



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).

C was the correct answer.

Marks awarded: 7 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."

[Statement1: Article 3(1) of the EIR Recast provides for presumption in location of the COMI in main insolvency proceedings. It provides that the presumption shall only apply if the registered office has not been moved to another member state within the three months preceding the request for opening of the insolvency proceedings. It also addresses the issue of forum shopping by introducing a limitation period of three(3) months to check the abuse of freedom of establishment. The freedom of shifting the debtor's COMI is therefore limited only shift effected before the statutory 3 months suspect period. Statement 2: Statement 2 deals with power to open secondary insolvency proceedings under Article 3(2) of the EIR Recast which creates a Modified Universalism, by allows courts of another member state to open insolvency proceeding where the debtor possesses an establishment within the territory of a state, even though the centre of debtor's main interest is located in another state. Contrary to the universal effect of the COMI, the effect of the secondary is restricted to the debtor's assets in the state of secondary proceeding.]

Statement 2 was referring to Articles 36 and 38.

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. Article 41(1) of the EIR Recast provides for co-operation and communication between Insolvency Practitioner appointed in the main insolvency proceedings and the insolvency practitioner(s) in the secondary proceeding, where the same debtor is involved. They are required to cooperate to the extent such cooperation is not incompatible with the rules applicable to the respective proceedings, such cooperation may include agreements or protocols.
2. Article 42 of the EIR Recast provides for cooperation and Communication between courts. Courts are required to cooperate with each other in order to facilitate co-ordination between main and secondary insolvency proceeding.
3. Article 43 provides for Cooperation and communication between insolvency practitioners and courts. Insolvency practitioner in main insolvency proceeding are required cooperate and communicate with court where secondary insolvency proceeding are

pending, while insolvency practitioner where the secondary insolvency proceeding is opened is required do same with the court where main or another secondary insolvency proceeding is pending.]

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.

[The EIR Recast is truly more rescue- oriented than the EIR 2000. The EIR Recast in Article 1 and Recital 10 reveals that emphasis was not on liquidation, rather on giving entrepreneurs a second chance to rescue their financially distressed but economically viable businesses. The EIR Recast is a public collective proceeding(including interim proceedings), that provides measures to protect the general body of creditors. The EIR Recast provides for stay of individual creditor's enforcement proceedings which provides a breathing space that aids negotiation between the debtor and its creditors, on a rescue and repayment plan. Unlike the EIR 2000 that emphasized partial or total divestment of a debtor and appointment of a liquidator, the EIR Recast now emphasizes restructuring of the debtors affairs at an early stage, when there is only likelihood of insolvency, which helps to avoid insolvency.]

Yes but you failed to provide references to enough articles.

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 3(2) of the EIR Recast allows for the opening of one or more secondary insolvency proceeding against a debtor, yet it restricted the effects of the secondary proceeding to only the assets of the debtor situate in the territory of the member state where the secondary proceeding have been opened. Therefore, the opening of secondary insolvency proceedings results in the creation of a separate insolvency estate and application of the law of state where the establishment is located, eliminating any conflict with the main proceeding. Also, Article 3(4) of the EIR Recast presupposes that secondary insolvency proceedings will play a supportive role to the main insolvency proceeding. That is why Article 3(4) of EIR Recast provides that secondary insolvency proceeding may follow in time after the opening of the main proceeding, subject to some few exceptions.]

Marks awarded: 7.5 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] 5

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

[The European Commission were required in Article 46 of the EIR 2000 to present a report of the application of the EIR 2000 with proposal for its adaptation if necessary. The European in their recommendation, observed that after 15 years of the application of the EIR 2000, some of its provisions needs to be amended, while new rules were recommended for other developments. This led to the EIR recast 2015 which was introduced to respond to the obvious needs of insolvency practise by extending the scope of the regulation to include rescue and restructuring provisions for saving economically viable businesses, greater protection against abusive forum shopping, review of secondary proceedings, providing stronger rules for cooperation between insolvency practitioners and courts, proceedings for members belonging to the same group of companies, interconnectivity of insolvency registers and data - protection.]

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 Recast enlarged the scope of the Regulation to include certain specified pre-insolvency rescue proceedings, as part of the policy to encourage rescue, restructuring and rehabilitation of financially distressed companies, whereas the EIR 2000 is only focused on traditional insolvency proceedings in member state, which as liquidation-oriented.

The EIR in the bid to make the COMI more predictable, did not only introduce a stricter definition to the concept of COMI, rather it introduced several presumptions indicating its location. Article 3(1) of the EIR Recast provides that the registered office shall be presumed to be the COMI, only if the registered office has not been moved to another member state within the three (3) months preceding the application for opening the insolvency proceedings. The introduction of a suspect period(3 months) was as a safeguard against forum shopping, which allows manipulation of the COMI shortly before the actual filing of the insolvency proceeding.

The EIR Recast also abolished the requirement under Article 3(3) of EIR 2000 that secondary proceedings must be limited to winding-up proceedings, which significantly hindered attempts to restructure businesses across Europe having several establishments located in different member states.]

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.

[The EIR Recast on one hand broadened the scope of application of the definition of “insolvency proceedings to national proceedings, but on the other hand, it sets out certain limits to national solutions, by taking the view that not all insolvency-related national proceedings should benefit from the application of the EIR Recast. The EIR Recast application of collective proceedings are not based on general company, rather are formulated exclusively for insolvency situations by Recital 16. Matters involving Scheme of Arrangement procedure is not included in the Annex A. This leaves Scheme of Arrangement outside the scope of the EIR Recast, even though Schemes are used many times in Insolvency situations for restructuring. Article 36 provides for a situation where an insolvency practitioner in the main insolvency proceedings may give a unilateral undertaking in respect of assets located in the member state in which the secondary insolvency proceedings could be opened, that when

distributing those assets, it will comply with the distribution and priority rights under the national law This provision has the weakness that the requirement of a financial deposit, may frustrate synthetic secondary proceedings. It also tends to “over protect” the local creditors, who already enjoy distribution rights under the local insolvency law.]

