



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).

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: 8 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.”

The first statement describes the obligation under Article 38(2) on a court seised [seized] of a request to open secondary proceedings, at the request of an insolvency practitioner who has given an undertaking in accordance with Article 36, not to open secondary insolvency proceedings if it is satisfied that the undertaking adequately protects the general interests of local creditors in the jurisdiction of the contemplated secondary proceedings. Even though the secondary proceedings are not opened, those local creditors will nonetheless receive the benefits to which they are entitled under the *lex concursus secundarii*. The hypothetical secondary proceedings are known as synthetic or virtual proceedings.

The second statement describes the obligation of court-to-court cooperation found in Article 42(1).

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 refers to a hybrid cross-border insolvency model, in which the unity and universality of the primary or main proceedings is limited by protections afforded to local creditors in other jurisdictions in the form of secondary proceedings.

Three examples of provisions in the EIR Recast which facilitate modified universalism are as follows. Firstly and most importantly, the EIR Recast permits main proceedings under Article 3(1) to co-exist alongside secondary proceedings under Article 34. Secondly, difficult questions which may arise over the conflict of laws are streamlined by Article 7, which provides that the law applicable to insolvency proceedings and their effects shall be that of the Member State in whose territory such proceedings are opened. This model is subject to limited exceptions for particular rights at Articles 8-18, for example, rights in rem (Article 8) and employment rights (Article 13). Thirdly, the smooth functioning of the modified universalism approach is facilitated by the co-operation and communication obligations which are imposed by Articles 41-43. These obligations go beyond the EIR 2000. In particular, Article 42 imposes an obligation of cooperation on any court seised of insolvency proceedings, whether main or secondary, or any court before which a request to open such proceedings is pending.

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.

The main court-to-court cooperative obligation is imposed by Article 42(1). Article 42(3) provides some examples of how that obligation might be fulfilled, but makes clear that the manner of cooperation lies in the court's discretion ("by any means that the court considers appropriate"). Article 42(1) makes clear that it applies to both primary and secondary proceedings, and also territorial (independent) proceedings. Per Article 42(1) first sentence, the only limitation on such cooperation is compatibility with national rules applicable to those proceedings (for example, the Irish constitutional provision of open justice may limit an Irish court's ability to communicate with foreign courts in advance of the Irish parties being heard in court).

A second provision of the EIR which requires court-to-court cooperation is Article 57(1). This article sits in Chapter V and applies to group coordination proceedings. Again, Article 57(3) provides examples of best practice, but leaves the means of cooperation to the discretion of the courts concerned. The costs of such cooperation are costs in the proceedings (Article 59).

A third provision dealing with court-to-court cooperation is Recital 50. While not directly enforceable, because it is not an operative part of the EIR Recast Regulation, it encourages courts to cooperate by coordinating the appointment of insolvency practitioners (IP), or appointing a single IP across several 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.

The two examples of controls on secondary proceedings are, firstly, "synthetic" or "virtual" proceedings, and secondly, the temporary stay at the request of the IP or debtor in possession.

I explained the concept of synthetic or virtual proceedings at answer 2.1 above. Here, I focus on how it operates. Synthetic proceedings operate in essentially three stages. First, the IP gives an undertaking to the local creditors. The undertaking must comply with the requirements set out in Article 36 and the hypothetical *lex concursus secundarii* (Article 36(2)). Second, the IP must request the court seised of the request to open secondary proceedings not to do so (Article 38(2)). The court is obliged to grant that request; the language of "shall" in Article 38(2) is mandatory and shows that no discretion is afforded to the court (assuming that local law is not thereby contravened). Third, the IP must fulfil his promise to the local creditors as per the undertaking. If the IP fails to keep this promise, he or she shall be liable to those local creditors in damages (Article 36(10)).

The second control on secondary proceedings I will discuss is intended to facilitate negotiations between the debtor and his or her creditors. Where there is also a corresponding temporary stay of enforcement proceedings in the jurisdiction of the main proceedings, Article 38(3) gives the court seised of a request to open secondary proceedings a discretion to stay those proceedings for up to 3 months, provided that the interests of local creditors are suitably

protected during the stay. Relief under Article 38(3) is only available on the application of the IP. It is not automatic. Article 38(3) paragraph 2 empowers the court to order protective measures, including the power to freeze assets (i.e. prevent the removal or disposal of assets within the jurisdiction). The circumstances in which the temporary stay must or may be lifted are outlined in Article 38(3) paragraphs 3 and 4. In any event, the stay must logically expire after 3 months, since the court's power under Article 38(3) paragraph 1 is limited to a power to stay for up to 3 months.

