



**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.

### Question 1.9

In a cross-border dispute, the main proceedings before the Italian court opposes Fema Srl (registered in Italy) and Lacroix SARL (registered in France). The case concerns an action to

set aside four contested payments that amount to EUR 850,000. These payments were made pursuant to a sales agreement dated 5 August 2020, governed by German law. The contested payments have been made by Fema SrL to Lacroix SARL before the former went insolvent. The insolvency practitioner of the company claims that under applicable Italian law, the contested payments shall be set aside because Lacroix SARL must have been aware that Fema SrL was facing insolvency at the time the payments were made.

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

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

### Question 1.10

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

Assume that:

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

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

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

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

**Total marks: 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.’  
– Articles 36/38

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

Statement 1: “Right to give an Undertaking” (“Synthetic” Secondary proceedings) is a concept under article 38(2) of the EIR recast read with Article 36 of the EIR Recast, whereby in order to stay/avoid a secondary proceeding (as secondary proceedings normally complicate the operations of the debtor, increases insolvency cost and lengthen the process) an undertaking is given by the insolvency practitioner of the main proceeding before the court handling the initiation of secondary proceedings, and the court is satisfied that the local creditors will receive the benefits of secondary proceedings without the secondary proceeding being opened (as if it was opened), thereby not opening the secondary proceedings.

Statement 2: “Cooperation and Communication between courts” is an important feature of the EIR recast under article 42(1), whereby the court which has opened an insolvency proceeding or before which an insolvency opening is pending will cooperate with another court before which the opening of insolvency proceedings is pending, this is to ensure efficient cross-border insolvency proceedings and also to prevent abuse forum shopping.

### **Question 2.2 [maximum 3 marks] 3**

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

Modified Universalism is the hallmark of EIR Recast, this can be understood by the following three examples:-

- a) Initiation of Secondary Insolvency Proceedings – Once the main proceeding has been opened (pure universalism), secondary proceedings are also allowed to be opened to safeguard creditors interest pertaining to assets located in a particular geography. Thereby modified universalism
- b) Exceptions to Application of Lex Concursus (modified universalism) – Once the main proceedings are opened the insolvency proceedings are governed by “Lex

Concursus". However there are exceptions wherein the Lex Concursus is not applicable:-

- (i) Article 8 , "Third Parties Right in Rem"- Lex concursus will not effect the right of creditors or third parties in respect of assets of a debtor which are situated within the territory of a member state at time of opening of the proceedings
  - (ii) Article 16 of the EIR recast – Avoidance of acts detrimental to the creditors as per Article 7(2)(m) shall not be triggered in case the beneficiary is able to prove that the act is subject to the law (lex causae) of a member state.
  - (iii) Article 13- Contracts of employment shall be governed by the laws of the member state applicable to the employment contract
- c) Public Policy Exceptions- Article 33 of the recast states that any member state can refuse to recognise insolvency proceedings opened in another member state or refuse to enforce a judgement where the effects of such recognition and enforcement would be "manifestly" contrary to that states public policy.

### **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.

Cross Border Cooperation and Communication between courts is an obligation under EIR recast as under:-

- a) Article 42(1) of the EIR recast obliges the court which has opened an insolvency proceeding or before which an insolvency opening is pending to cooperate with another court before which the opening of insolvency proceedings is pending, this is to ensure efficient cross-border insolvency proceedings and also to prevent abuse forum shopping. This cooperation extends to a time even before the insolvency proceedings
- b) Article 42(3) of EIR Recast obliges the courts to coordinate the administration and supervision of the assets of the debtor, to synchronise the hearing of the various insolvency proceedings opened against the debtor.
- c) Recital 50 of the EIR Recast obliges the courts to appoint a common single insolvency practitioner for all the several insolvency proceedings opened against a debtor, provided that it is compatible with the territorial eligibility criteria of each insolvency proceeding.

### **Question 2.4 [maximum 2 marks] 2**

It is widely accepted that the opening of secondary proceedings can hamper the efficient administration of the debtor's estate. For this reason, the EIR Recast has introduced a number of legal instruments to avoid or otherwise control the opening, conduct and closure of secondary proceedings. Provide **two (2) examples** of such instruments and briefly (in 1 to 3 sentences) explain how they operate.

- 1) "Undertaking" & "Synthetic Secondary Proceedings" are one such instrument under article 36 and Article 38(2) of EIR recast whereby on an UNDERTAKING of the Insolvency Practitioner of the main proceedings the court (before which opening of secondary proceedings is pending) is satisfied that the creditors will receive the same treatment as they would have in case the secondary proceedings were opened, will stay the opening of the secondary proceedings
- 2) Stay of opening of the secondary proceedings under Article 45 of EIR Recast, is an instrument whereby the secondary proceeding is stayed so as to make efficient utilization of the stay against enforcement in the main proceedings.



