



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.”

Statement 1: Article 36 – The insolvency practitioner in main proceedings may give a unilateral undertaking that assets located within a jurisdiction that secondary proceedings could be opened will be dealt with in accordance with that jurisdiction’s national law. Giving this undertaking creates ‘synthetic proceedings’. A court that is asked to open secondary proceedings in that jurisdiction should (on the insolvency practitioner’s request) decline to do so if they are satisfied the undertaking adequately protects the general interest of local creditors.

Statement 2: Article 42 – Courts of member states should use the cooperation framework set out in this article, which provides, inter alia, that where two courts are faced with application to open insolvency proceedings in respect of the same entity, they should cooperate to reach a conclusion.

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.

Article 3(2) and Recitals 23 and 40 – These provisions provide for the opening of secondary proceedings, that shall only be effective in respect of assets situated in the relevant state and which are territorial in nature. This modifies the universalist implications of having main proceedings which automatically bind creditors across all Member States.

Article 38 – This allows for the opening of ‘synthetic’ secondary proceedings, which again serve to modify the universalist implications of having one set of main proceedings.

Articles 8-18 – These articles provide exceptions to the general rule that the law applicable to an insolvency proceeding will be where the proceedings are opened. These exceptions, for example, Article 16 serves to ensure that parties maintain freedom to choose which law governs their agreements and the territorial implications that will follow.

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.

Article 42(1): Where a court is presented with a request to open insolvency proceedings, or has opened such proceedings, it must cooperate with another court also faced with an application to open insolvency proceedings.

Article 42(3): Courts of Members States have the power to coordinate the administration of the debtor's assets and affairs. This includes having the power to agree to synchronise the conduct of hearings between courts of different member states and to approve protocols for cooperation (between courts and between insolvency practitioners).

Article 57(1): In group insolvencies, a court may appoint an independent person or body to act on their instructions as regards to improving communication between the courts of Members States, whose role can be set out in a protocol approved by the court.

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.

Pursuant to Article 38(3), an insolvency practitioner or debtor in possession can apply to stay the opening of secondary proceedings for a period of up to three months if (i) main proceedings are opened and (ii) under the law applicable to those main proceedings, a temporary stay has been granted. This delays the opening of secondary proceedings to allow breathing space which can provide time to explore restructuring options.

Pursuant to Article 38(2), an insolvency practitioner can give an undertaking to treat assets of a debtor in a jurisdiction in which secondary proceedings could be opened in accordance with the laws of that jurisdiction. If the insolvency practitioner does so, and provided the court in the jurisdiction of the potential secondary proceedings is satisfied that the undertaking adequately protects the general interests of local creditors, the court in that jurisdiction should decline any application to open secondary proceedings.

Total marks: 10 out of 10.

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

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

Question 3.1 [maximum 5 marks] 5

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

The aspects of the EIR 2000 that were amended in the EIR Recast, as recommended by the European Insolvency Regulation were:

1. broadening the scope of the EIR 2000 to include restructuring and rescue processes;
2. introducing stronger rules for cooperation and communication between insolvency practitioners and courts;
3. opening up the possibility of single proceedings to deal with multiple members of the same groups of companies;
4. expanding creditors access to information; and
5. generally modernising the EIR in accordance with legal rules, such as the introduction of wider data protection regulation in the EU.

Taking each in turn, these have been introduced into the EIR Recast in the following ways:

1. The definition of 'insolvency proceedings', as contained in Article 1 EIR Recast, was extended beyond traditional liquidation focused processes to include rescue proceedings. As a result, Annex A (which contains a list of proceedings that fall within the definition) now includes various voluntary arrangements which are aimed at restructuring a debtor's liabilities to allow them to trade through their distress, while also providing for a stay on proceedings against that debtor to create the breathing space required to facilitate a rescue.
2. The EIR Recast put in place a new framework for cooperation and communication between (i) insolvency practitioners in different Member States (Article 41 EIR Recast), (ii) the courts of different Member States (Article 42 EIR Recast) and (iii) insolvency practitioners and the courts of different Member States (Article 43 EIR Recast). These provisions contain a mixture of mandatory practices (e.g the obligation between insolvency practitioners in main and secondary proceedings to cooperate, if compatible with the rules applicable to their respective proceedings) and recommendations and guidelines, which are suggested to assist with efficient handling of cross border EU insolvencies.
3. The EIR Recast contains a new set of provisions designed to address insolvency proceedings across group of companies. In addition to creating specific cooperation and communication duties (Articles 56 to 60 EIR Recast) the EIR Recast provides for the creation of a new mechanism known as 'group co-ordination proceedings (Articles 61 to 77 EIR Recast). These group coordination proceedings are led by a group coordinator, who acts independently and impartially to the insolvency practitioners appointed in respect of individual members within the group. The coordinator is tasked with matters such as identifying and outlining recommended coordinated conduct across the group and proposing a group coordination plan.
4. The EIR Recast creates an obligation at Article 28 on insolvency practitioners to request that notice of the opening of either main or secondary insolvency proceedings be given at the place of any of the debtor's establishments (in accordance with notification requirements of the Member State in which the establishment is located). It also created an obligation on Member States to have at least one register of insolvency proceedings publicly accessible, which is updated with details of new insolvency proceedings as soon as possible (Article 24 EIR Recast), and provided for the creation of a new decentralised system which linked all such registers together (Article 25). Various other notice requirements are included throughout the EIR Recast.

5. The modernisation of the EIR Recast is implemented throughout the text. It is also demonstrated by the EIR Recast's efforts to document the leading principles established by the CJEU when implementing terms of the EIR 2000.

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.

The EIR Recast significantly expanded on the EIR 2000, over doubling its size. In doing so, it provided several new and innovative provisions. I consider some of the most important of these to be the provisions which increase transparency and communication across Member States. Three of these provisions are set out below:

1. Pursuant to Article 28(1) EIR Recast, insolvency practitioners or debtors in possession are obliged to request that notification of the opening of insolvency proceedings be publicised at the debtor's establishment(s) in accordance with the publication provisions applicable in the Member State in which establishment is located. Prior to EIR Recast, an insolvency practitioner had discretion as to whether to give such notice.

This increases the prospects of creditors across Member States being made aware of the inception of insolvency proceedings, therefore ensuring they are aware of their rights in respect of that process. By creating such transparency, it is likely to reduce costs across all stakeholders as creditors can tailor steps to the existing scenario – for example, a creditor who is aware main proceedings have been opened in another Member State may be happy to submit their claim to those proceedings, instead of seeking to present a new petition to place the debtor into an insolvency proceeding. They will also not run the risk of incurring the costs of bringing a claim against the debtor if they are aware that the main proceedings provide for a stay of such action.

2. Pursuant to Article 24 EIR Recast, Member States must now have a centralised insolvency register containing specific information as regards to insolvencies in its jurisdiction. Prior to this point, while many Member States had such register, they were often not reliable and had varying degrees of information. Article 25 EIR Recast went on to provide for the creation of a decentralised system which allows you to search the registers of all Member States simultaneously. This facility has been available since 2019.

The transparency created by having reliable, publicly accessible records is vital to creditors for the reasons set out at 1 above. Further, it provides certainty for insolvency practitioners, who can be confident that their appointment is a matter of public record in all Member States.

3. Pursuant to Article 42(1) EIR Recast, courts that receive a request to open insolvency proceedings, or which have opened insolvency proceedings, are obliged to cooperate with any other court that is in the same position. This was an innovation in the EIR Recast which went beyond simply codifying the good practice that courts and insolvency practitioners had developed while operating under the EIR 2000 (which did not contain any provisions requiring such cooperation).

The cooperation at this early stage, before insolvency proceedings have been opened, is a welcome development that ensures courts can adopt an aligned approach in seeking to prevent abusive forum shopping. Further, it provides a framework for courts to have visibility as to the aims of an insolvency process. This can be vital in cross-border scenarios where the objective is to rescue the debtor as cooperation and communication may increase a courts willingness to afford that rescue process breathing space in their jurisdiction, thereby preventing individual creditors scuppering an otherwise bona fide rescue proposal.

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.

The EIR Recast has been criticised for not going far enough in sufficient areas. Two of these are:

1. The EIR Recast did not go far enough in providing for harmonisation of substantive insolvency laws across member states.

