



**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.

D was the correct answer.

#### Question 1.6

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

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

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

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

### Question 1.7

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

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

### Question 1.8

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

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

### Question 1.9

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

The insolvency practitioner of the company claims that under applicable Italian law, the contested payments shall be set aside because Lacroix SARL must have been aware that Fema Srl was facing insolvency at the time the payments were made.

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

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

#### Question 1.10

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

Assume that:

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

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

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

C was the correct answer.

**Total marks: 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."

Synthetic proceedings: Article 38(2) EIR Recast

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

Co-operation and communication between courts: Article 42(1) EIR Recast.

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

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

In an ideal universal case, there would only be one worldwide proceeding brought against the debtor. THE EIR Recast recognizes the impracticalities of pure universalism and is based on the idea of modified universalism. The basis of the modified universalism concept is 'universalism', but when there are local issues more important than a universal case, countries retain the power to refuse the universal regime and to refuse recognition.

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

- Article 3(2): When a debtor possesses an establishment in any Member state, the EIR Recast allows for the opening of one or more secondary (territorial) insolvency proceedings against this debtor.
- Article 33 EIR Recast: There is a public policy exception in which Member states may refuse to recognize insolvency proceedings in another State, where the effect of such recognition opposes the State's public policy.
- Article 41(1) EIR Recast: Insolvency practitioners in main and secondary insolvency proceedings shall co-operate with each other. They must communicate any information which may be relevant to other proceedings.

### 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 EIR 2000 only dealt with co-operation and communication between insolvency practitioners. The EIR Recast has introduced specific provisions dealing with co-operation and communication between courts in insolvency proceedings.

Three of these provisions are as follows:

- Article 42(1) EIR Recast: In order to facilitate the coordination of main and territorial or secondary insolvency proceedings concerning the same debtor, a court before which a request to open insolvency proceedings is pending or which has opened such proceedings shall co-operate with any other court before which insolvency proceedings are pending or which has opened such proceedings
- Recital 50 EIR Recast: Courts may appoint a single insolvency practitioner for several insolvency proceedings concerning the same debtor, provided that this is not incompatible with the rules applicable to the proceedings.
- Article 42(3) EIR Recast: Where necessary, the courts have the power to co-ordinate the administration and supervision of the debtor's assets and affairs and synchronise the conduct of hearings and approval of protocols.

### 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.

One or more secondary insolvency proceedings may be opened under the EIR Recast against a debtor in any Member state where it possess an establishment.

EIR Recast has a number of instruments around the avoidance and control of secondary insolvency proceedings which include:

- Undertaking: Article 36 of the EIR Recast provides for the right to give an undertaking in order to avoid secondary proceedings. This is based on the promise given by the main insolvency practitioner to local creditors that they will receive treatment 'as if' secondary proceedings had in fact been open.' The insolvency practitioner must comply with the distribution and priority rights under the national law that creditors would have received if a secondary proceeding was opened in that Member State. If an undertaking is given in full compliance with Article 36, the court will not open a secondary proceeding.
- Stay of the opening of secondary proceedings: The court may temporarily stay the opening of secondary insolvency proceedings under the EIR Recast. This is

possible when a temporary stay of individual enforcement proceedings has been granted in the main insolvency proceedings. The request must be brought forward to the court by the insolvency practitioner or the debtor in possession. This stay must not exceed a period of three months. This stay can be lifted in certain circumstances, for example, if the creditors' rights are not protected.

**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.

Despite the general success of the EIR 2000, it became clear, following a report presented by the European Commission in 2012, that further improvements were necessary. The increase in globalization, technological trends and cross-border insolvency cases lead to the adoption of the EIR Recast. The EIR Recast improvements include modernization of the legal rules, increased co-operation and communication, creditor rights and information as well as broadening the scope of the restructuring proceeding.

One area that the EIR Recast enhanced was the application of the COMI (Centre of main interest) presumption for the purpose of reducing abusive insolvency forum shopping. The EIR 2000 did not contain a definition of COMI, while the EIR Recast has mandated the definition of COMI. The COMI of a debtor shall be where the debtor conducts the administration of its interest on a regular basis. The EIR Recast has introduced this definition by including it in the text regulation and therefore making it enforceable.