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.

[Assuming that the EIR 2000 applies, Strasbourg Court does not have the international jurisdiction to open safeguard proceeding. Safeguard proceedings which is intended to provide reorganisation and restructuring measures for companies in financial distress but not yet insolvent to be rescued. Article 1 of the EIR 2000 only provided for proceedings to partially or totally divest a debtor and the appointment of a liquidator. The provision for rescue of financially distressed businesses that are still economically viable at an early stage to avoid insolvency was introduced under the EIR Recast, in Article 1 and Recital 10. It was the introduction of the EIR Recast that extended insolvency proceedings beyond liquidation-oriented procedures to rescue procedure. Also, according to Article 6 of the EIR Recast the jurisdiction of courts opening insolvency proceedings extends to other “related action”, which are actions that are so closely connected to insolvency proceedings, that it is advisable for them to fall within the jurisdiction of the courts of opening. In *Henri Gourdain v. Franz Nadler*, the CJEU in deciding to application of Brussels Convention to enforcement of a wrongful trading noted that the action was for general benefit of the creditors, the court based on its findings concluded that the action was given in the context of bankruptcy, and therefore did not fall under the provision of 1968 convention. However, many years later the CJEU in the case of *Christopher Seagon v. Deko Marty Belgium NV* on the grounds of related matters to insolvency decided that concentrating all actions directly related to insolvency before the courts of the member state with jurisdiction to open insolvency is consistent with the objective of improving the effectiveness and efficiency of insolvency proceedings having cross-border effects.]

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.

[In determining the scope of the EIR Recast one need to consider the various scope applicable under the EIR Recast, namely;

1. The "temporal scope" which answers the question of when does it apply in time. The EIR Recast from 26th June, 2017 according to Article 92 of the EIR Recast. By Article 84(1) of the EIR Recast the provisions of the EIR Recast is only applicable to insolvency proceedings opened before that day. Insolvency proceeding open before 26th June, 2017 shall be governed by the EIR 2000. Based on the temporal scope the EIR Recast will be applicable, EIR Recast is applicable to Insolvency proceedings opened before the date the EIR Recast came into force. The EIR Recast came into force on 26th June, 2017 while petition was filed with the Strasbourg Court on 29 June, 2017.
2. The "personal scope" answers the question of "to whom does it apply". By Recital 10 to the EIR Recast, the EIR Recast applies to both natural or legal person, a trader or consumer. However, by Article 1(2) of the EIR Recast, the EIR Recast does not apply to insurance undertakings, credit institutions, investment firms and other firms, institutions and undertakings covered by Directive 2001/24/EC, as well as, collective investment undertaking. Based on the personal scope PAJ being a Toy shop does not fall under the category of exempted firms. That being the case the EIR Recast is applicable.
3. The "material scope" answers the question of "which proceedings are covered by it?" By Article 1 of the EIR Recast, the EIR Recast applies to public collective proceedings, based on laws relating to insolvency, for the purpose of rescue, adjustment of debt, reorganisation or liquidation. The EIR Recast extends beyond liquidation procedures, to proceedings aims at rescuing financial distressed business. Based on the material scope the EIR Recast covers safeguard proceedings.
4. Finally, "Territorial scope", which answers the question of "what are its geographical limitations. The EIR Recast is binding in all member states of the European Union, with the exception of Denmark. Based on the territorial scope the EIR Recast is applicable in the instant case because both France and Spain are members states of the European Union, Denmark is not one of the states in the instant case. Therefore generally, the EIR Recast is applicable in this case.]

Question 4.3 [maximum 5 marks] 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.

[By Article 3(2) of the EIR Recast the EIR Recast allows for the opening of one or more secondary insolvency proceedings against a debtor in any member state where it has an establishment. Unlike the main proceeding which is opened in the debtor's COMI, secondary proceeding can only be opened where the debtor has an establishment. According to Article 2(10) of the EIR Recast an establishment means any place of operations where the debtor carries out or has carried out in the three- month prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets. In interdil the CJEU connects the pursuit of an economic activity to the presence of human resources. To

prove that an establishment exists a minimum level of organisation and a degree of stability is required. The debtor shall conduct its activities with the involvement of human resources and assets, which together demonstrates organisational presence in the forum. Therefore, the presence alone of goods in isolation or bank accounts does not in principle satisfy the requirements to qualify as an establishment. The “non-transitory nature of the debtor’s activities indicates a certain degree of continuity and stability. An occasional place of operations cannot qualify as an establishment. The business activity must also be ascertainable by third parties. A Spanish bank cannot file a secondary insolvency proceedings in Spain because to do so, the debtor PAJ needs to have an establishment in Spain. I am of the view that Spain does not qualify as an establishment. I say so because PAJ only has warehouses in Spain, which it also rents out to other toy companies. It is not enough that PAJ has a bank account. The business PAJ has in Spain does not qualify as Non-transitory economic activity, nor does it have organisational presence with human means. Therefore, a secondary insolvency proceedings cannot be successfully open in Spain.]

Marks awarded: 15 out of 15.

*** End of Assessment ***

Marks awarded: 44.5 out of 50