INSOL INTERNATIONAL
FOUNDATION
CERTIFICATE
in INTERNATIONAL INSOLVENCY LAW

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: **[student number.assessment2B]**. An example would be something along the following lines: 202021IFU-314.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 "studentnumber" 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 2021**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2021. 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 2021** or by **23:00 (11 pm) BST on 31 July 2021**. If you elect to submit by 1 March 2021, you **may not** submit the assessment again by 31 July 2021 (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 was the first European initiative to ever attempt to harmonise the insolvency laws of EU Member States.

(a) True, before the EIR 2000, the EU has not sought to harmonise the insolvency laws of EU Member States.

(b) False, there was another EU Regulation regulating insolvency law at EU level before the EIR 2000.

(c) False, an EU Directive regulating insolvency law at EU level existed before the EIR 2000.

(d) 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.

Question 1.2

In 2017, the EIR Recast replaced the EIR 2000. Recasting the EIR 2000 was deemed necessary by various stakeholders. Why?

(a) Through its case law, the CJEU had altered the literal meaning of several provisions of the EIR 2000. Newly formulated rules, in line with the CJEU interpretation, were therefore needed.

(b) The EIR 2000 was generally regarded as a successful instrument in the area of European insolvency law by the EU institutions, practitioners and academics. However, a number of its shortcomings were identified by an evaluation study and a public consultation.

(c) The fundamental choices and underlying policies of the EIR 2000 lacked support from the major stakeholders (businesses, public authorities, insolvency practitioners, etc.). A new Regulation was therefore needed to meet their expectations.

(d) The EIR 2000 proved to be inefficient and incapable of promoting co-ordination of cross-border insolvency proceedings in the EU.

Question 1.3

The EIR Recast is an instrument of predominantly procedural nature (including private international law issues). Nevertheless, it contains a number of substantive provisions. Which one of the following provisions constitutes a harmonised (stand-alone) rule of substantive law?

(a) Article 18 EIR Recast ("Effects of insolvency proceedings on pending lawsuits or arbitral proceedings").

(b) Article 31 EIR Recast ("Honouring of an obligation to a debtor").

(c) Article 40 EIR Recast ("Advance payment of costs and expenses").

(d) Article 7 EIR Recast ("Applicable law").

B is the correct answer.

Question 1.4

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 it harmonises substantive aspects of domestic proceedings.

(b) The EIR Recast is more rescue-oriented because all domestic rescue procedures fall within its scope.

(c) The EIR Recast is more rescue-oriented because its scope was extended to cover pre-insolvency proceedings and secondary proceedings can be rescue proceedings.

(d) It is incorrect to say that the EIR Recast is more rescue-oriented than the EIR 2000, as the latter was already heavily focused on rescue.

Question 1.5

The EIR Recast introduced the concept of "synthetic proceedings". What are "synthetic proceedings"?

(a) Where 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.

(b) Where secondary proceedings are opened, synthetic proceedings mean that these secondary proceedings are automatically rescue proceedings, as opposed to liquidation proceedings.

(c) Synthetic proceedings mean 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 mean that for the case at hand, several main insolvency proceedings can be opened, in addition to several secondary proceedings.

Question 1.6

The EIR Recast kept the concept of the "centre of main interests" (COMI) of the debtor, which already existed in the EIR 2000. What were the amendments adopted in relation to this concept?

(a) The COMI of the debtor is not presumed to be "at the place of the registered office" anymore and the debtor will need to confirm where his COMI is before the beginning of each case.
(b) Although the COMI of a debtor is still presumed to be "at the place of the registered office", it is now possible to rebut this presumption, albeit only by the courts.

(c) The rule that a company's COMI conforms to its registered office is now an irrefutable presumption.

(d) Although the COMI of a debtor is still presumed to be "at the place of the registered office", it should now be possible to rebut this presumption based on Article 3 EIR Recast and Recital 31.

Question 1.7

Which one of the following claims **does not** fall within the definition of a "related action" under the EIR Recast?

(a) Claim to hold a director of the insolvent company liable for causing its insolvency.

