall within its scope.
- (b) The EIR Recast is more rescue-oriented because it harmonises all substantive aspects of national insolvency laws.
- (c) It is incorrect to say that the EIR Recast is more rescue-oriented than the EIR 2000, as the latter was already heavily rescue-focused.
- (d) The EIR Recast is more rescue-oriented because its scope was extended to cover pre-insolvency proceedings and secondary proceedings can now also be rescue proceedings.

Question 1.6

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

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

- (b) Rules on co-operation and communication between courts were to be refined; the concept of COMI was to be abandoned and a new jurisdictional concept was to be found; the Recast Regulation was to apply to Denmark.
- (c) The Recast Regulation was to apply to private individuals and self-employed; a common European-wide insolvency proceeding was to be added to the Regulation.
- (d) The Regulation was meant to fully embrace the universalism principle by abandoning the concept of secondary proceedings; the Regulation was meant to mostly promote out-of-court settlement and abandon all intervention of a judicial or administrative authority in cross-border proceedings.

Question 1.7

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

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

Question 1.8

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

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

C was the correct answer.

Question 1.9

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

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

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

B was the correct answer.

Question 1.10

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

Assume that:

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

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

- (a) Within two (2) months following the publication date, as guaranteed by the French law (law applicable to the creditor).
- (b) Within one month, as stipulated in the applicable *lex concursus secundarii* (law of the insolvency proceeding at issue).

(c) Within 30 days following the publication of the opening of insolvency proceedings in the insolvency register of Spain.

(d) Within the time limit prescribed by the *lex concursus* of the main insolvency proceeding (Irish law).

C was the correct answer.

Total marks: 6 out of 10.

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks] 2

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

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

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

[Type your answer here]

Statement 1: Article 7(2)(m) and Article 16 on Detrimental Acts, Article 36 and Recital 42 of the EIR Recast which provides the following:-

Article 7(2)(m) provides that "The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. In particular, it shall determine the following: (m) the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors.

Article 16 provides that Point (m) of Article 7(2) shall not apply where the person who benefited from an act detrimental to all the creditors provides proof that: (a) the act is subject to the law of a Member State other than that of the State of the opening of proceedings; and (b) the law of that Member State does not allow any means of challenging that act in the relevant case.

Article 36 on the right to give undertaking by insolvency practitioner in the main insolvency proceeding in order to avoid secondary proceedings.

Recital 42 which confers on the insolvency practitioner in main insolvency proceedings the possibility of giving an undertaking to local creditors that they will be treated as if secondary insolvency proceedings had been opened. That undertaking has to meet a number of conditions set out in this Regulation, in particular that it be approved by a qualified majority of local creditors. Where such an undertaking has been given, the court seised of a request to open secondary insolvency proceedings should be able to refuse that request if it is satisfied that the undertaking adequately protects the general interests of local creditors. When assessing those interests, the court should take into

account the fact that the undertaking has been approved by a qualified majority of local creditors.

Statement 2: Recital 3 of the EIR Recast which provides that “The proper functioning of the internal market requires that cross-border insolvency proceedings should operate efficiently and effectively. This Regulation needs to be adopted in order to achieve that objective, which falls within the scope of judicial cooperation in civil matters within the meaning of Article 81 of the Treaty.”]

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

The three (3) examples of modified universalism approach as set out in the EIR Recast are the following provisions:

(1) Article 1 and Article 2(4) in relation to Annex A to the EIR Recast, which means that if a proceeding is not listed in Annex A, it does not trigger the application of the EIR Recast, and which means that any of those proceeding will not enjoy automatic recognition of the EU Member State;

(2) Articles 25, 26 and Article 27 on matters of jurisdiction where it designates the Member State the courts of which may open insolvency proceedings whereas the territorial jurisdiction is still determined by the national or domestic laws; and

(3) Recitals 23 and 40 in relation to Articles 2(10) and 3(1) where the courts of the Member State within the territory of the debtor’s COMI is situated has jurisdiction to open proceedings but pursuant to Recital 23, secondary proceedings may be opened in parallel in the Member State where the debtor has 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

The following are three (3) provision in the EIR Recast that deal with the cross-border cooperation and communication between courts:

(1) Article 42 of the EIR Recast which provides that the EIR Recast confers on the insolvency practitioner in main insolvency proceedings the possibility of giving an undertaking to local creditors that they will be treated as if secondary insolvency proceedings had been opened. That undertaking has to meet a number of conditions set out in this Regulation, in particular that it be approved by a qualified majority of local creditors. Where such an undertaking has been given, the court seised [seized] of a request to open secondary insolvency proceedings should be able to refuse that request if it is satisfied that the undertaking adequately protects the general interests of local creditors. When assessing those interests, the court should take into account the fact that the undertaking has been approved by a qualified majority of local creditors.

