



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).
4. You must save this document using the following format: **[studentID.assessment2B]**. An example would be something along the following lines: 2021122-526.assessment2B. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the word “studentID” with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
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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).

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).

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 – The right to give an undertaking to avoid secondary proceedings ("synthetic secondary proceedings) – Article 38(2) following and undertaking given under Art. 36.

Statement 2 – Recital 3 drawing on the principle of modified universalism. The concept of co-operation and communication between courts (Arts 42 and 43).

Question 2.2 [maximum 3 marks] 2

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.

1. Mutual recognition of judgments (Art. 19(1) – any judgement opening insolvency proceedings by a court of a member state (having Art. 3 jurisdiction) shall be recognised in all other members states at the point in which that judgment is given effect.
2. Art 21(1) – an IP appointed pursuant to Art 3(1) may exercise all the powers conferred in it by the law of that State in another member state provided no other proceedings have been opened in that state and no preservation measures to the contrary have been taken in that State.
3. Art 25 – the establishment of a decentralised system for the interconnection of insolvency registers. **This could also exist under a true universal approach.**

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.

Art 42 introduces a comprehensive framework for co-operation and communication between courts.

Recital 3 highlights the importance of judicial co-operation in cross-border civil matters for the proper functioning of the internal market.

Art 57 provides that where two sets of proceedings relating to two or more members of a group company the court which opened such proceedings shall co-operate with the other court(s) to facilitate the effective administration of the proceedings. To achieve this courts have discretion to appoint an independent person/body to act on its instructions.

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.

Art 38(3) – this provides for a stay of secondary proceedings for a period not exceeding 3 months. This can only be done where suitable measures are in place to protect the interests of local creditors and will require to be made by application of the IP or the debtor in possession. In order to achieve suitable protection for creditors who may otherwise be prejudiced by the stay, the court may require the IP in the main proceedings to refrain from disposing of any assets not otherwise in the course of ordinary business.

Art 39 – this allows for an IP in the main insolvency proceedings to challenge a decision to open secondary proceedings before the court of the member state in which the secondary proceedings were initiated on the basis that the proceedings do not comply with the conditions of Art.38, this may be by way of, for example, failure adhere to an undertaking under Art. 36.

Total marks: 9 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.

While it was generally accepted within the international insolvency community that the EIR 2000 has been a successful instrument codifying the principle of modified universalism, it was nevertheless apparent that certain aspect required amendment and new concepts and rules introduced to both modernise and increase the utility of the instrument.

The EIR Recast built on the EIR 2000 in the following areas:

Broadened scope for restructuring proceeding

The scope of the EIR Recast has been widened to include certain pre-insolvency rescue and restructuring proceedings. This will encompass certain distressed business and the plans for their rescue – it is perhaps worth noting that when the EIR Recast applied to the UK (pre-Brexit, 31 December 2020) that schemes of arrangement and members voluntary liquidations were not subject to the EIR Recast.

Enhanced rules for co-operation between practitioners and the court.

The EIR 2000 did not contain specific provisions on co-ordination and communication. The principle of co-operation is perhaps most acutely laid out in Bank Handlowy. The EIR Recast has built on existing best practices and solidified these practices further by creating an obligation on the courts to co-operate and will, in principle, assist in the prevention of forum shopping. Similarly, the co-operation between the courts and IPs have been set out fully and contains obligations between Ips (Art 41) courts-to-court (Art 42) and between IPs and the courts (Art 43) with the overall goal of improving the efficacy of cross-border insolvency proceedings.

Centre of Main Interests

The principles for around determining the COMI of a debtor have been codified within the EIR Recast, having previously been a matter of case law (including e.g. Polbud-Wyknowstwo; Susanne Stuabitz-Schrieber and Interedil Srl v Fallimento), is now contained in Art. 3. While this does not radically change the previous position Art 3 does set out a series of presumptions regarding the location of a debtor's COMI.