(b) Claim of the insolvent company against its contracting party, arising from non-performance of the (pre-insolvent) contractual obligations by the latter.

(c) *Actio pauliana* claim filed by the insolvency practitioner.

(d) Claim of the advance payment for the costs of the insolvency proceedings.

Question 1.8

The dispute in the main proceedings, pending before the Spanish court, is between Abogados SA (Spain) and Fema GmbH (Germany), concerning an action to set aside two payments ("contested payments") in the amount of EUR 800,000, made pursuant to a sales agreement of 10 September 2019, governed by English law. The contested payments had been made by Abogados SA to Fema GmbH before the former went insolvent. The insolvency practitioner of Abogados SA claims that under applicable Spanish law the contested payments shall be set aside. This is due to the fact that Fema GmbH must have been aware that Abogados SA was facing insolvency at the time that 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 contested payments shall not be avoided if Fema GmbH proves that such transactions cannot be challenged on the basis of the insolvency provisions of English law (Article 16 EIR Recast).

(b) To defend the contested payments Fema GmbH 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*.

(c) The contested transactions cannot be avoided if Fema GmbH 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.

(d) 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).

C is the correct answer.

Question 1.9

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

(a) 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.

(b) The judgment, subject to recognition, was passed with incorrect application of the applicable substantive law.

(c) The court, which has opened insolvency proceedings (originating court), most certainly did not have international insolvency jurisdiction to do so under the EIR Recast.

(d) 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.

Question 1.10

The French tax authority asserts to have a tax claim against a Spanish, LPZ Corp (debtor). The debtor is subject to the main insolvency proceeding (*Concurso*) in Spain. In addition, a secondary insolvency proceeding (Examinership) relating to LPZ Corp has been opened in Ireland.

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 Irish law, the period within which creditors must file their claims is 15 days, as set in the order opening secondary insolvency proceedings against LPZ Corp.

The French tax authority intends to file its claim in the Irish 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 15 days, 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 Ireland.

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

Marks awarded: 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. "The possibility for companies to move their COMI is a legitimate exercise of the freedom of establishment."

Statement 2. "This concept provides an instrument which makes allowance for special, domestic privileges while maintaining the procedural integrity of the main proceeding, thus preserving the principle of unity."

Statement 1: International jurisdiction. Article 3 EIR Recast

1. The courts of the Member State within the territory of which the centre of the debtor's main interests is situated shall have jurisdiction to open insolvency proceedings ('main insolvency proceedings'). The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.

In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary. That presumption shall only apply if the registered office has not been moved to another Member State within the 3-month period prior to the request for the opening of insolvency proceedings.

In the case of an individual exercising an independent business or professional activity, the centre of main interests shall be presumed to be that individual's principal place of business in the absence of proof to the contrary. That presumption shall only apply if the individual's principal place of business has not been moved to another Member State within the 3-month period prior to the request for the opening of insolvency proceedings.

In the case of any other individual, the centre of main interests shall be presumed to be the place of the individual's habitual residence in the absence of proof to the contrary. This presumption shall only apply if the habitual residence has not been moved to another Member State within the 6-month period prior to the request for the opening of insolvency proceedings.

2. Where the centre of the debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if it possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.

3. Where insolvency proceedings have been opened in accordance with paragraph 1, any proceedings opened subsequently in accordance with paragraph 2 shall be secondary insolvency proceedings.

4. The territorial insolvency proceedings referred to in paragraph 2 may only be opened prior to the opening of main insolvency proceedings in accordance with paragraph 1 where

(a)insolvency proceedings under paragraph 1 cannot be opened because of the conditions laid down by the law of the Member State within the territory of which the centre of the debtor's main interests is situated; or

(b)the opening of territorial insolvency proceedings is requested by:

(i)a creditor whose claim arises from or is in connection with the operation of an establishment situated within the territory of the Member State where the opening of territorial proceedings is requested; or

(ii)a public authority which, under the law of the Member State within the territory of which the establishment is situated, has the right to request the opening of insolvency proceedings.

When main insolvency proceedings are opened, the territorial insolvency proceedings shall become secondary insolvency proceedings.