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.

On 12 December 2012, the European Commission published its Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1356/2000 on insolvency proceedings COM (2012) 744. The Commission explained that, while the EIR 2000 was generally considered to operate successfully in facilitating cross-border insolvency proceedings within the EU, public consultations and empirical studies had revealed certain practical problems with the application of EIR 2000. The five main shortcomings identified by the Commission were as follows.

Firstly, the EIR 2000 did not encompass pre-insolvency proceedings or hybrid proceedings (i.e. procedures which leave the pre-insolvency management team in place). Such proceedings were considered desirable to include within the scope of the new EIR Recast as they were thought to promote the chances of successfully restructuring struggling businesses. This was addressed by including certain pre-insolvency and hybrid proceedings in the list of national insolvency proceedings at Annex A of the Regulation, which defines the scope of the EIR Recast Regulation by reference to Article 2(4) and the definition of "insolvency proceedings".

Secondly, the Commission identified difficulties in determining which Member State was competent to open insolvency proceedings due to difficulties applying the concept of COMI (Centre of Main Interests) in practice. To tackle this, the Commission proposed clarification of the jurisdictional rules and an improvement of the procedural framework for determining jurisdiction. This proposal is reflected *inter alia* in the additional rebuttable jurisdictional presumptions applicable to sole traders and individuals contained in Article 3(1).

Thirdly, the Commission identified that the opening of secondary proceedings could hamper the efficient administration of the debtor's estate. To combat this problem, the EIR Recast empowers a court seised of a request to open secondary proceedings to reject the request or to temporarily stay the secondary proceedings (see Articles 38(2) and 38(3)).

Fourthly, there were problems relating to the rules on publicity of insolvency proceedings and the lodging of claims. Under the EIR 2000 there was no mandatory publication system or

register of the decision of Member States in which proceedings had been opened, nor in Member States in which the debtor had an establishment. There was no European Insolvency Register. These issues were addressed in the EIR Recast by mandatory rules on creditor notification (Article 28) and the establishment of insolvency registers (Article 24) including a centralised search engine for those registers (Article 25). There is also a broader regime of cooperation and communication underpinning the EIR Recast than was the case under the EIR 2000, so there should be altogether greater transparency and accessibility of information about insolvency proceedings (see, for example, the court-to-creditor notification obligation under Article 54).

Fifthly, the EIR 2000 contained no specific rules dealing with the insolvency of a multi-national corporate group. The Commission identified that a large number of cross-border insolvencies did involve corporate groups. In a radical innovation from the EIR 2000, the EIR Recast introduced a whole chapter of provisions dealing with multinational group insolvencies (Chapter V).

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 important innovations to promote efficiency in cross-border insolvencies are: (1) the additional jurisdictional presumptions of Article 3(1); (2) the establishment of insolvency registers; and (3) the corporate group insolvency provisions of Chapter V.

The additional jurisdictional presumptions of Article 3(1) promote efficiency by reducing uncertainty for creditors, IPs and legal practitioners. The EIR 2000 contained a presumption that, where the debtor was a company or legal person, the place of the registered office was presumed to be the COMI. That presumption reduced uncertainty about which Member State would have jurisdiction over the main proceedings. The EIR Recast provides two additional jurisdictional presumptions at paragraphs 3 to 4 of Article 3(1) which apply in the case of sole traders and individuals. It is important to note that, to avoid injustice through forum shopping, the presumptions are rebuttable. This is made clear in the text of the regulation itself (see also the final sentence of each of paragraphs 2 to 4 of Article 3(1)). Article 3(1) now also helpfully defines COMI. Under the EIR 2000, that definition was in somewhat uncertain terms (“should correspond to”) in a non-operative part of the Regulation (Recital 13). Again, this change will promote legal certainty.