Group Companies

A new framework for co-operation and co-ordination of insolvency proceedings relating to multinational members of the same group of companies was introduced by the EIR Recast. IPs taking on appointments in connection with group companies are under an obligation pursuant to Chapter V of the EIR Recast to co-operate and communicate with each other and with the courts. The introduction of group co-ordination proceedings in the EIR Recast is designed to achieve this by setting out the mechanism to be followed including the appointment of a group co-ordinator. The principles of co-ordination and co-operation largely mirror those for communication and co-operation between main and secondary proceedings. Although the case is more instructive for the principles surrounding the concept of COMI, the case of Eurofood IFSC Ltd set down a set of principles for the treatment of group companies in 2006, the tenor of which is reflected in the EIR Recast.

Improvement of creditor information

All member states are required to maintain a register of insolvencies under Art. 24. By contrast with the more *ad hoc* approach under the previous regime, the EIR Recast under Art. 25 creates a decentralised system for the interconnection of insolvency registers. This improves a creditor's (or other parties') ability to search via a single platform with the advantage of having confidence the information is accurate and complete.

Data protection provisions

In keeping with the modernising of the framework, the EIR Recast contains data protection provisions in Chapter VI consistent with the EU's move generally towards enhancing the data security of data subject and how information containing such data is processed.

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.

Restructure & Rescue

The focus on restructuring is an innovation that the EIR Recast has adopted. Previously, the focus has been on proceedings akin to liquidation without proper consideration of rescue plans, which have become a more common tool used by IP in dealing with distressed businesses. By placing a greater emphasis on the rehabilitation and rescue of companies and providing for proceedings where a restructuring is being advocated (as opposed to e.g. liquidation) and where the prospect of insolvency is not guaranteed the EIR Recast has taken on a more holistic approach to the issues of cross-border insolvency allowing the debtor, in certain circumstances, to remain with more control over the company's daily affairs and still be caught under the ambit of the regulations. This enhances the overall scope of the regulation and the broadening the provisions out to include rehabilitation of ailing businesses, the Recast has provided an additional set of tools to aid in the efficient administration of cross-border cases.

Suspect Period

The principles for around determining the COMI of a debtor have been codified within the EIR Recast, having previously been a matter of case law (including e.g. *Polbud-Wyknowstwo*; *Susanne Stuabitz-Schrieber* and *Interedil Srl v Fallimento*), is now contained in Art. 3. While this does not radically change the previous position Art 3 does set out a series of presumptions regarding the location of a debtor's COMI.

The presumption relating to COMI is that the registered office of the company will be the COMI (Art.3(1)). This presumption will only apply where the registered office of the company has not moved in the preceding three-month period prior to the insolvency proceedings. The rationale for this innovation was an acknowledgment of the need to make COMI more readily determinable but equally to prevent abuse or fraudulent manipulation of the forum in order to counteract instances of forum-shopping to achieve a more beneficial outcome or additional protections via for example utilising a more debtor-friendly set of rules in another jurisdiction.

Where this does occur and the suspect period is triggered the court will disregard the change and proceed as if the relocation of the registered office had not occurred. This approach is in line with the *perpetuatio fori* doctrine (i.e. the continuation of the place of jurisdiction) which prevents one party from moving proceedings between jurisdictions to gain a strategic advantage. These principles were examined in *Susanne Stuabitz-Schrieber* and provided the springboard for the adoption of this practice within the EIR Recast in order to ensure the efficacious operation of cross-border insolvencies and to ensure creditors interest and legitimate expectations can be preserved.

Synthetic Proceedings

Secondary proceedings previously applied to winding up proceedings but, consistent with the broadened scope of the EIR Recast noted above, has expanded to include all pre-insolvency or rescue proceedings covered under the EIR Recast. The use of synthetic proceedings is set out in Art. 36 of the EIR Recast. Synthetic proceedings have their advent from the case of *Collins & Aikman Europe SA* having previously been absent from the EIR 2000. To avoid secondary proceedings being brought an undertaking can be granted to give the creditors the benefit of secondary proceedings without the need for formal proceedings to be instigated (i.e. synthetic or virtual proceedings). The approach adopted in *Collins & Aikman* was both

pragmatic and commercially driven and subsequently incorporated formally into the EIR Recast.

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.

