INSOL INTERNATIONAL
FOUNDATION
CERTIFICATE
in INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2B

THE EUROPEAN INSOLVENCY REGULATION

This is the **summative (formal) assessment** for **Module 2B** of this course and is compulsory for all candidates who **selected this module as one of their compulsory modules from Module 2**. Please read instruction 6.1 on the next page very carefully.

If you selected this module as **one of your elective modules**, please read instruction 6.2 on the next page very carefully.

The mark awarded for this assessment will determine your final mark for Module 2B. In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.

2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way**. **DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.

3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).

4. You must save this document using the following format: **[student number.assessment2B]**. An example would be something along the following lines: 202021IFU-314.assessment2B. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the word "studentnumber" with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked**.

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6.1 If you selected Module 2B as one of your **compulsory modules** (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is **23:00 (11 pm) GMT on 1 March 2021**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2021. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.

6.2 If you selected Module 2B as one of your **elective modules** (see the e-mail that was sent to you when your place on the course was confirmed), you have a **choice** as to when you may submit this assessment. You may either submit the assessment by **23:00 (11 pm) GMT on 1 March 2021** or by **23:00 (11 pm) BST on 31 July 2021**. If you elect to submit by 1 March 2021, you **may not** submit the assessment again by 31 July 2021 (for example, in order to achieve a higher mark).

7. Prior to being populated with your answers, this assessment consists of **9 pages**.

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total]

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph **in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

The EIR 2000 was the first European initiative to ever attempt to harmonise the insolvency laws of EU Member States.

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

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

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

(d) False, the EU sought to draft Conventions with a view to harmonising the insolvency laws of EU Member States as early as the 1960s, but these initiatives failed.

Question 1.2

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

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

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

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

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

Question 1.3

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

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

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

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

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

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.

D was the correct answer.

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).

Marks awarded: 9 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."

Answer:

Statement 1:In the case of a company or a legal person, the place of the registered office shall be presumed to be the place of COMI. This provision shows in Article 3(1) EIR Recast:"The courts of the Member State within the territory of which the centre of the debtor's main interests is situated shall have jurisdiction to open insolvency proceedings ('main insolvency proceedings'). The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.

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

Statement 2: Secondary insolvency proceedings. This concept shows in Article 3(3)and(4) EIR Recast:".....3.Where insolvency proceedings have been opened in accordance with paragraph 1, any proceedings opened subsequently in accordance with paragraph 2 shall be secondary insolvency proceedings.

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

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

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

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

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

When main insolvency proceedings are opened, the territorial insolvency proceedings shall become secondary insolvency proceeding."
Statement 2 refers 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.

Answer:

- Article 41 Cooperation and communication between insolvency practitioners

1. The insolvency practitioner in the main insolvency proceedings and the insolvency practitioner or practitioners 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.

2. In implementing the cooperation set out in paragraph 1, 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. Paragraphs 1 and 2 shall apply mutatis mutandis to situations where, in the main or in the secondary insolvency proceedings or in any territorial insolvency proceedings concerning the same debtor and open at the same time, the debtor remains in possession of its assets.

- Article 42 Cooperation and communication between courts

1. In order to facilitate the coordination of main, territorial and secondary insolvency proceedings concerning the same debtor, 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. For that purpose, the courts may, where appropriate, appoint an independent person or body acting on its instructions, provided that it is not incompatible with the rules applicable to them.

2. In implementing the cooperation set out in paragraph 1, the courts, or any appointed person or body acting on their behalf, as referred to in paragraph 1, may communicate directly with, or request information or assistance directly from, each other provided that such communication respects the procedural rights of the parties to the proceedings and the confidentiality of information.

3. The cooperation referred to in paragraph 1 may be implemented by any means that the court considers appropriate. It may, in particular, concern:

(a) coordination in the appointment of the insolvency practitioners;

(b) communication of information by any means considered appropriate by the court;

(c) coordination of the administration and supervision of the debtor's assets and affairs;

(d) coordination of the conduct of hearings;

(e) coordination in the approval of protocols, where necessary.

- Article 43 Cooperation and communication between insolvency practitioners and courts

1. In order to facilitate the coordination of main, territorial and secondary insolvency proceedings opened in respect of the same debtor:

(a) an insolvency practitioner in main insolvency proceedings shall cooperate and communicate with any court before which a request to open secondary insolvency proceedings is pending or which has opened such proceedings;

(b) an insolvency practitioner in territorial or secondary insolvency proceedings shall cooperate and communicate with the court before which a request to open main insolvency proceedings is pending or which has opened such proceedings; and

(c) an insolvency practitioner in territorial or secondary insolvency proceedings shall cooperate and communicate with the court before which a request to open other territorial or secondary insolvency proceedings is pending or which has opened such proceedings;to the extent that such cooperation and communication are not incompatible with the rules applicable to each of the proceedings and do not entail any conflict of interest.