The EIR Recast develops a regulatory system for dealing with cross border insolvencies in the EU. It is focused on procedural harmonisation, as opposed to harmonisation of substantive insolvency laws. Arguably this aligns with the ‘golden meme’ of modified universalism.

However, a vital part of creating stability and efficiency in cross border business, which in turn drives growth, is ensuring that creditors understand how matters will be dealt with in the event of financial distress and insolvency and can therefore conduct their business in a predictable way. While the EIR Recast allows creditors to take comfort as to how insolvency proceedings will be opened across different jurisdictions, unless you are familiar with the jurisdiction, it remains difficult to predict what substantive laws will apply to those proceedings (including as to the pursuit of claims, the realisation of assets and distribution of realisations).

There are significant drawbacks to implementing an entirely universalist system across members states. Such legislation is also highly unlikely to be supported by Member States as it would fetter their sovereignty. I therefore do not argue this is the correct approach. However, the EIR Recast could go further in seeking a greater level of harmonisation by clarifying that certain definitions apply to the EIR Recast universally.

An example of this is Article 13 EIR Recast. It provides that the general rule of applying the law of the Member State that has conduct of the proceedings (the *lex concursus*), shall not apply to employment contracts and relationships and that these matters shall remain subject to the law applicable to the relevant contract. While I would argue that this is a proper exception in principle (as employees fall within a separate class of stakeholders that should treated separately in an insolvency process), greater harmonisation could be affected by the EIR Recast applying a specific definition of ‘employment contract’. That would create certainty and predictability as to which types of contracts fall within this exclusion. Another undefined terms in the EIR Recast which may benefit from definition applied across all members states include, definition a right *in rem* in Article 8,

2. The EIR Recast did not go far enough in tackling the prejudice creditors face when transacting with groups of companies.

The EIR Recast contains various provisions which dealt with groups of companies. This is a welcome development from the EIR 2000, which contained no such provisions.

Generally, the EIR Recast follows the principle set down in *Eurofood IFSC*, which respects the separate legal personality of individual companies within a group. It therefore permits businesses to create a corporate structure which supports 'entity shielding'. In doing so, the EIR Recast follows the approach set down in the UNCITRAL Model Law of providing a mechanism for cooperation and communication between the states in which different group companies are in insolvency proceedings. One of which provides for a procedure for opening group co-ordination procedures (Recital 55, Article 61 EIR Recast).

However, the EIR Recast goes no further than providing mechanisms for voluntary cooperation. Even those mechanisms are weak considering the automatic right of an insolvency practitioner appointed in respect of group company to object to the inclusion of its insolvency proceedings in group coordination proceedings (Article 64). This means the EIR Recast has insufficient strength to ensure the unity and predictability that is frequently required to implement large group restructurings.

The EIR Recast also does not contain prescriptive provisions which allow courts and creditors to look beyond the corporate structure to the business reality of the group, which is may often be preferable from a creditor perspective.

The group of companies provisions could be improved by removing the right of veto afforded to insolvency practitioners (referred to above) and by requiring only a majority of insolvency practitioners appointed in respect of group companies to vote favour of a group co-ordination regime. The EIR Recast could also require cooperation agreements to be put in place for each group insolvency and provide a default set of rules that apply. These rules may give preference to the insolvency practitioner and the courts in the Member State in which the largest group company is located. To maintain the flexibility required to address the various structures groups can take, those default rules can be departed from where it is demonstrated to the coordinating court that it is just and reasonable to do so.

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.

Pursuant to Article 3(1) of the EIR 2000, the court with international jurisdiction to open insolvency proceedings (i.e. main proceedings) will be the court in which the debtor's centre of main interest (**COMI**) is situated. While the EIR 2000 provides no definition of COMI, Article 3(1) contains a rebuttable presumption that the debtor's COMI shall be the place of its registered office.

Here, Cardinal Home is incorporated in Ireland and therefore there is a presumption that Ireland is its COMI and therefore that, assuming the Dublin High Court has the appropriate domestic jurisdiction to open insolvency proceedings, the Dublin High Court has jurisdiction to open main insolvency proceedings with international jurisdiction.