**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.

**Wider Scope**

The recast EIR has an enlarged scope in the sense that its provisions will be engaged in relation to certain pre-insolvency proceedings in member states, whereas the EIR applied only to each member state's traditional insolvency proceedings. The intention behind these changes is to encourage further the rescue culture as opposed to a culture in which companies with potentially viable businesses may be liquidated without first exploring other options.

Article 1 of EIR recast clearly says that EIR recast applies to public collective proceedings, including interim proceedings for the purpose of rescue, adjustment of debt, reorganization or liquidation.

Annexure-A included in EIR recast no doubt is rigid but it opens the door for application of EIR recast without further examination by the courts of other member states as to whether the conditions of the regulations are met.

**COMI and prevention of Forum Shopping**

The EIR had no definition of COMI, however EIR recast has under article 3(1) COMI is defined, thereby paving way for a unambiguous initiation of main proceedings by determining the COMI of the debtor absolutely. Unambiguous recognition of COMI has also curbed the practise of "forum shopping" by the debtor so as to get initiated insolvency proceedings in a favourable jurisdiction to the detriment of the creditors

**Cooperation and Communication between the various courts, professionals**

One of the important improvement of EIR is the introduction of article 41(1), article 42(1) whereby mechanism for cooperation between courts of main /secondary proceedings, between insolvency professionals of main/secondary proceedings, court and professionals is developed thereby leading to an efficient and fruitful culmination and handling of the insolvency resolution. Mechanism for such cooperation is also established in cases of group insolvencies

**Prevention of Secondary Proceedings**

The concept of secondary proceedings though encouraged by EIR recast, still the secondary proceedings are prevented from creating complexities in the main proceedings by the concept of "Synthetic Proceedings via an undertaking" or by concept of "Stay" on the secondary proceedings

**Introduction of concept of Group Insolvencies**

Concept of “ Group Insolvency”,and “Group Insolvency coordinator” are introduced so as to facilitate possibility of resolution of insolvency of group companies. It is a departure from the earlier system of entity-by-entity resolution of the companies belonging to the same insolvent group

**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.

Some of the major improvements/innovations in the EIR recast are:-

- 1) **Addressing the Issue of “Insolvency of Corporate groups”** - The introduction of Chapter V (a totally dedicated chapter) for group insolvencies is a major innovation of EIR recast. It provides a mechanism to achieve a resolution of a group of companies. Earlier each company (of the group) was being treated as a separate entity and was subject to individual resolution, after the recast it is attempted that proceedings of several companies are opened in a single jurisdiction under a single insolvency practitioner (Recital 53).

A definition of “group of companies” is given under article 2(13) and provisions of cooperation and communication among courts, practitioners in case of group insolvency companies are enshrined in articles 56,57,58.

Concept of “Group Coordination Proceedings” under a “Group Coordinator) as per article 71(1) is a new feature which actually goes a long way in achieving a cost efficient, time efficient and seamless solution to complex cases of group/multinational insolvencies.

- 2) **Discourage the use of Secondary Insolvency-** Although Secondary Insolvency proceedings are in line with the ethos of modified universalism and provides local creditors control over the assets of the debtor within the particular member state , yet It is an established fact that secondary insolvency makes the main proceeding more complex, time consuming, costly and uncertain.

To curtail this shortfall, Article 36 and 38(2) of the EIR introduces a concept of “Synthetic Proceedings” wherein on an undertaking the secondary proceedings is not opened if the courts are satisfied that the creditors would be taken care of in the same manner had they been in case the secondary proceeding were opened.

Article 45 of the recast also allows the “Stay” of the secondary proceedings , so as to allow the moratorium under the main proceedings to result into some resolution for the debtor. EIR recast lifts the restrictions so that secondary proceedings are no longer confined to being winding up proceedings;

- 3) **Insolvency Registers-** The efficient functioning of cross border insolvency proceedings is possible only when the court opening an insolvency proceeding is in knowledge as to whether the debtor is already facing insolvency proceedings in another member state. EIR recast has made considerable progress in this area, article 24 of the recast directs the member states to establish and maintain one or

several registers in which information concerning insolvency proceedings is published “Insolvency Registers”

**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.

- 1) **Inadequate mechanism to resolve Group Insolvency-** In today's world wherein operations of large companies are parcelled into different entities to achieve specialization and economies of scale and these companies are also located in different jurisdictions (to make use of tax incentives and cheaper factors of production), the EIR recast falls terribly short of addressing the issue of Group Insolvency Resolution.