2. The cooperation referred to in paragraph 1 may be implemented by any appropriate means, such as those set out in Article 42(3).

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.

Answer:

- The predecessor of Article 41 EIR Recast,Article 31 EIR 2000,did not mention the need to communicate information on measures related to the debtor's rescue and restructuring.

Article 41 Cooperation and communication between insolvency practitioners

1. The insolvency practitioner in the main insolvency proceedings and the insolvency practitioner or practitioners 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.

2. In implementing the cooperation set out in paragraph 1, 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;

(d) 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.

2. Paragraphs 1 and 2 shall apply mutatis mutandis to situations where, in the main or in the secondary insolvency proceedings or in any territorial insolvency proceedings concerning the same debtor and open at the same time, the debtor remains in possession of its assets.

- Recital 53 EIR Recast enhance the chances for a successful restructuring (rescue) of a group as a whole. Recital 53 EIR Recast:"The introduction of rules on the insolvency proceedings of groups of companies should not limit the possibility for a court to open insolvency proceedings for several companies belonging to the same group in a single jurisdiction if the court finds that the centre of main interests of those companies is located in a single Member State. In such cases, the court should also be able to appoint, if appropriate, the same insolvency practitioner in all proceedings concerned, provided that this is not incompatible with the rules applicable to them."

- Article 66(1) EIR Recast: "Where at least two-thirds of all insolvency practitioners appointed in insolvency proceedings of the members of the group have agreed that a court of another Member State having jurisdiction is the most appropriate court for the opening of group coordination proceedings, that court shall have exclusive jurisdiction."

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.

Answer:

1. Right to give an undertaking in order to avoid secondary insolvency proceedings
This instrument is discribed in Article 36 EIR Recast. According to this article,in order to avoid the opening of secondary insolvency proceedings,the insolvency practitioner in the main insolvency proceedings may give a unilateral undertaking (the "undertaking ") in response of the assets located in the Member State in which secondary considerations could be opened, That when distributing those assets or the received received as a result of their rehabilitation, He will complete with the distribution and priority rights under national law that crediters would have if secondary insolvency proceedings were opened in that Member State.

2. Stay of the opening of secondary insolvency proceedings
This instrument is discribed in Recital 45 EIR Recast and Article 38(3) EIR Recast. It requires a request from the insolvency practitioner or the debtor in possession. The stay may be imposed for a period not exceeding three months and on condition that suitable

measures are in place to protect the interests of local creditors.To guard these interests the court may decide to order protective measures.

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.

Answer:

1. The EIR 2000's scope does not cover national procedures which provide for the restructuring of a company at a pre-insolvency stage (" pre-insolvency procedures ") or procedures which leaves the existing management in place (" hybrid procedures "). In addition,a number of personal insolvency proceedings are currently outside the EIR 2000's scope.

2. There are difficulties in determining which Member State is competent to open insolvency proceedings. While there is wide support for granting jurisdiction for opening main insolvency proceedings to the Member State where the debtor's COMI is located, there have been difficulties in applying the concept in practice. The EIR 2000's jurisdiction rules have also been criticised for allowing forum shopping by companies and natural persons through abusive COMI-relocation.

3. Secondary proceedings problems.The opening of secondary proceedings can hamper the efficient administration of the debtor's estate. With the opening of secondary proceedings, the liquidator in the main proceedings no longer has control over the assets located in the other Member State which makes a sale of the debtor on a going concern basis more difficult. Moreover, secondary proceedings have to be windingup proceedings which constitutes an obstacle to the successful restructuring of a debtor.

4. There are problems relating to the rules on publicity of insolvency proceedings and the lodging of claims. There is no mandatory publication or registration of the decisions in the Member States where a proceeding is opened, nor in Member States where there is an establishment. There is also no European Insolvency Register which would permit searches in several national registers. However, the good functioning of cross-border insolvency proceedings relies to a significant extent on the publicity of the relevant decisions relating to an insolvency procedure. Judges need to be aware whether proceedings have already been opened in another Member State; creditors or potential creditors need to be aware that proceedings have commenced. In addition, creditors, particularly small creditors and SMEs, face difficulties and costs in lodging claims under the EIR 2000.

5. Finally, the EIR 2000 does not contain specific rules dealing with the insolvency of a multi-national enterprise group although a large number of cross-border insolvencies involve groups of companies. The basic premise of the Insolvency EIR 2000 is that separate proceedings must be opened for each individual member of the group and that these proceedings are entirely independent of each other. The lack of specific provisions for group

insolvency often diminishes the prospects of successful restructuring of the group as a whole and may lead to a break-up of the group in its 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.

