



## **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 was 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 was 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).

**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.

Article 3, International Jurisdiction

Statement 2.

Recital 45 EIR Recast, stay of the opening of secondary insolvency proceedings or Parallel proceedings and Article 36 Right to give an undertaking in order to avoid secondary insolvency proceedings.

**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.

The three provisions (articles) of the EIR Recast, which mandate the co-operation and communication in the context of main and secondary insolvency proceedings are as follows:

1. Article 41 EIR Recast, co-operation and communication between Insolvency Practitioners.
2. Article 42 EIR Recast, co-operation and communication between Courts.
3. Article 43 EIR Recast, co-operation and communication between Insolvency Practitioners and Courts.

**Question 2.3 [maximum 3 marks] 1.5**

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. Article 1 EIR Recast, Scope: -

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).

2. Article 41(2) EIR Recast, where the the insolvency practitioners shall: -

a) as soon as possible communicate to each other any information which may be relevant to the other proceedings, in particular any progress made in lodging and verifying claims and all measures aimed at rescuing or restructuring the debtor, or at terminating the proceedings, provided appropriate arrangements are made to protect confidential information;

b) explore the possibility of restructuring the debtor and, where such a possibility exists, coordinate the elaboration and implementation of a restructuring plan;

c) coordinate the administration of the realisation or use of the debtor's assets and affairs; the insolvency practitioner in the secondary insolvency proceedings shall give the insolvency practitioner in the main insolvency proceedings an early opportunity to submit proposals on the realisation or use of the assets in the secondary insolvency proceedings.

3. Article 36 EIR Recast, right to give an undertaking in order to avoid secondary insolvency proceedings and Recital 45 EIR Recast, stay on the opening of secondary insolvency proceedings.

**Yes but you were also supposed to explain why these provisions have made the EIR Recast more rescue-oriented than the EIR 2000.**

#### **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. Article 36 EIR Recast, right to give an undertaking in order to avoid secondary insolvency proceedings.

The insolvency practitioner in main insolvency proceedings can give an undertaking to local creditors that they will be treated as if secondary insolvency proceedings had been opened. That undertaking has to meet a number of conditions set out in this Regulation, in particular that it be approved by a qualified majority of local creditors. Further, when distributing the proceeds from realisation, the insolvency practitioner in the main insolvency proceedings should respect the priority rights that creditors would have had if secondary insolvency proceedings had been opened in that Member State.



2. Article 38(3) EIR Recast, the court temporarily stays the opening of secondary insolvency proceedings.

The court should be able to grant the temporary stay for a period not exceeding three months in order to allow for negotiations between debtors and its creditors, if it is satisfied that suitable measures are in place to protect the general interest of local creditors. In such a case, all creditors that could be affected by the outcome of the negotiations on a restructuring plan should be informed of the negotiations and be allowed to participate in them.

Marks awarded: 8.5 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] 2.5

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

The adoption of the new European regulation was the need of hour since EIR 2000 was not able to deal with new instruments [what kind of instruments are you referring to here? It is unclear] or to promote restructuring tools to maximise value for creditors, increase investments and job opportunities. The need of multi-dimensional cooperation and communication, greater data protection with improved creditor information and insolvency proceedings with regard to members of the same group companies was also needed.

There was a need widen the scope, remove ambiguity, more universality with improved cooperation.

Further there were various case laws which needed to be a part of regulation for its efficient and effective working, now rescue is given more emphasis then winding up.

[Yes, but it would have made your answer stronger had you referred to the documents preceding the passing of the EIR Recast, especially of the European Parliament, which identified five specific elements in need of reform.]

#### 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 three major improvements of EIR 2015 in comparison to EIR 2000 are as follows: -

1. Expansion of Scope: - The scope has been extended to include certain pre-insolvency rescue and restructuring proceedings.

2. Secondary Proceedings, Virtual or Synthetic: - The method for ascertaining a debtor's Centre of Main Interest has now been codified within the EIR Recast. Now, the secondary proceedings are those opened in an EU member state where the debtor does not have their

COMI but does have an economic presence known as an establishment. The secondary proceedings 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.

3. Co-operation and communication: - The insolvency proceedings relating to different members of a corporate group are opened in more than one member state. IPs appointed in these circumstances are under an obligation to communicate and cooperate with office-holders in other member states. Further, the courts are also obliged to communicate and cooperate with one another and mandatory cooperation and communication between IPs and courts.

Since, EIR Recast is more rescue oriented and it has provisions for compulsory communication between office holders, courts, this will to reduction in legal costs and time. Now, the preservation of value in the assets of debtor will be achieved. The principles of Unity and universalism will stay enacted in the process.

Further, The IPs are obliged to examine whether or not COMI is in the jurisdiction in which they are appointed. The clarification and guidance given in the Recast EIR is helpful for practitioners taking appointments in EU member states.

Moreover, with the secondary insolvency proceeding dual objective of protection of local interest and improving the administration of insolvency estate can be achieved.