Statement 2: Stay of the opening of secondary insolvency proceedings. Article 38 EIR Recast.

3. Where a temporary stay of individual enforcement proceedings has been granted in order to allow for negotiations between the debtor and its creditors, the court, at the request of the insolvency practitioner or the debtor in possession, may stay the opening of secondary insolvency proceedings for a period not exceeding 3 months, provided that suitable measures are in place to protect the interests of local creditors.

The court referred to in paragraph 1 may order protective measures to protect the interests of local creditors by requiring the insolvency practitioner or the debtor in possession not to remove or dispose of any assets which are located in the Member State where its establishment is located unless this is done in the ordinary course of business. The court may also order other measures to protect the interest of local creditors during a stay, unless this is incompatible with the national rules on civil procedure.

The stay of the opening of secondary insolvency proceedings shall be lifted by the court of its own motion or at the request of any creditor if, during the stay, an agreement in the negotiations referred to in the first subparagraph has been concluded.

The stay may be lifted by the court of its own motion or at the request of any creditor if the continuation of the stay is detrimental to the creditor's rights, in particular if the negotiations have been disrupted or it has become evident that they are unlikely to be concluded, or if the insolvency practitioner or the debtor in possession has infringed the prohibition on disposal of its assets or on removal of them from the territory of the Member State where the establishment is located.

[Very good]

Question 2.2 [maximum 3 marks] 3

Where several insolvency proceedings have been opened against the same company, there should be proper co-operation between the actors involved in these proceedings. The EIR Recast has introduced co-operation and communication obligations. List **three (3) provisions**

(articles) of the EIR Recast, which mandate co-operation and communication in the context of main and secondary insolvency proceedings.

1. Co-operation and communication between insolvency practitioners. Article 41 EIR Recast.

2. Co-operation and communication between courts. Article 42 EIR Recast.

3. Co-operation and communication between insolvency practitioners and courts. Article 43 EIR Recast.

Question 2.3 [maximum 3 marks] 2

The EIR Recast is more rescue-oriented than its predecessor the EIR 2000. Name **three (3) provisions** (articles) of the EIR Recast which explain why this statement is true.

1. **Scope. Article 1 EIR Recast.**

1. This Regulation shall apply to public collective proceedings, including interim proceedings, which are based on laws relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation:

(a) a debtor is totally or partially divested of its assets and an insolvency practitioner is appointed;

(b) the assets and affairs of a debtor are subject to control or supervision by a court; or

(c) a temporary stay of individual enforcement proceedings is granted by a court or by operation of law, in order to allow for negotiations between the debtor and its creditors, provided that the proceedings in which the stay is granted provide for suitable measures to protect the general body of creditors, and, where no agreement is reached, are preliminary to one of the proceedings referred to in point (a) or (b).

Where the proceedings referred to in this paragraph may be commenced in situations where there is only a likelihood of insolvency, their purpose shall be to avoid the debtor's insolvency or the cessation of the debtor's business activities.

The proceedings referred to in this paragraph are listed in Annex A.

2. This Regulation shall not apply to proceedings referred to in paragraph 1 that concern:

(a) insurance undertakings;

(b) credit institutions;

(c) investment firms and other firms, institutions and undertakings to the extent that they are covered by Directive 2001/24/EC; or

(d) collective investment undertakings.

2. **Definitions. Article 2 EIR Recast. (5) Insolvency practitioner** [How does this provision relate to rescue? Explanation missing]

(5) 'insolvency practitioner' means any person or body whose function, including on an interim basis, is to:

(i) verify and admit claims submitted in insolvency proceedings;

(ii) represent the collective interest of the creditors;

(iii) administer, either in full or in part, assets of which the debtor has been divested;

(iv) liquidate the assets referred to in point (iii); or

(v) supervise the administration of the debtor's affairs.