A second important innovation to promote the efficiency of cross-border insolvencies is the establishment of one or more official insolvency registers in each Member State (except Denmark which has opted out of the Regulation). The registers must include the information required by Article 24(2). Importantly, this includes the contact details of the IP appointed in the main proceedings and the time limit for lodging claims (Article 24(2)(g) and (h)). This information should hopefully make it much easier for a foreign creditor to know how to raise a claim, which might reduce the need for a multiplicity of secondary proceedings (especially when combined with the IP’s optional undertaking under Article 36).

A third, major innovation from the EIR 2000 which should make cross-border insolvencies more efficient is the new regime for insolvent corporate groups (Chapter V). As the Commission identified in 2012, many cross-border insolvencies concern companies which belong to the same corporate group. Articles 61-77 establish a new group coordination procedure, which may be commenced by an IP appointed in insolvency proceedings opened

in relation to any company within the group. A “first seised” rule then applies (Article 62). The group coordination procedure is supported by obligations of cooperation and coordination contained in Articles 56 to 60. The procedure allows a court in a single jurisdiction to deal with the insolvency of several companies in the same corporate group as long as those companies have their COMI in that jurisdiction (Recital 53). This procedure is designed to reduce costs and increase the likelihood of a successful rescue of the group as a whole.

Question 3.3 [maximum 5 marks] 4

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.

One missed opportunity concerns group proceedings. The court opening proceedings can only exercise jurisdiction over companies which have their COMI within the territory of that court’s jurisdiction (Recital 53). This limitation is intended to respect the separate legal personality of each company in the group (Recital 54), but it curtails the ability of the coordinating court to streamline the group’s affairs with a view to restructuring. In my view, it would be preferable if the COMI restriction were lifted in the case of group coordination proceedings and there could be a substantive consolidation of all insolvency proceedings related to companies within the group, so that all companies within a group could be subject to a single insolvency proceeding in one Member State (e.g. where the parent company has its COMI). The safeguards which already exist to protect foreign creditors (secondary proceedings, notification and publication requirements, and so on) would in my view provide adequate safeguards against possible injustices which could arise from centralisation of group insolvency proceedings.

A second missed opportunity concerns the carve out for rights *in rem* (Article 8). While the policy justifications for certain other carve outs is clear and compelling, in particular, employment contracts and contracts for the use and acquisition of immovable property (Articles 13 and 11), in my view the carve out for rights *in rem* undermines the equal treatment of creditors because it potentially privileges a creditor from a jurisdiction other than where the insolvency proceedings are taking place. It appears to me to run contrary to the fundamental principles of equal treatment and fair competition which supposedly underpin the common market, that a foreign creditor should be in a potentially better position than a domestic lender upon the insolvency of the debtor, because the foreign creditor may be able to assert a more advantageous position under foreign law. The breadth of Article 8(c), which seems likely to result in potentially arbitrary results depending on the particular remedies provided in domestic law for a given wrong, underscores the unsatisfactory nature of the rights *in rem* carve out. Specifically, the causes of action which might fall within Article 8(c) seem likely to be considerably broader in a common law system, such as Ireland, than would be the case in a civil law system like Germany, because the evolution of the common law has led to a position in which a remedy of delivery up or restitution might often be sought as an alternative remedy (e.g. a breach of bailment claim in parallel with a breach of contract or negligence claim). That seems to give an unfair advantage to creditors from common law systems. **How do you propose this flaw be corrected?**

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] 2.5

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 question states that I should assume the EIR 2000 applies. I will therefore assume that the examinership procedure falls within the EIR 2000, because the Regulation would not apply if examinership were out of scope (Article 1(1) EIR 2000). **This is not necessary true. You would need to check whether examinership is listed within Annex A to determine whether it applies.**

The insolvency concerns only one debtor: Cardinal. The court which has international jurisdiction over the main insolvency proceedings is the court where the debtor has the Centre of its Main Interests (COMI), although another court may have jurisdiction to open secondary proceedings over assets in that jurisdiction (Article 3(1) and Recital 12).

The 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 (Recital 13). In the case of a company, as here, the place of the registered office shall be presumed to be the COMI in the absence of proof to the contrary (Article 3(1)). In *Eurofood IFSC Ltd*, Case C-341/04, 2 May 2006, the ECJ held that the presumption of COMI can only be rebutted by factors which are both objective and ascertainable by third parties. Such factors must establish on the balance of probabilities that an actual situation exists which is different from that which locating the COMI at the registered office is deemed to reflect (paragraph 34 of the judgment). The Court gave the example of a “letterbox” company not carrying out any business in the territory of the Member State where it is registered (paragraph 35).