Group company co-ordination is designed to facilitate better administration of group insolvency/restructurings. However as this is a voluntary procedure. While it may be desirable to preserve the value of a group company by co-ordinating proceedings, this is undermined where one member of the group can voluntarily choose to opt out under Art. 64(3) without the need to provide much by way of explanation or justification for the refusal to participate. Recital 54 makes it apparent that the aim of group co-ordination is to provide for the efficient administration of group companies while retaining the autonomy of each distinct legal entity. The ability for opt out makes much of the group co-ordination toothless – there is no requirement for the IP to adhere to the recommendations of the co-ordinators under Art 70 the requirement is no higher than to "consider" the recommendations and although reasons for refusing to follow the recommendation are required and the system is non-committal. The voluntary process makes it too simple for a subsidiary to opt out of the proposed restructuring of the group in the group plan. In order to improve this position the mechanism for 'opt-out' should not be used without scrutiny – it may be a court supervisory role could assess the opt-out – this would allow the opt out to be preserved (which is crucial to avoid for example certain subsidiaries from being strongarmed into the rescue plan).

Criticism of the EIR Recast as "modest" and also as potentially underwhelming as it does not drastically depart from the previous EIR 2000 although there are new concepts, improvements and innovations the fingerprints of the old regulations are evident in the Recast. The EIR Recast does not attempt to harmonise the member state's domestic laws to provide a consistency bridge to cross-border EU insolvency. The approach of the EU, as with many of the EU instruments is based in pragmatism and incremental, allowing the courts to determine and at times dictate the direction of travel for certain aspects of insolvency (see, e.g. *Eurofood*). The incremental approach taken in the EIR Recast (*i.e. theory of public policy making, according to which policies result from a process of interaction and mutual adaptation among a multiplicity of actors advocating different values, representing different interests, and possessing different information*, defined by Michael T. Hayes in "Incrementalism") – this slow developing approach to regulations is frustrating from a policy perspective and at times can be considered regressive, where the regulations are not able to adequately keep up with modern business practices. The criticism that the incrementalism approach of the EIR Recast is a compromise borne out of pragmatism in an attempt to please all parties and reach agreement rather than to enact policy through regulations that will create meaningful change. The Recast is, on one view, a preservation of the status quo with a some new additions. With regard to the Recast, it has prioritised the procedural harmonisation rather than focussing on the harmonisation of the substantive laws of the member states to prevent the considerable imbalance between the members states' respective regimes. While harmonisation has always been a thorn in the side of any international multi-jurisdictional treaty or instrument, the lack of any attempt to harmonise the member state's laws to foster consistency across the EU, in favour the slower-paced incremental approach is a missed opportunity and provisions that attempt to harmonise the insolvency rules would be welcomed by some who wish to see more joined up relationships between the member state's insolvency procedures.

Total marks: 15 out of 15.

QUESTION 4 (fact-based application-type question) [15 marks in total]

Cardinal Home is an Ireland-registered furniture company. The company opened its first store in Cork, Ireland in 2009 and has warehouses across Europe, including in Milan, Italy. In 2010, Cardinal Home entered into a credit agreement with an Italian bank since it was planning to expand its reach to the Spanish luxury furniture market, expected to grow by over 8% annually. It opened a bank account with the bank and started negotiating with local distributors, thus signing some (non-binding) memoranda of understanding with them.

Cardinal Home grew and performed well for several years. However, the impact of the economic and financial crisis of the late 2000s eventually hit the company who suffered financial difficulties from 2016. On 22 June 2017, it filed a petition to open examinership proceedings in the High Court in Dublin, Ireland.

Question 4.1 [maximum 5 marks] 5

Assume that the EIR 2000 applies. Does the Dublin High Court have international jurisdiction to open the requested insolvency proceeding? (Explain why it does or does not have jurisdiction.) Your answer should contain references to the applicable law and the relevant CJEU jurisprudence.

The Dublin High Court will have to determine whether the COMI of Cardinal Home is. Proceedings can only be opened in the jurisdiction of the debtor's COMI. As the EIR 2000 does not contain a definition of COMI, the Irish court will need to look to case law to assist in determining this question. The *Eurofood IFSC* case is particularly instructive, as the court stressed that the concept of COMI is distinct to the EIR 2000, the meaning of which was not be conflated with what that term may be defined as in domestic legislation. The autonomous nature of the definition is designed to provide certain for, *inter alios*, creditors. The Irish Court will be required to determine the COMI by reference to objective criteria ascertainable by a third party. As the Cardinal Home is registered in Ireland, and has a physical store in the country, it is more than a 'letterbox' company. There is a real substance and connection to Ireland.