Considering the absence of any further definition of COMI in the EIR 2000, to assess whether that presumption is rebuttable we must consider (i) the guidance set out at Recital 13 EIR 2000 and (ii) the case law of the CJEU (formerly the European Court of Justice).

According to Recital 13 EIR 2000, Cardinal Home's 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".

As to the guidance set out in case law, *Interedil Srl v Fallimento Interedil Srl* Case 396/09, ECLI: EU:C:2011:671 (Oct. 20, 2011) confirms that where the bodies responsible for managing and supervising the debtor are conducted from the same Member State as its registered office, the presumption that a COMI is in that Member State is irrefutable. Insufficient information concerning the location of Cardinal Home's management and administration has been provided to determine whether this rule applies.

Accordingly, it is necessary to consider whether the presumption Cardinal Home's COMI is in Ireland can be rebutted in light of wider factors. The case of *Eurofood IFSC Ltd* Case C-341/04, ECLI:EU:C:2006:281 (May 2, 2006) outlines how this assessment should be carried out by confirming that COMI has an autonomous meaning: it is an objective question and turns on what is ascertainable by third parties.

This means, to suggest that Ireland is not Cardinal Home's COMI, there must be objective factors that suggest that Cardinal Home is administering its business and affairs outside of Ireland which are apparent to third parties (such as creditors). In determining the view of third parties, the longevity of Cardinal Home's business endeavours should be considered. For example, has the administration of affairs outside of Ireland been for a sufficiently long view to demonstrate to creditors that its COMI is no longer in Ireland?

While there is reference to Cardinal Home having warehouses across Europe and spanning its reach to the Spanish market, the principal facts which suggest Cardinal Home's COMI may not be in Ireland relate to its relationship with Italy. These are:

1. It had a growing line of business in Italy for around 7 years prior to the commencement of insolvency proceedings in Ireland;
2. It's main source of finance appears to be obtained from Italy, by an Italian bank and pursuant to a credit agreement which is presumably governed by Italian law;

3. It has a warehouse in Italy, where presumably it has a significant number of employees, holds a significant number of assets and where it engages services and materials from other creditors; and
4. It has entered various arrangements with distributors in Italy. While these are referred to as non-binding, which would suggest no liabilities arose and therefore no creditors generated, that appears to have been several years ago.

Various further information would be required to establish where Cardinal Home's COMI is located and therefore whether the Dublin High Court has jurisdiction to open international insolvency proceedings. That information would include (i) where Cardinal Home's management operate from and (ii) the size of the store in Ireland, relative to the size of the operations in Italy (i.e., employee numbers, how many assets are located there).

However, based on the information available, Cardinal Home appears to operate its main trading front from Ireland and therefore I do not consider the presumption that its COMI is in Ireland has been rebutted. Accordingly, the High Court in Dublin has jurisdiction to open the requested insolvency 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.

Whether the EIR Recast will be applicable will be determined by the following four questions. If the answer to each of them is yes, the EIR Recast will apply.

1. Is Cardinal Home within the geographical scope of the EIR Recast, meaning its COMI is in a Member State of the EU (excluding Denmark that opted out of the EIR Recast): According to the analysis at question 4.1 above, Cardinal Home's COMI is in Ireland. Even if this is incorrect, there is no suggestion Cardinal Home operates outside of the EU or in Denmark and therefore its COMI must be in a relevant Member State. The answer is yes.
2. Is Cardinal Home within the penal scope of the EIR Recast, meaning it is not an 'excluded' undertaking pursuant to Article 1(2) EIR Recast? Excluded entities are (i) insurance undertakings, (ii) credit institutions, (iii) investment and other firms, institutions understandings covered by Directive 2001/24/EC or (iv) collective investment undertakings. Cardinal Homes does not appear to be any of these entities. The answer is yes.
3. Are the proceedings within the material scope of the EIR Recast, meaning do the proceedings opened by the Dublin High Court fall within the schedule of Insolvency Proceedings listed in Annex A EIR Recast? Examinership in Ireland is included in Annex A. The answer is yes.
4. Are the proceedings within the temporal scope of the EIR Recast, meaning were the proceedings opened after 26 June 2017? The time of the opening of the insolvency proceedings is defined in Article 2(8) EIR Recast as the time at which the judgment opening the insolvency proceedings becomes effective, regardless of whether the judgment is final or not. The 'judgment opening insolvency proceedings' is in turn defined in Article 2(7) as the decision of any court to open insolvency proceedings or to confirm the opening of such insolvency proceedings, or the decision of the court to appoint an insolvency practitioner. Here, the petition was presented four days prior to 26 June 2017, on 22 June 2017. However, the date a 'judgment opening insolvency

proceedings was given' was 30 June 2022. That is the date of the opening of the insolvency proceedings. The answer is therefore yes.