One of the shortcomings of the EIR 2000 was the fact that the opening of secondary insolvency proceedings can hamper the efficient administration of the company's estate. Under the EIR Recast, secondary insolvency proceedings are no longer required to be winding-up proceedings. The EIR Recast provides for the right to give an undertaking in order to avoid secondary proceedings.

The EIR Recast outlines what duties regarding co-operation and communication that insolvency practitioners and the courts are to adhere to. The EIR 2000 contained only one article mandating insolvency practitioners in main and secondary proceedings to communicate with each other. The EIR Recast has introduced specific provisions like article 41(1) which focuses on the insolvency practitioners and article 42(1) which covers the communication between the courts. The EIR Recast also references best practice such as UNCITRAL.

The EIR Recast has improved information access for creditors. It has established national registers and created more user-friendly procedures for lodging claims. The Recast has introduced standardized forms for the notification of known foreign creditors when proceedings are opened. Foreign creditors can lodge claims by any means of communication and do not need legal representation (Art 53).

Under the 2000 EIR there is no process for the coordination of different insolvency proceedings affecting a group of companies. The EIR Recast contains a whole chapter which is dedicated to group insolvencies, while also offering a definition for a group of companies. The insolvency practitioner in respect of a group of companies has a number of rights which are outlined in Article 60 of the EIR Recast.

### **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 improved the understanding around the concept of COMI. This is important in cross-border cases in deciding whether the proceeding will be a main or non-main proceeding. The EIR Recast definition of COMI is “the place where the debtor conducts the administration of its interests on a regular basis and is ascertainable by third parties”. There have been previous cases where debtors attempted to move their COMI in order to utilize insolvency proceedings available in other member states and the recast EIR attempts to curb this trend and protect the rights of creditors.

Co-operation and communication are a key area of the EIR Recast that has helped insolvency practitioners and courts in cross-border cases. The efficiency of cross-border cases has been improved due to the Recast imposing mandatory obligations of cooperation and coordination between insolvency practitioners and courts. Article 55(1) has made it easier for any foreign creditor to lodge a claim by introducing standardized claims. Introduction of insolvency registers has also made access to information easier. The EIR Recast determines the minimum amount of information to be published in these registers.

The EIR Recast recognized the increasing trend of interconnected companies across countries. The Recast has introduced the concept of a group coordinator when dealing with group co-ordination proceedings. This person helps to realize the group co-ordination proceedings and must be eligible to act as an insolvency practitioner in that Member state. The Recast provides for independence requirements of a group coordinator and also the duties that they must follow. The group coordinator also has a number of rights in order to effectively coordinate parallel proceedings.

### **Question 3.3 [maximum 5 marks] 2.5**

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.

One shortcoming of the EIR Recast is around the regulation of group coordination proceedings. For example, the group coordinator is assigned to help realize the group coordination proceedings. However, any recommendation by the group co-ordinator do not have to be followed by the insolvency practitioners. If the corporate group has entities that are based outside of the EU, the EIR Recast will not bind the courts and insolvency practitioners in these state proceedings. Communication with the creditors of group companies is also not efficient such as lack of consultation with creditors around the opening of group proceedings. The EIR Recast should consider revising articles around the communication with creditors in group proceedings. The powers of a group coordinator in group proceedings should also be reevaluated. **They should be revised and re-evaluated in what way? Be more specific here.**

Another recent issue is that there may be issues in EU member states now recognizing UK proceedings. Upon leaving the EU, the UK proceedings will not be captured by the EIR Recast language of “Member States” and the “court of the Member States”, and there will thus be no obligation on EU member states to recognize decisions from the UK courts or insolvency proceedings initiated in the UK. This may require officeholders appointed in UK insolvency proceedings to seek recognition in EU member states under local law in each member state. This will lead to increased costs and inefficiencies. The EIR Recast should consider implementing a chapter on Brexit considering the influence that UK proceedings have on restructuring worldwide. **How do you anticipate this happening? The EU does not have the competence to legislate for non-Member States.**

**Total marks: 12.5 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] 3**

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 EIR 2000 was introduced to deal with the issues of jurisdiction, applicable law, recognition, and enforcement of insolvency decisions, as well as coordination of cross-border insolvency proceedings. The overall idea behind the EIR 2000 is modified universalism. Therefore, the Dublin High Court will be able to establish main insolvency proceedings if Cardinal Home’s center of main interest (COMI) is in Ireland (Article 3(1)). The EIR 2000 also allows for the opening of secondary proceedings in a member state where the debtor has an establishment.