The persons and bodies referred to in the first subparagraph are listed in Annex B;

3. Cooperation and communication between insolvency practitioners. Article 56 EIR Recast

1. Where insolvency proceedings relate to two or more members of a group of companies, an insolvency practitioner appointed in proceedings concerning a member of the group shall cooperate with any insolvency practitioner appointed in proceedings concerning another member of the same group to the extent that such cooperation is appropriate to facilitate the effective administration of those proceedings, is not incompatible with the rules applicable to such proceedings and does not entail any conflict of interest. That cooperation may take any form, including the conclusion of agreements or protocols.

2. In implementing the cooperation set out in paragraph 1, insolvency practitioners shall:

(a) as soon as possible communicate to each other any information which may be relevant to the other proceedings, provided appropriate arrangements are made to protect confidential information;

(b) consider whether possibilities exist for coordinating the administration and supervision of the affairs of the group members which are subject to insolvency proceedings, and if so, coordinate such administration and supervision;

(c) consider whether possibilities exist for restructuring group members which are subject to insolvency proceedings and, if so, coordinate with regard to the proposal and negotiation of a coordinated restructuring plan.

For the purposes of points (b) and (c), all or some of the insolvency practitioners referred to in paragraph 1 may agree to grant additional powers to an insolvency practitioner appointed in one of the proceedings where such an agreement is permitted by the rules applicable to each of the proceedings. They may also agree on the allocation of certain tasks amongst them, where such allocation of tasks is permitted by the rules applicable to each of the proceedings.

Question 2.4 [maximum 2 marks] 2

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

1. Right to give an undertaking ("synthetic" secondary proceedings)

For example, courts authorize an administrator of a group of companies to implement the assurances given earlier to creditors in the relevant European jurisdictions and hence to depart from the application of the ordinary provisions of the law of the main proceedings.

In this case, the court asked to open secondary proceedings should not, at the request of the insolvency practitioner, open them if it is satisfied that the undertaking adequately protects the general interests of local creditors.

2. Stay of the opening of secondary insolvency proceedings

For instance, when an insolvency practitioner or the debtor in possession request to the court a stay of the opening of secondary insolvency proceedings. This stay may be imposed for a period not exceeding three months and on condition that suitable measures are in place to protect the interests of local creditors.

The EIR Recast provides for the possibility for the court to temporarily stay the opening of secondary insolvency proceedings, when a temporary stay of individual enforcement proceedings has been granted in the main insolvency proceedings.

Marks awarded: 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

Explain why the adoption of the new European regulation was needed and recommended by the European Commission in 2012.

On 12 December 2012, the Commission adopted a report on the application of Council Regulation (EC) No 1346/2002. The report concluded that the Regulation is functioning well in general but that it would be desirable to improve the application of certain of its provisions in order to enhance the effective administration of cross-border insolvency proceedings.

Furthermore, according to this report[1], among the main elements of the proposed reform of the Insolvency Regulation can be summarised as follows:

Scope:

The proposal extends the scope of the Regulation by revising the definition of insolvency proceedings to include hybrid and pre-insolvency proceedings as well as debt discharge proceedings and other insolvency proceedings for natural persons which currently do not fit the definition.

Jurisdiction:

The proposal clarifies the jurisdiction rules and improves the procedural framework for determining jurisdiction.

[1] See, Report on the application of Council Regulation (EC) No 1346/2002.

Secondary proceedings:

The proposal provides for a more efficient administration of insolvency proceedings by enabling the court to refuse the opening of secondary proceedings if this is not necessary to protect the interests of local creditors, by abolishing the requirement that secondary proceedings must be winding-up proceedings and by improving the cooperation between main and secondary proceedings, in particular by extending the cooperation requirements to the courts involved.

Publicity of proceedings and lodging of claims:

The proposal requires Member States to publish the relevant court decisions in cross-border insolvency cases in a publicly accessible electronic register and provides for the interconnection of national insolvency registers. It also introduces standard forms for the lodging of claims.

Groups of companies:

The proposal provides for a coordination of the insolvency proceedings concerning different members of the same group of companies by obliging the liquidators and courts involved in the different main proceedings to cooperate and communicate with each other; in addition, it gives the liquidators involved in such proceedings the procedural tools to request a stay of the respective other proceedings and to propose a rescue plan for the members of the group subject to insolvency proceedings.