Accordingly, the EIR Recast does apply to examinership proceedings opened by the Dublin High Court on 30 June 2017.

Question 4.3 [maximum 5 marks]

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.

First, it is necessary to determine whether the EIR Recast applies. Adopting the 4-stage test set out at question 4.2 above, it will because:

1. Cardinal Home has a COMI in a Member State of the EU, excluding Denmark.
2. Cardinal Home is not an excluded undertaking under Article 1(2).
3. The proceedings contemplated in Italy appear to be insolvency proceedings, as defined in the list set out at Schedule A (albeit this would need to be confirmed).
4. The proceedings are understood to be opened after the Irish proceedings have been commenced and therefore after 26 June 2017.

Secondly, to open secondary insolvency proceedings in Italy against Cardinal Home, pursuant to article 3(2) EIR Recast, the Italian court must be satisfied that Cardinal Home has an 'establishment' in Italy.

An establishment is defined at Article 2(1) EIR Recast as any place of operations where a debtor carries out or has carried out in the three-month period prior to the request to the open main insolvency proceedings a non-transitory economic activity with human means and assets.

As with the definition applicable to 'COMI', the reference to 'non-transitory economic activity with human means and assets' confirms that this is an objective factor, i.e., it is determined by reference to the views of third parties.

As confirmed in the CJEU case of *Interedil* (also referred to at question 4.1 above), there must be a level of organisation and stability of the debtor's obligations in the Member State to determine that there is an establishment. This means that the presence of goods alone, or the establishment of bank accounts in a jurisdiction alone, will not alone mean an establishment is present.

The various factors set out at question 4.1, including (i) the credit agreement with an Italian bank, (ii) the Italian bank account, (iii) the warehouse in Milan, Italy (which presumably contains assets and houses various employees) and (iv) the business relationships conducted in Italy, cumulatively, confirm an establishment is present.

Thirdly, there must be nothing that prevents the opening of secondary proceedings. This means:

1. No synthetic proceedings have been opened in Italy by the insolvency practitioner(s) appointed in the main proceedings opened by the High Court of Dublin, by virtue of them giving an undertaking in accordance with Article 36. That undertaking would need to be given by the insolvency practitioner in the Irish proceedings that the assets

of Cardinal Home located in Italy will be realised and distributed in accordance with domestic Italian insolvency legislation, including as to how rules on the priority of distributions which is the focus for the Italian bank bringing the application. If such an undertaking has been given, and the Italian court is satisfied that it adequately protects the general interest of Italian creditors as a whole (including the Bank), the Italian court should not open secondary proceedings in Italy if requested to do so by the insolvency practitioner in the Irish main proceedings (Article 38(2)).

2. The insolvency practitioner(s) appointed in the main proceedings opened by the High Court of Dublin have not requested a stay of the opening of proceedings pursuant to Article 38(3) EIR Recast. That stay could be sought for three months on conditions the Italian court considers appropriate to protect the interests of Italian creditors, including the Bank, such as by preventing the insolvency practitioner from removing Cardinal Home's assets located in Italy to outside the jurisdiction. However, the Italian court is not obliged to stay the opening of secondary proceedings where requisite conditions are met. It is only permitted to do so if, for example, it considers the stay would afford sufficient breathing space for the insolvency practitioner(s) in the main proceedings to facilitate a rescue proposal.

There is nothing to suggest synthetic secondary proceedings have been opened or that a stay has been requested or is appropriate. Therefore, the three stages are satisfied that the Italian Court can open secondary proceedings in Italy, which will have territorial effect over Cardinal Home's assets within that jurisdiction.

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

Total marks: 13 out of 15.

*** End of Assessment ***

Total marks: 46 out of 50.