### **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. Shortcomings of ordinary legislative procedure and practical problems in amendment of Annex A: - Several Member States will be working on the modernisation of their insolvency laws and in the absence of a provision, the future amendments of Annex A will have to be adopted according to the ordinary legislative procedure.

Since, the ordinary legislative procedure is rather long, it is unlikely that the Council will be able to react promptly to the evolution of the Member States' legislations and thus there will always be a transitory period during which new national proceedings in line with the conditions set forth in Article 1(1) will not be covered by the Regulation. \*\*

2. EIR Recast is only applicable with in the member states, various other states or countries have different rules and regulations with regard to cross-border insolvency. EIR Recast only talks about cooperation and coordination with in state members, but in today's world of globalism it is not possible to stay with in the limits of European Union, co-operations are expanding their business in other developing economies to take advantage. EIR Recast does not address the cross-border insolvency issues with regard to non-members of European Union. Further, UK Schemes of arrangement, members' voluntary liquidations and receiverships continue to fall outside of the scope of EIR Recast.

Recommendations: -

1. The Article 45 Amendment of Annexes, EIR 2000 has not been recast in the Regulation, therefore, in the absence of a specific rule, the amendment of Annex A should follow the formal ordinary legislative procedure, set forth in Article 294 Treaty on the Functioning of European Union.

2. The provisions to address cross border issues with regard to non-member states may be introduced.

\*\* <http://ejtn6r2.episerverhosting.com/PageFiles/16467/Guidelines.pdf>

Marks awarded: 12.5 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 2000's application establishes that insolvency proceedings could be initiated at the place of Debtor's centre of main interest (Article 3(1) EIR 2000), further such proceeding shall have universal scope and encompass all the debtor's assets throughout EU.

Further in the matter of Eurofood IFSC Ltd., it was held that where insolvency proceedings are first opened by a court in the Member State in which a company's registered office is situated and in which the company conducts the administration of its interests on a regular basis in a manner ascertainable by third parties, the courts of other Member States do not have jurisdiction under Article 3(1) of Regulation No 1346/2000 to open main insolvency proceedings.

Conclusion: - In the given case, PAJ has registered office in France and also doing business in France, therefore in the light above stated law and judgement it can be concluded that the Strasbourg Court has international jurisdiction to open the requested insolvency proceeding.

##### **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.

To answer whether the EIR Recast would be applicable or not, we have to first understand the scope of EIR Recast and steps involved.

Article 1 EIR Recast: -

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).\*\*

Further determining the scope will require answering the four questions in the following sequence: -

1. (Geographical Scope) The debtor has COMI in member state of the EU, except Denmark, if yes
2. (Personal Scope) The debtor is not a bank, insurance company or another “excluded” undertaking, if yes
3. (Material Scope) The proceeding opened against the debtor is listed in Annex A to the EIR Recast, if yes
4. (Temporal Scope) The proceeding is opened after 26 June 2017, if yes

The opened insolvency proceeding is covered under the scope of EIR Recast.

Now, in the given case, PAJ has COMI in member state of the EU, PAJ is also not a bank, insurance company or an “excluded” undertaking, Safeguard (*Sauvegarde*) is also covered in Annex A, under France. Further the court has opened proceedings on 29<sup>th</sup> June 2017, therefore in my opinion the EIR Recast is applicable.

\*\*<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015R0848>

#### **Question 4.3 [maximum 5 marks] 1.5**

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.

As per Article 34, This Regulation enables the main insolvency proceedings to be opened in the Member State where the debtor has the centre of its main interests. Those proceedings have universal scope and are aimed at encompassing all the debtor's assets. To protect the diversity of interests, this Regulation permits secondary insolvency proceedings to be opened to run in parallel with the main insolvency proceedings. Secondary insolvency proceedings may be opened in the Member State where the debtor has an establishment. The effects of secondary insolvency proceedings are limited to the assets located in that State. Mandatory rules of coordination with the main insolvency proceedings satisfy the need for unity in the Union.

Further in the matter of *Interedil Srl, (in Liquidation) v Fallimento Interedil Srl, Intesa Gestione Crediti SpA*, it was concluded that, If a company has, in a Member State other than that in which it has its registered office, immovable property, a lease agreement concluded by the debtor company with another company in respect of two hotel complexes, and a contract with a banking institution, these factors can only be sufficient for the company to be regarded as having an 'establishment' within the meaning of Article 3(2) of Regulation No 1346/2000, if these factors, individually or as a whole, on the basis of a permanently established organisational structure, are embedded in a place of operations where the debtor carries out a non-transitory economic activity with human means and goods\*\*\*

As per the facts given in the case, it can be concluded that secondary insolvency proceedings can be opened in the Spain under the EIR Recast, since PAJ has establishment in member state other than its registered office i.e. Spain.

[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: 11.5 out of 15

\*\*\*<https://curia.europa.eu/juris/document/document.jsf?text=&docid=81837&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3288367>

**\* End of Assessment \***

Marks awarded: 40.5 out of 50