In *Interredil Srl v Fallimento Interredil Srl* the CJEU determined that where the management of supervision of the company is in the same place as the registered office and the management decisions of the company are taken in that same place as the registered office, this is presumed to be the COMI. In the present case the signs all point to Dublin/Ireland being the COMI. The fact that immovable property and a bank account are held in Italy will not be sufficient to rebut the presumption that the place of the registered office is also the COMI.

Based on the above facts the courts of Ireland would have jurisdiction to open the requested insolvency proceedings where the COMI is competently assessed as being Ireland.

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 be applicable as the regulation came into force on 26 June 2017. As the proceedings were brought on 30 June 2017 these will be subject to the EIR recast as the

applicable regulation governing the insolvency proceedings in Ireland. As the EIR Recast has no retrospective effect, proceedings require to be opened after 26 June 2017 (Art.84(1))

The company appears to be a regular business engaged in the manufacture and sale of furniture. It would not fall within the excluded category therefore the personal scope can be confirmed.

In terms of the material scope examinership is listed in Annex A, therefore this has been met and would fall within the scope of the EIR Recast.

The COMI is located within the EU (Ireland) satisfying the geographical scope.

The steps undertaken are as follow:

- i. When does it apply in time (temporal scope)
- ii. To whom does it apply (personal scope)
- iii. Which proceedings are covered by it (material scope)
- iv. What, if any, are the geographical/territorial limitations, (geographical scope).

In apply the above steps to the facts of Cardinal Home's scenario we can confirm:

- i. The proceedings took place after the EIR Recast was in force. post 26 June 2017.
- ii. Cardinal Home are not an excluded company/institution within the meaning of the regulations *i.e.* an insurance undertaking, credit institution, investment firm covered by Directive 2001/24/EC or a collective investment undertaking.
- iii. The proceeding opened against Cardinal Home (examinership) is listed under Annex A of the EIR Recast.
- iv. Cardinal Home has its COMI in Ireland, a member state of the EU.

On the basis i-iv can be answered in the affirmative the EIR recast is applicable to the insolvency proceeding.

Question 4.3 [maximum 5 marks] 5

An Italian bank files a petition to open secondary insolvency proceedings in Italy with the purpose of securing an Italian insolvency distribution ranking. Given the facts of the case, can such proceedings be opened in Italy under the EIR Recast? Your answer should contain references to the applicable law and the relevant CJEU jurisprudence.

The effect of the secondary proceedings will be limited to the assets in Italy only. The law of Italy will govern these proceedings (*lex concursus secundarii*) and will protect the local interests of the Italian bank. If proceedings were filed on before 26 June 2017, the EIR 2000 is still applicable as outlined in Art 84(1) of the Recast. Pursuant to the EIR 2000 the proceedings would have to be winding up proceedings under Art 3(3) of the EIR 2000 – if the Italian proceedings pre-date the EIR Recast secondary proceedings cannot be brought unless they are winding up proceedings.

Assuming that the proceedings are post 26 June 2017, the requirement for winding up to be the purpose of the secondary proceedings has been abolished.

The court in *In Interredil Srl v Fallimento Interedil Srl* determined that the definition of establishment connections the pursuit of an economic activity to the presence of human resources, shows a minimum level of organisation and a degree of stability is required. While the presence of goods and a bank account will not satisfy the classification of an "establishment" on their own. Cardinal Home needs to show an establishment (Art 3(2)) in Italy. The warehouse could constitute a place of operations carrying out non-transitory economic activity and an establishment in Italy could be able to be determined on that basis if there is some human presence there – if the warehouse is merely for the storage of goods and an account is held with an Italian bank, establishing Italy as an establishment for the purposes of the Recast may be more problematic. These factors (particularly the lack of human recourses in the operation in Italy) would potentially no be ascertainable to third parties and therefore may struggle to me the objective criteria for establishment under Art 2(10) of the EIR Recast.

Total marks: 15 out of 15.

*** End of Assessment ***

Total marks: 49 out of 50.