The EIR 2000 did not contain a definition of COMI. However, Recital 13 of EIR 2000 outlined that the COMI of a debtor will be where the debtor conducts the administration of its interests on a regular basis, and which is ascertainable by third parties. This definition is also backed by CJEU case law (Eurofood IFSC Ltd).

Firstly, it is presumed that the debtor's COMI is to be the jurisdiction where such company has been registered. In this case, the company is registered in Ireland. This presumption can only be rebutted if other factors indicate that the debtor's interests happen in a different state to where the registered office is. There is no 'suspect' period in play here considering the office was registered in Ireland in 2009 and the insolvency proceedings are only beginning in 2017. It is clear from the facts that Cardinal Home conducts business in Italy. They also have a credit agreement with an Italian bank, have an Italian bank account and conduct business with local distributors. However, this is not a strong enough argument to rebut the fact that its COMI is in Ireland. It does not prove that their main interests are in Italy, it only shows that they also conduct business in Italy.

The Irish High Court therefore has international jurisdiction to open this insolvency proceeding. **You must also determine whether examinership is listed under Annex A.**

#### **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.

Determining whether the EIR Recast should be applicable to the opened insolvency proceeding involves looking at the following four scopes:

1. Geographical scope

The COMI of Cardinal Home must be located in a Member State of the EU, except Denmark. As discussed above, the COMI of Cardinal Home is in Ireland and therefore, the requirement of the geographical scope is satisfied.

2. Personal scope

The debtor cannot be a bank, insurance company, investment firm or a collective investment undertaking. These entities are subject to special arrangements (Recital 19 EIR Recast). As Cardinal Home is a furniture company, the requirement of the personal scope is satisfied.

3. Material scope

The insolvency proceeding brought by the Dublin High Court must be listed in Annex A to the EIR Recast. The purpose of this proceeding is to rescue the company. The assets and affairs of the debtor will also be subject to supervision by the Dublin High Court. This proceeding is therefore included in Annex A and the material scope is satisfied.

4. Temporal scope

The insolvency proceeding must be opened after 26 June 2017 (the entry of the EIR Recast into force). The facts of this case indicate that the insolvency proceeding of

Cardinal Home was opened on 30 June 2017. As this date is after 26 2017, the EIR Recast applies.

All four requirements have been met, therefore the EIR Recast applies here.

**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.

Secondary proceedings can be opened in any member state country in which the debtor has an establishment (Article 3(2) EIR Recast). These proceedings will be restricted to the assets of the debtor situated in the member state where the secondary proceedings have been opened.

According to Article 2(10) EIR Recast, an establishment means any place of operations where a debtor carried out or has carried out in the three-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets.

The main proceedings were opened on 30 June 2017. Cardinal Home has a warehouse in Italy, as well as a bank account and credit agreement with an Italian bank. They have also performed business in Italy with local distributors and signed some memoranda of understanding with them. This is clear evidence of an establishment here. There is a certain degree of continuity and stability which is evidence from the business interactions with distributors and the fact that they opened a bank account in Italy. There is a presence of humans (employees in the warehouse and distributors), as well as assets being the warehouse and bank account.

In *Interdil*, the CJEU confirmed that the presence of a bank account alone does not constitute an establishment. However, in this case, there is also a credit agreement, warehouse and local business being conducted.

All the facts above indicate that the Italian bank's petition to open secondary insolvency proceedings in Italy will be successful under the EIR Recast.

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

**Total marks: 11 out of 15.**

**\* End of Assessment \***

**Total marks: 41.5 out of 50.**