Question 3.2 [maximum 5 marks] 5

Compare the EIR Recast with the EIR 2000: choose **three (3)** major improvements and / or innovations of the EIR Recast. Explain how these improvements and / or innovations should stimulate a more efficient administration of insolvency proceedings spanning across several EU Member States.

1. **Scope**

The scope has been extended to include certain pre-insolvency rescue and restructuring proceedings.

It is noticeable from the wording of Article 1 that the EIR Recast extends not only to traditional liquidation-oriented procedures, but also to proceedings aiming at rescuing economically viable but financially distressed businesses, including those providing for a stay of individual creditors' actions for the sake of protecting the general body of creditors.

So, companies with the expectation to restructure themselves to manage and administer the business can do that in benefit to creditors.

In addition, Annex A provides a list of names of insolvency proceedings for all 27 countries covered by the EIR Recast.

2. **Synthetic secondary proceedings**

Secondary proceedings undeniably complicate the operation of an insolvent debtor, result in additional costs for insolvency practitioners and courts, lengthen the proceedings either to the detriment of creditors and or may disrupt the debtor's efficient restructuring or liquidation.

Secondary proceedings are limited to the debtor's assets in the member state where they are opened. They can cause difficulties for the office-holder in the main proceedings. To avoid this, the office-holder may now give an undertaking to treat claims of foreign creditors in the same way as they would be treated in the local jurisdiction. As a result, creditors were to receive the benefits of the secondary proceedings (for instance preferential payments), while such proceedings did not formally exist. If the court which is being asked to open secondary proceedings considers that this undertaking adequately protects creditors, it may refuse to open secondary proceedings.

3. Co-operation and communication in group insolvencies

The EIR 2000 did not touch the issues pertinent to the insolvency of different group members being the needs to ensure the fair and efficient administration of cross-border insolvencies concerning enterprise group member. So, The EIR Recast introduced some articles to co-operation and communication in group insolvencies.

Insolvency practitioners appointed in insolvency proceedings, opened against members of the same corporate group, must co-operate to the extent that such co- operation is appropriate to facilitate the effective administration of those proceedings and so far as it is compatible with the rules applicable to them and does not entail any conflict of interest.

Furthermore, insolvency Practitioners appointed in these circumstances are under an obligation to communicate and cooperate with office-holders in other member states. The relevant courts are similarly obliged to communicate and cooperate with one another.

Question 3.3 [maximum 5 marks] 5

Select **two (2)** major flaws and / or omissions of the EIR Recast. Explain why you consider them to be flaws and / or omissions and how they can be corrected or remedied.

1. Objections by insolvency practitioners

The EIR Recast to improving the co-ordination of insolvency proceedings of members of a group of companies and to allow for co-ordinated restructuring of the group, introduces procedural rules on the co-ordination of the insolvency proceedings of members of a company. Article 64 EIR Recast states that:

"1. An insolvency practitioner appointed in respect of any group member may object to:

(a)the inclusion within group coordination proceedings of the insolvency proceedings in respect of which it has been appointed; or

(b) the person proposed as a coordinator.

2. Objections pursuant to paragraph 1 of this Article shall be lodged with the court referred to in Article 63 within 30 days of receipt of notice of the request for the opening of group coordination proceedings by the insolvency practitioner referred to in paragraph 1 of this Article.

The objection may be made by means of the standard form established in accordance with Article 88.

3. Prior to taking the decision to participate or not to participate in the coordination in accordance with point (a) of paragraph 1, an insolvency practitioner shall obtain any approval

which may be required under the law of the State of the opening of proceedings for which it has been appointed".

However, this article does not require insolvency practitioners to give reasons for this objection, but I think that these practitioners should provide the reasons of these objections even take into account how the group of creditors will react to this exclusion.
To managing these procedures that EIR Recast should include regulations where practitioners must provide the reasons for these objections.

2. Recommendations and group coordination plan

Article 64 EIR Recast states that:

"1. When conducting their insolvency proceedings, insolvency practitioners shall consider the recommendations of the coordinator and the content of the group coordination plan referred to in Article 72(1).

