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**.

5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words**.

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).

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).

C is the correct answer.

Marks awarded: 8 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks] 1

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 – Forum shopping – Article 3(1) – The EIR Recasts only prohibits the harmful and abusive forms of forum shopping. The change of insolvency venue for the benefit of successful restructuring is not per se prohibited.

Statement 2 – Secondary insolvency proceedings – Article 3 (2) – Secondary proceedings serve to protect local interest and enhance the handling of complex insolvency proceedings. Secondary proceedings serve a supportive function to the main proceedings.] [No, this is incorrect. Statement 2 relates to synthetic proceedings, i.e. Article 36 and Article 38 EIR Recast.]

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.

[Article 41 - Cooperation and communication between insolvency practitioners - The insolvency practitioner in the main insolvency proceedings and the insolvency practitioner(s) in secondary insolvency proceedings concerning the same debtor shall cooperate with each other to the extent such cooperation is not incompatible with the rules applicable to the respective proceedings. Such cooperation may take any form, including the conclusion of agreements or protocols.

Article 42 - Cooperation and communication between courts - A court before which a request to open insolvency proceedings is pending, or which has opened such proceedings, shall cooperate with any other court before which a request to open insolvency proceedings is pending, or which has opened such proceedings, to the extent that such cooperation is not incompatible with the rules applicable to each of the proceedings.

Article 43 - Cooperation and communication between insolvency practitioner and court - An insolvency practitioner in main or territorial or secondary insolvency proceedings shall cooperate and communicate with any court before which a request to open insolvency proceedings is pending or which has opened such proceedings.]

Question 2.3 [maximum 3 marks] 3

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.

[Article 1 – Scope – The scope of EIR Recast extends to proceedings that promote the rescue of economically viable but distressed businesses and gives a second chance to entrepreneurs. EIR recast also covers the restricting of a debtor at a stage when there is only a likelihood of restructuring.

Article 41(2)(b) – Cooperation and communication between insolvency practitioners – This article implores insolvency practitioners to explore the possibility of restructuring a debtor and, where such possibility exists, to coordinate the elaboration and implementation of a restructuring plan.

Article 47 – Power of insolvency practitioner to propose a restructuring plan – The insolvency practitioner in the main insolvency proceeding is empowered to propose a restructuring plan where the law of the member state in which secondary proceedings have been opened allows for a closing of liquidation proceedings by a restructuring plan or composition or comparable measure.]

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.

[Article 36(1) – Right to give an undertaking in order to avoid secondary proceedings

In order to avoid the opening of secondary proceedings, the insolvency practitioner in the main proceedings may give a unilateral undertaking ("the undertaking") in respect of the assets located in the Member State in which secondary proceedings could be opened, that when distributing those assets or the proceeds received as a result of their realisation, he will comply with the distribution and priority rights under national law that creditors would have if secondary proceedings were opened in that Member State. The undertaking shall specify the factual assumptions on which it is based, in particular in respect of the value of assets located in the Member State concerned and the options available to realise such assets.

This *undertaking* allows for centralisation of control over major decisions affecting the debtor and the insolvency estate e.g. the development of a comprehensive restructuring plan. Secondly, it safeguards the rights and legitimate expectations of local and preferential creditors by guaranteeing the priority rights guaranteed under the relevant local insolvency laws.

Article 38(3) – Stay of the opening of secondary proceedings

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.

This *stay* helps prevent the secondary proceedings from frustrating the process of negotiations and undermining business rescue, it therefore preserves the efficacy of the *stay* 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.

[The overall objective of the revision of the Insolvency Regulation was to improve the efficiency of the European framework for resolving cross-border insolvency cases in view of ensuring a smooth functioning of the internal market and its resilience in economic crises.

While the Insolvency Regulation was generally considered to operate successfully in facilitating cross-border insolvency proceedings within the European Union, the European Commission noted, from its consultation with stakeholders and from legal and empirical studies, that a range of practical problems arose in the application of the Regulation.

Moreover, the Commission noted the extant Regulation did not sufficiently reflect current EU priorities and national practices in insolvency law, in particular in promoting the rescue of enterprises in difficulties.

Five main shortcomings were identified:

1. **Scope** - The Regulation's scope did not cover national procedures which provide for the restructuring of a company at a pre-insolvency stage ("pre-insolvency proceedings") or proceedings which leave the existing management in place ("hybrid proceedings"). In addition, there were a number of personal insolvency proceedings outside the Regulation's scope.