The evidence to countervailing the presumption of COMI in this case would be the bank account held with an Italian bank, the warehouse in Milan, the credit agreement with an Italian bank, and the non-binding MOUs with local distributors in Spain. I am told that Cardinal performed well for several years, so I assume that these Italian and other international operations were not transitory (i.e. not very short term). To run a warehouse in Milan, Cardinal would have needed a lease or freehold (local property rights) and would have needed to employ or hire some local personnel for security and distribution roles. These are features which are objective and would likely be ascertainable by third parties, e.g. by a sign outside the warehouse, or by insignia on the workers’ uniforms.

What is not clear from the question is whether Cardinal continues to operate in Ireland. It had a store there in 2009, but there is no mention of other operations there. If the Irish registered office does not reflect real economic activity, if it is just a “letterbox”, then there would be a good argument that the COMI would be elsewhere – perhaps in Italy.

If the first shop in Ireland reflects a centre of economic activity, however, with for example design, manufacturing, distribution, corporate finance and/or strategic functions in Ireland, then I would not expect the presumption of COMI to be rebutted because the presumption would reflect the commercial reality. Assuming that the COMI is in Ireland (i.e. assuming that the contrary cannot be proven), the Irish court will have international jurisdiction over the main insolvency proceedings and may open the examinership proceedings.

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.

The EIR Recast will apply if the proceedings are within scope temporally, personally, materially and geographically. The main issue here is temporal, so I will deal briefly with the other points first before moving onto the temporal question.

Personal scope: Cardinal is not a bank, insurance company or another excluded entity, so it is within the personal scope of the EIR Recast (Article 1(2)).

Material scope: examinership proceedings are listed in Annex A as being within scope of the Regulation (Annex A and Article 2(4)).

Geographical scope: the Regulation applies to Ireland as a Member State of the EU which is not Denmark (postscript following Article 92).

Temporal scope: pursuant to Article 92, the Regulation enters into force on 26 June 2017. It applies only to insolvency proceedings opened after 26 June 2017 (Article 84(1)), so it is the opening of proceedings which is the relevant date. Assuming that the Dublin High Court opens the proceedings on 30 June 2017, the proceedings would be within scope of the Recast Regulation.

In conclusion, the examinership proceedings would be in scope of the Recast Regulation if opened by the Dublin High Court on 30 June 2017.

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.

Pursuant to Article 34 and Article 3(2), the Italian court shall have jurisdiction to open secondary proceedings if Cardinal has an establishment in Italy. The effect of such secondary proceedings will be limited to Cardinal's assets located in Italy.

"Establishment" is defined by Article 2(10) 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".

As alluded to at answer 4.1 above, there is evidence the Cardinal had both human means and assets in Italy over several years. If that is the case, then I consider that a court would

conclude that Cardinal did have an establishment in Italy and as such the Italian court would have international jurisdiction to open secondary proceedings there.

To explain in more detail, the assets which I conclude exist in Italy are, firstly, the warehouse and the goods in it. The warehouse is a physical asset, whether held on a leasehold or freehold basis, and it may contain furniture or other goods which Cardinal has title to sell. It is also possible that Cardinal may have some cash (although not enough to meet its liabilities as they fall due, since it is insolvent) in its Italian bank account.

The human resources which I infer Cardinal has in Italy are personnel to provide security for the warehouse and to fulfil stock management and distribution roles (without distribution there would be little point in having a warehouse).

I am told that Cardinal performed well for several years, so I assume that these Italian operations were not transitory (i.e. not very short term).

I conclude that Cardinal had a place of operations in Milan where it carried out non-transitory economic activity (manufacturing or buying and selling or distributing furniture) using human resources and assets in Milan for several years and at least for more than three months prior to the petition to open an examinership in Dublin (the main proceedings). That amounts to an establishment within the meaning of Article 2(10). On that basis, the Italian court has international jurisdiction to open secondary proceedings there.

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: 10.5 out of 15.

*** End of Assessment ***

Total marks: 42.5 out of 50.