The aforesaid provision, therefore, requires cooperation between the court that that received a request to open an insolvency proceeding and the other court which has received similar request to open proceeding.

(2) Article 57 on insolvency proceedings of members of group of companies in cross border insolvency proceedings, the courts are mandated to cooperate and coordinate with each others.

(3) Recital 50 where the courts of the Member States may cooperate on the appointment of insolvency practitioners.]

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]

(1) Unilateral Undertaking, pursuant to Article 36 in order to avoid the opening of secondary insolvency proceedings, the insolvency practitioner in the main insolvency proceedings may give unilateral undertaking in respect of the assets located in the Member State in which the secondary insolvency proceedings could be opened such that when distributing those assets or the proceeds received as a result of their realisation, it will comply with the distribution and priority rights under national law that creditors would have if secondary insolvency proceedings were opened in that Member State. The undertaking shall specify the factual assumptions on which it is based, in particular in respect of the value of the assets located in the Member State concerned and the options available to realise such assets.

(2) The right to request the opening of secondary insolvency proceedings pursuant to Article 37, which request can be done by the insolvency practitioner in the main insolvency proceedings or any other person or authority empowered to request the opening of insolvency proceedings under the law of the Member State within the territory of which the opening of secondary insolvency proceedings is requested.

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] 4

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]

While Recital 1 recognized the general success of the EIR 2000, the European Commission, however, deemed it desirable to improve the application of certain of its provision in order to enhance the concept on equality of creditors, effective administration of the insolvency estate and the maximisation of the return of creditors. The following are some changes made in the EIR Recast

(1) the right to file claims which has been recognized to cover both local and foreign creditors in both main insolvency proceeding and/or in the secondary insolvency proceedings, and which can be done in any form. This new approach makes it easier for any creditors to be involved in the insolvency proceedings;

(2) the principle on return and imputation as set out in Article 23, which aligns with on the principle of equality of treatment of creditors. This highlights that unless a special circumstance applies, for example rights in rem of certain creditors, all creditors should be treated equally. Under Article 23, where a creditor obtains satisfaction, either total or partial, of its claims on the assets of the debtor situated within the Member State other than the state of the main insolvency proceeding, the creditor is under obligation to return the same to the insolvency practitioner;

(3) notification of creditors and insolvency registers, to provide notice on the part of the relevant creditors to file its claim in the insolvency proceedings. In the duty to inform the creditors, under the EIR it was discretionary on the part of the liquidator to make publication on the opening of the insolvency proceeding whereas under the EIR Recast it is mandatory for the insolvency practitioners or debtors in possession to request publication of the notice on the opening of insolvency proceedings, whether main or secondary, at the place of the debtor's establishment in accordance with the publication procedures provided for in that Member State pursuant to Article 28(1). On the establishment of insolvency register, this is necessary for the efficient functioning of cross-border insolvency proceedings, which relies on the exchange of information between insolvency practitioners, courts and creditors;

(4) communication and cooperation in insolvency cases, between insolvency practitioners, between courts, and between insolvency practitioners and the courts;

(5) prevention of secondary insolvency proceedings, the introduction of synthetic secondary proceedings with the right to give undertaking by the insolvency practitioner to guarantee adequate protection of the general interest of the local creditors, and the stay of secondary insolvency proceedings; and

(6) provision on insolvency of group of companies as set out in Chapter V of the EIR Recast, which introduced a distinct mechanism on insolvency of companies belonging to a group through the concept of group-coordination.

Yes but you forgot the extension of the scope of the EIR Recast to pre-insolvency proceedings.

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.

[Type your answer here]

While the general principles in the EIR have been retained under the EIR Recast, the following improvements / innovations made their way into the EIR Recast:

(1) Clarifications on centre of main interest (COMI) where COMI shall be presumed to be the registered address, provided it has not been changed in the last 3 months. The EIR Recast provides for the guidelines on when the presumption of the COMI when the same has been

changed within the relevant period. This new rebuttal on the presumption of COMI addresses issues on last minute changes on registered address to be able to carry out forum shopping on where to file the insolvency proceedings in jurisdictions with favourable outcome;