2. **Jurisdiction** - There were also difficulties in determining which Member State was competent to open insolvency proceedings. The Regulation's jurisdiction rules had also been criticised for allowing forum shopping by companies and natural persons through abusive COMI-relocation.

3. **Secondary proceedings** - Problems were also identified with respect to secondary proceedings. Secondary proceedings at the time had to be winding-up proceedings which constituted an obstacle to the successful restructuring of a debtor.

4. **Publicity** - There were issues relating to the rules on publicity of insolvency proceedings and the lodging of claims. There was no mandatory publication or registration of the decisions in the Member States where a proceeding was opened, nor in Member States where there is an establishment. There was also no European Insolvency Register which would permit searches in several national registers.

5. **Groups of Companies** - The Regulation did not contain specific rules dealing with the insolvency of a multi-national enterprise group, yet a large number of cross-border

insolvencies involved groups of companies. The lack of specific provisions for group insolvency diminished the prospects of successful restructuring of the group as a whole and was leading to a break-up of the groups into their constituting parts.]

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.

[The EIR recast was designed to address shortcomings in EIR 2000 and includes many helpful changes. In particular:

1. **Centre of Main Interests (COMI)** – EIR 2000 did not contain a definition of COMI although guidance was provided in Recital 13. This created a certain level of uncertainty. In contrast Article 3(1) of EIR Recast mandates that COMI shall be the place where the debtor conducts the administration of the its interests on a regular basis and which is ascertainable by third parties (see *Eurofood IFSC Ltd Case C-341/04 ECLI:EU:C:2006:281 (2 May 2006)).* The autonomous meaning of COMI facilitates legal certainty and predictability by all stakeholders dealing with a debtor. EIR Recast contains a presumption that a debtor's COMI is in the place of its registered office and this can only be rebutted if objective factors indicate that the administration of a debtor's interests happens in a State different from the State of the registered office. This measure is designed to curb abusive forum shopping.

2. **Recognition and enforceability of other judgments** - Article 32(1) of EIR Recast mandates that judgements covered by it (including judgments deriving directly from the insolvency proceedings or preservation measures), concerning course and closure of insolvency proceedings and compositions, shall be recognised with no further formalities. Such judgments shall be enforced in accordance with Articles 39 to 44 and 47 to 57 of Regulation (EU) No 1215/2012. There is therefore no declaration of enforceability, approval or exequatur required. This was not the case with EIR 2000 which required the declaration of enforceability by a court in the State where enforcement was sought. This represents a major procedural improvement in enforcement of insolvency judgements.

3. **Duty to inform creditors** – EIR 2000 had left it to the discretion of insolvency practitioner to publish, in other Member States, information regarding the opening of insolvency proceedings. In contrast, Article 28(1) of EIR Recast obligates the insolvency practitioner or debtor in possession to request the publication of the notice of the opening of insolvency proceedings, whether main or secondary, at the place of the debtor's establishment in accordance with the publication procedures provided for in the Member State. This addresses the need to inform foreign creditors amidst the difficulties and barriers they face (such as language, procedure and information) regarding foreign insolvencies.]

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.

[**Article 72 - Tasks and rights of the coordinator**

Article 72(1) provides for the appointment of a Group Coordinator. Article 72(2) explains the duties of the coordinator to include:

(a) identify and outline recommendations for the coordinated conduct of the insolvency proceedings;
(b) propose a group coordination plan that identifies, describes and recommends a comprehensive set of measures appropriate to an integrated approach to the resolution of the group members' insolvencies. In particular, the plan may contain proposals for:

    (i) the measures to be taken in order to re-establish the economic performance and the financial soundness of the group or any part of it;
    (ii) the settlement of intra-group disputes as regards intra-group transactions and avoidance actions;
    (iii) agreements between the insolvency practitioners of the insolvent group members.

Apart from the power of the Coordinator to request for a stay of up to six months of proceedings opened in respect of any member of the Group to ensure the implementation of a coordination plan, the actions of the coordinator are generally recommendatory in nature.