Although it infuses the concept of “Group Insolvency Coordinator” and also encourages opening of insolvency of several group companies in a single jurisdiction, it also has mechanism to improve cooperation and communication among the various courts, insolvency professionals involved in proceedings of various group companies, the measures are inadequate.

There is still not a single unified approach to open a Group Insolvency Proceeding and a single resolution of the ENTIRE GROUP is not conceived in the EIR Recast.

This can be overcome by inserting a concept of “MASTER INSOLVENCY PROCEEDINGS “ for the ENTIRE GROUP. Wherein a master proceeding will be opened in the jurisdiction which is the COMI of the Ultimate Holding/Management Company/Entity. Once master proceedings are initiated, a MASTER INSOLVENCY Professional be appointed and thereafter several insolvency proceedings in the line of mechanism of main/secondary proceedings be opened but none of these proceedings shall be allowed to hinder the resolution under the master proceedings.

- 2) Application of EIR restricted due to:-
- a) Annexure A list of proceedings, which captures the list of national proceedings that are automatically recognised under EIR recast misses out some important one like UK scheme of Arrangement. This annexure based system is rigid and somewhat inflexible.
  - b) Excluded Entities – Entities such as Insurance undertakings, Credit institutions, Investment firms, collective investment undertakings are not included in the EIR Recast net under article 1(2) of the recast.

This flaw can be corrected by creating a separate mechanism for handling financial insolvencies. Since the financial institutions are vital for any country, so the insolvencies of financial institutions need to be differently handled, hence the need for a separate mechanism.

Also the rigidity of Annexure-A be disposed off.

**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.

The petition to open examinership proceedings were filed in Dublin High Court on 22/6/2017 (ie before 26/6/2017 – date of EIR Recast), therefore EIR 2000 will apply in the proceedings.

The company Cardinal Home is registered in Ireland, it also had its first store in Ireland, we can therefore presume that the management of the company was controlled from Ireland, therefore the COMI (Centre of Main Interest) of the company is Ireland.

Although EIR 2000 does not have a definition of COMI, yet it has provided some guidance to COMI under recital 13. Reference be made to the important order in the EUROFOOD IFSC Ltd case, wherein the High Court at Dublin had refused to recognise an insolvency proceeding opened in Italy.

Therefore, in the present case, since the COMI of the company is in Ireland, the High Court at Dublin has the jurisdiction to open examinership proceedings as the main proceedings against the company.

##### **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.

EIR recast scope has the following pillars:-

- a) Material Scope- Whether the applicable Proceedings is covered by the RECAST in Annexure-A
- b) Temporal Scope- At what point of time is the proceeding been adjudicated. EIR recast comes into force on 26/6/2017.

- c) Personal Scope- Nature of the person against whom the proceedings are initiated. There are some “Excluded undertakings” against (Banking companies, insurance companies) against whom the recast is not applicable
- d) Territorial Scope- Whether the country where the proceedings is being initiated a member of the EU , as EIR recast is applicable on members of EU only.

Therefore the steps to ascertain whether the EIR recast is applicable in the case of Cardinal Home is as under:-

- i) The Debtor has a COMI in member state of the EU – Yes-Ireland – EIR recast applies
- ii) The Debtor is not an “excluded” undertaking (ie not a Bank, insurance Company etc)- Yes Not an Excluded entity – EIR Recast Applies
- iii) The Proceedings opened against the Debtor is listed in Annexure-A of the Recast- Yes- Examinership Proceedings are part of Annexure A- EIR recast applies
- iv) The Proceedings is opened after 27/6/2017- Yes – EIR recast applies

Therefore the main proceedings can be opened in Ireland under EIR recast

#### **Question 4.3 [maximum 5 marks] 2.5**

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.

Yes, Secondary Insolvency Proceedings can be opened in Italy under the EIR Recast. The EIR recast under article 3(2) allows the initiation of Secondary Proceedings in any member state where the debtor has an “Establishment”. Now “Establishment” is defined in the article 2(10) of the EIR Recast.

“Establishment” means any place of operation wherein the debtor has carried on operations in a period 3 months prior to the request of opening of main proceedings. Therefore in the present case of Cardinal Homes, the company has a store in Milan (Italy) in operations since 2010, therefore it has an “establishment” in Italy.

Article 3(4) of the Recast allows for a secondary proceedings to be opened after the main proceeding has been opened. Since in the present case the main proceedings have been opened in Ireland, the secondary proceedings can be opened in Italy (a Member state of the EU).

A separate insolvency estate and application of “Lex Concursus Secundarii” shall come into force on opening of the secondary insolvency proceedings in Italy.

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: 12.5 out of 15**

**\* End of Assessment \***

**Total marks: 46.5 out of 50**