2. An insolvency practitioner shall not be obliged to follow in whole or in part the coordinator's recommendations or the group coordination plan.

If it does not follow the coordinator's recommendations or the group coordination plan, it shall give reasons for not doing so to the persons or bodies that it is to report to under its national law, and to the coordinator."

I strongly believe that the regulation of group co-ordination proceedings, especially this article 70, misses the desired goal of securing the efficient administration of group insolvency proceedings including co-ordinated restructuring of the group being this the goal when EIR Recast added the figure of coordinator.

In this case, as the insolvency practitioners are not obliged to follow the co-ordinator's recommendations or the group co-ordination plan in whole or in part (Article 70 EIR Recast), this system should be changed to committal.

Therefore, to preventing this situation, EIR Recast must include that co-ordinator's recommendations must be mandatory for insolvency practitioners, and these proceedings would gain efficiency and coordination among different parties such as creditors, debtors, insolvency practitioners, coordinators, judges, among others.

Marks awarded: 15 out of 15

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

Prêt A Jouer (PAJ) is a France-registered toy shop company. The company opened its first store in Strasbourg in 2011. One of PAJ's warehouses is in Madrid (Spain) and PAJ rents out this warehouse to other toy companies. In 2013, PAJ concluded a line of credit agreement with a Spanish bank where it maintains a bank account. During the same year, PAJ announced that it had plans to expand to the Spanish adult gaming market, as the latter was expected to grow annually by over 10%. As a result, PAJ started negotiations with local distributors and some (non-binding) memoranda of understanding have been signed.

However, like many other toy businesses, PAJ has faced the challenges of increased fixed costs and it has underestimated competition with web-based companies and an increasing

preference for video games. For a few years now, PAJ has been beset by financial difficulties and, having witnessed the ongoing demise in revenue and fall in profits, it decided to file a petition to open safeguard proceedings (*procédure de sauvegarde*) in France. The petition was filed with the Strasbourg Court on 23 June 2017.

Question 4.1 [maximum 5 marks] 4

Assume that the EIR 2000 applies. Does the Strasbourg 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.

Yes, it does, the Strasbourg Court had international jurisdiction to open an insolvency proceeding of Pret A Jouer (PAJ) because the EIR 2000 was applicable to France due to the fact that On 29 May 2000, the European Council adopted the EIR 2000, which entered into force on 31 May 2002.

This regulation was binding in its entirety and directly applicable in all EU Member States with the exception of Denmark, which decided to opt out. It contained uniform rules on international jurisdiction, recognition of insolvency judgments, applicable law in insolvency matters and cooperation between insolvency practitioners.

Furthermore, according to the Article 3 (1) EIR 2000 a main insolvency proceeding could be initiated at the place of the debtor's centre of main interest (COMI). Such proceeding had universal scope and encompassed all debtor's assets throughout the EU. The EIR 2000 also prescribed that the law of the state of the opening of insolvency proceedings, the lex concursus, determines the effects of such proceedings (Article 4 EIR 2000).

In addition, the EIR 2000 did not contain a definition of COMI; it however provided some guidance in its Recital 13; however, in one of the most important cases on interpretation of the EIR 2000, *Eurofood IFSC Ltd* the court defined the concept of COMI is peculiar to the regulation. It has an autonomous meaning and must therefore be interpreted in a uniform way, independently of what a similar term may mean in national legislation. Moreover, the Court of Justice of the European Union (CJEU) explained the autonomous meaning of the term COMI and then emphasized that it must be identified by reference to criteria that are both objective and ascertainable by third parties.

Finally, for these reasons, I think that In France is situated the COMI of PAJ. [Make sure you specifically answer the question. Does the Strasbourg court have jurisdiction?]

Question 4.2 [maximum 5 marks] 5

Assume that the Strasbourg Court opens the respective proceeding on 29 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.

Determination of the EIR Recast's scope requires analyzing all kinds of scopes.