In principle, the involved insolvency practitioners must consider the recommendations of the coordinator and take into account the group coordination plan. However, there is room to deviate from these recommendations and/or the group coordination plan as long as the relevant insolvency practitioners reports his or her reasons for doing so to the relevant national authority and the coordinator.

This makes the tool of the group coordinator less useful in practice. For group coordination proceedings to be successful, participation should be less voluntary. Furthermore, it would have been more useful to appoint one person, either an independent coordinator or one of the insolvency practitioners, with farther-reaching powers who could give binding recommendations to manage the effective administration of the different insolvency proceedings.

Article 8 - Third parties' rights in rem

Article 8(1) provides that the opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets, both specific assets and collections of indefinite assets as a whole which change from time to time, belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.

EIR Recast does not confer any rights to holders of a right in rem, but it protects a right in rem from the effects of insolvency laws of another Member state in which insolvency proceedings have been opened. As a result of this protection, an insolvency practitioner appointed in the main insolvency proceedings cannot simply ignore a right in rem that is protected by the EIR Recast by, for instance, disposing over assets that are subject to such right in rem. On the other hand, a holder of a right in rem that is protected under the R-EIR can enforce his rights while ignoring the primary insolvency proceedings.

The protection under the EIR Recast is ‘hard and fast’; in other words, no limitation whatsoever under any applicable insolvency law would apply to the rights in rem that are protected under the EIR Recast. Secured creditors are therefore overprotected under EIR Recast. Security rights in rem should not be affected to any larger extent than would be the case if local insolvency proceedings were opened.]

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] 5

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.

[EIR applies the modified universalism approach in which the main insolvency proceedings are to be initiated in the place of the debtor's centre of main interest or COMI (see Article 3(1) of EIR 2000). Such proceedings have universal scope and encompass all the debtor's assets throughout the European Union.

Therefore, under EIR 2000 the Strasbourg Court being the COMI of PAJ would have jurisdiction to open the main insolvency proceedings with international scope and affecting all of PAJ's assets in the EU, subject to any secondary insolvency proceedings in Spain.
(See Eurofood IFSC Ltd Case C-341/104 ECLI:EU:C:2006:281 (2 May 2006)).

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 EIR Recast's scope requires answering the following questions: (a) when does it apply in time (temporal scope); (b) to whom does it apply (person scope); (c) which proceedings are covered by it (material scope); and (d) what are its geographical limitations (geographical scope).

The step by step plan is illustrated below:

1. Does the debtor have COMI in a Member State of the EU (geographical scope)? In this case the COMI is presumed to be in France which is an EU member state (except where there are objective factors to rebut this presumption). The answer to question 1 is Yes.

2. Is the debtor not a bank, insurance company or another “excluded” undertaking (personal scope)? PAJ is a toy shop company, so the answer is Yes.
3. Is the proceeding opened against the debtor listed in Annex A to EIR Recast (material scope)? Sauvegarde proceedings are listed in Annex A, so the answer is Yes.
4. Was the proceeding opened after 26 June 2017, the effective date of EIR Recast (temporal scope)? The answer (29 June 2017) is Yes.

Since all four steps have been answered in the affirmative, then EIR Recast is applicable to the insolvency proceeding against PAJ.]

Question 4.3 [maximum 5 marks] 2

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.

[EIR Recast allows for 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.

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, non-transitory economic activity with human means and assets (see *Interedil srl v Fallimento Interedil Srl Case C-396/09, ECLI:EU:C:2011:261 (20 Oct 2011)*).

In this case, PAJ has assets in (Madrid) Spain where it has warehouses that it rents out to other toy companies. Therefore PAJ has an establishment in Spain, as result of which the Spanish bank can open secondary insolvency proceedings.]

[This is incorrect. Based on the facts, it would seem that the finding of an establishment would not be made out in Spain, as these facts do not qualify as "non-transitory economic activity with human means and assets" (Article 2(10) of the EIR Recast). The EIR Recast does not have requirements as to form i.e. that there has to specifically be a corporate branch or representative office, in order for there to be an establishment. The EIR Recast places more importance on the substance, looking at both human resources and assets. Nevertheless, the facts of the case suggest that the threshold for there to be considered an establishment in Spain has not been reached, as there is only a bank account and intentions to expand into the adult gaming market in Spain, and the signing of some non-binding memoranda of understanding.

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: 12 out of 15

*** End of Assessment ***

Marks awarded: 44 out of 50