(2) Introduction of synthetic secondary proceedings, which is the fusion of the principle of unity and universality. While the EIR Recast maintains the principle of universality in relation to the main insolvency proceedings, there are provisions and restrictions on matters of secondary proceedings. Under the EIR Recast, in order to avoid the opening of multiple secondary proceedings which could become time consuming and too costly, the EIR Recast provides for a procedure where the insolvency practitioner in the main insolvency proceedings could provide an undertaking in order to avoid the opening of the secondary proceeding if the court before whom the application to open the secondary proceeding is asked is satisfied that the scope of the undertakings adequately protects the general interest of the local creditors; and

(3) Insolvency of group of companies as provided under Chapter V provides better a framework in dealing with financial difficulties of companies within a group. The EIR Recast provides for the definition on in Article 1 (13) on what constitutes 'group of companies' and set out guidelines on better coordination between courts in relevant jurisdictions and with the insolvency practitioners, and amongst and between themselves.

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.

[Type your answer here

(1) On the scope, the EIR Recast remains to cover only public collective proceedings as set out in Article 1, which left private or confidential proceedings out of its scope despite the fact that the latter could potentially be more expeditious and less expensive proceedings;

; and

(2) While the general refinement of the concept of COMI provides clarity on the matters of jurisdiction determination for instance, the express inclusion of the guidelines on when the presumption on COMI can be rebutted provides for an avenue of abuse. For example, the 3 months period is too short, and any abusive company wanting to circumvent the presumption could just change in a little over that period. I would suggest that a period, if need be included, should be extended to a year or 2 years as this cover at least one financial period and a confirmation that a change of COMI is not triggered by the knowledge of potential or apparent insolvency of the relevant company.]

Total marks: 14 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

Yes, the Dublin High Court have international jurisdiction to pen **[open]** the request insolvency proceedings pursuant to Article 3 of the EIR 2000. The said Article provides that the courts of the Member State within the territory of which the centre of a debtor's main interest is situated shall have jurisdiction to open insolvency proceedings, and that in the case of a company or legal person, 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. Recital 13 provides that the 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertain-able by third parties. In the case of Eurofoods IFSC Ltd, C-341/40, ECLI: EU:C:2006:281 (2 May 2006) the Grand Chamber ruled that (paragraph 37) "where a debtor is a subsidiary company whose registered office and that of its parent company are situated in two different Member States, the presumption laid down in the second sentence of Article 3(1) of the Regulation, whereby the centre of main interests of that subsidiary is situated in the Member State where its registered office is situated, can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect. That could be so in particular in the case of a company not carrying out any business in the territory of the Member State in which its registered office is situated. By contrast, where a company carries on its business in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by the Regulation."

Premises considered, the Dublin High Court has jurisdiction.

]

Question 4.2 [maximum 5 marks] 2

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

Yes, the EIR Recast will be applicable because pursuant to Articles 84 and 92, the provisions of the EIR Recast shall apply to insolvency proceedings opened after 26 June 2017, and pursuant to Article 2(8), "the time of the opening of proceedings" means the time at which the judgment opening insolvency proceedings becomes effective, regardless of whether the judgment is final or not. In this case, the Dublin High Court opens the respective proceedings on 30 June 2017, which is after the applicability date of the EIR Recast.]

Some steps are missing here.

- The EIR Recast will be applicable. The logical order of the steps to be taken is the following:
- Article 3(1) EIR Recast. COMI of Cardinal Home is in the EU (and not in Denmark), i.e. in Ireland (as stated in the answer to Question 4.1.). YES

- Article 1(2) EIR Recast. Cardinal Home is not a credit institution, insurance undertaking or any other 'excluded' entity. YES
- Article 2(4), Recital 9, Annex A EIR Recast. The opened proceeding 'Examinership' is listed in Annex A to the EIR Recast. YES
- Article 2(7), 84(1), 92 EIR Recast. The proceeding in question was opened on 30 June 2017, i.e. after the EIR Recast has entered into force. The filing date (22 June 2017) is not determinative for the temporal scope. YES

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]

Yes, Article 3(2) of the EIR Recast provides that where the centre of the debtor's main interest is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if it possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State. In addition, Article 3(4) allows opening of territorial secondary insolvency proceedings in certain permitted circumstances when a creditor whose claim arises from or is in connection with the operation of an establishment situated within the territory of the Member State where the opening of territorial proceedings is requested.

You needed to determine whether secondary proceedings could be opened against Cardinal Home. You failed to provide an answer and provide references to relevant CJEU jurisprudence.

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

Total marks: 8 out of 15.

*** End of Assessment ***

Total marks: 38 out of 50.