Material Scope: According to Article 1 EIR Recast, this reguklation applies to public collective proceedings, including interim proceedings, which are based on laws relating to insolvency and in which, for the purposes of rescue, adjustment of debt, reorganisation or liquidation. The proceedings referred to in Article 1 are listed in Annex A to the EIR Recast.

The proceeding (sauvegarde) opened against PAJ is listed in Annex A to the EIR Recast.

Temporal scope: The EIR Recast applies from 26 June 2017 (Article 92 EIR Recast). Furthermore, Provisions of the EIR Recast shall apply only to insolvency proceedings opened after the indicated date (Article 84(1) EIR Recast).

The proceeding of PAJ is opened from 29 June 2017 after 26 June 2017.

Personal Scope: Some entities are explicitly excluded from the personal scope of the EIR Recast. Thus, according to Article 1(2) EIR Recast, it does not apply to proceedings that concern: a) insurance undertakings, b) credit institutions, c) investment firms and other firms, institutions and undertakings to the extent that they are covered by Directive 2001/24/EC; or d) collective investment undertakings.

PAJ is a toy shop company, it is not an excluded undertaking of this regulation.

Territorial scope: The EIR Recast is a binding piece of EU legislation and it is therefore directly applicably in all Member States, with the exception of Denmark.

In the case, PAJ has COMI in a Member State of the EU, except Denmark.

All four scopes have complied, for this reason, the EIR Recast should be applicable to the opened insolvency proceeding of PAJ.

Question 4.3 [maximum 5 marks] 4.4

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

The EIR Recast allows for the opening of one or more secondary insolvency proceedings against a debtor in any Member State where it possesses an establishment (Article 3(2) EIR Recast).

The concept of an "establishment" is essential to the opening of secondary proceedings, as such proceedings can only be opened in a Member State in which the debtor has an establishment. According to Article 2(10) EIR Recast, "establishment" means any place of operations where a debtor carries 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.

In *Interedil*[2], the CJEU examined the concept and concluded that:

"The fact that that definition links the pursuit of an economic activity to the presence of human resources shows that a minimum level of organisation and a degree of stability are required. It follows that, conversely, the presence alone of goods in isolation or bank accounts does not, in principle, satisfy the requirements for classification as an establishment" (paragraph 62).

[2] Case C-396/09, Interedil Srl v Intensa Gestione Crediti (October 20,2011).

According to EIR Recast and CJEU jurisprudence, an establishment must be an organization doing economic activities with human beings and assets. In the PAJ case, it only has a bank account in Spain and some memoranda of understanding (MOU) sign with local distributors, in this sense, the Spanish bank cannot open a secondary insolvency proceeding in Spain against PAJ.

[Good. Further analysis and application of this quote to the case at hand would have been welcomed:
In the CJEU decision in *Interedil Srl v Fallimento Interedil Srl,* the Court stated at paragraph 64 that the term "establishment" under the EIR Recast requires the presence of a structure consisting of a "*minimum level of organisation and a degree of stability necessary for the purpose of pursuing an economic activity. The presence alone of goods in isolation or bank accounts does not, in principle, meet that definition*." Although there is no explicit time limit on how long the activity has gone on for, an occasional place of operations would not be considered as an establishment. This assessment is an objective one, rather than viewed through the subjective lens of the debtor (see paragraph 71 of the Virgós-Schmit Report).

Applied to this case, this is significant because it cannot be said that because there was the intention to enter the Spanish market (by signing non-binding MOUs), that this demonstrated sufficient connection for there to be an establishment in Spain.

The same *Interedil* decision also held that if the bodies responsible for the management and supervision of the debtor are in the same place as its registered office, and the management decisions of the company are in fact taking place there, the registered office presumption (i.e. the COMI is presumed to be the same place as the registered office) cannot be refuted. In this case, the facts do not expressly say that the management takes place in France, although given that the first store was opened there, this is possible.

In this case, in consideration of the facts and the relevant case law, it appears that the minimum level of organization and stability has not been demonstrated for Spain. Therefore, it would not be possible to open secondary insolvency proceedings in Spain.]

Marks awarded: 13.5 out of 15

*** End of Assessment ***

Marks awarded: 45.5 out of 50