Answer:

1. The Recast Regulation contains a codification of the method of determination of centre of main interests (COMI). COMI is a central concept that determines whether the Recast Regulation applies to a debtor and the jurisdiction for opening of main insolvency proceedings. COMI will be presumed to be at the registered office, but the presumption is rebuttable if the central administration is located in another Member State and a comprehensive assessment of all the relevant factors establishes, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests is located in that other Member State. The registered office presumption will not apply if there has been a move of the registered office during the three months prior to the opening of proceedings. Although essentially stating what has been developed by case law since the Regulation, these new rules provide welcome clarity.

2. The Recast Regulation is extended in scope to new categories of proceedings. It covers hybrid and pre-insolvency proceedings and secondary proceedings will no longer be limited to liquidation proceedings where a company has an establishment. The definition of 'establishment' is amended to 'any place of operations where the debtor carries out a non-transitory economic activity with human means and assets' (using a reference to 'assets' rather than 'goods') and the relevant time for assessing an establishment will be either the time of the opening of the secondary proceedings or, alternatively, the three month period prior to that, so that secondary proceedings may still be possible even if an establishment has recently closed. In addition, the insolvency practitioner in the main proceedings is now expressly permitted to provide undertakings to treat local creditors as they would be treated under secondary proceedings.

3. There will be new linked registers of insolvency proceedings. The recast Regulation calls for both national electronically-searchable databases in each member state, and for these to then be linked via a central European e-justice portal.

4. Under the Recast Regulation, the courts of the member state where main insolvency proceedings are opened will also have jurisdiction to hear actions derived directly from the insolvency proceedings that are closely linked, such as avoidance actions, to avoid the risk of irreconcilable judgments resulting from separate proceedings.

5. The Recast Regulation introduces a framework for group insolvency proceedings. The aim is to improve the efficiency of insolvency proceedings concerning different members of a group of companies, which may encourage cooperation across the group and rescue of the group as a whole. Currently, each insolvent debtor company is subject to separate insolvency proceedings in the place of its COMI. Where two or more members of a group of companies are subject to insolvency proceedings, an insolvency practitioner appointed to any group company, together with any courts involved, will be obliged to cooperate (for example by agreement or protocol) to facilitate the effective administration of those proceedings, to the

extent it is not incompatible with the rules of such proceedings and there is no conflict of interest in doing so.

Group coordination proceedings may be requested before any court having jurisdiction over the insolvency proceedings of a group member by the insolvency practitioner appointed there. The purpose of these proceedings is to propose a group coordination plan recommending a comprehensive set of measures appropriate to an integrated approach to the resolution of the group members' insolvencies. Insolvency practitioners in other members states may choose not to participate in proposed group coordination proceedings, so they will only be effective where they are consensual. It is already open to insolvency practitioners in some European jurisdictions to form agreements with insolvency practitioners in other jurisdictions and give appropriate undertakings to creditors in order to effect a form of group coordination plan, and given the new provisions in the recast Regulation, group coordination would be increased in advance of the new provisions applying.

The amendments to COMI and extension to all secondary proceedings should discourage forum shopping. The insolvency register and group coordination proceedings will facilitate complex cross-border insolvencies.There may be a push towards increased cooperation in group 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.

Answer:

1.The first flaw is COMI. The preamble to the recast Regulation adds bit of detail generally on COMI determinations. It suggests that in cases of doubt, self-serving assertions about COMI by the debtor should not be taken at face value in the absence of supporting evidence. It also suggests the COMI presumption may be rebutted if the principal reason for a debtor to move his habitual residence was to file for insolvency proceeding in a new jurisdiction and such a filing would materially impair the interests of creditors whose dealings with the debtor took place prior to the relocation.For companies, the COMI/registered office presumption only applies if the registered office has not been moved to another State within 3 months prior to the request for the opening of insolvency proceedings.

However,COMI shifting can easily occur without moving the registered office and it may be that the new provision will have little effect in practice. In my view, due to avoid fourm shopping, the EIR should use US court's standard, change the rule of which party have to proof the COMI in some special situations. See In re Bear Stearns, 374 B.R. 122.

3. Voluntary cooperation is not enough. Insolvency practitioners and courts are obliged to cooperate and communicate (Article 56-59) insofar as it is compatible with the respective *lex concursus* in the proceedings and does not entail any conflict of interest. However, as the recast EIR does not provide for any legal remedies, it seems as cooperation is more or less voluntary. During the revision process of the EIR, it was suggested that a procedural coordination approach to group insolvencies should draw upon the model of main and secondary proceedings. The general obligations introduced 56-59 are indeed similar to those for main and secondary proceedings in Articles 41-43. In this context, one has to differentiate between soft measures (general obligation to communicate and cooperate, right to be heard, right to participate on meetings etc.) on the one hand, and specific powers over others proceedings even in cases where those affected (the practitioner and/or creditors in the other proceedings) do not agree, on the other hand. Insight the insolvency practitioners of a parent

or other leading company would be given a domestic role in group insight. By Article 46,the insolvency practitioner in the main proceedings has the right to request a stay of realisation of assets in secondary proceedings,which can be refused only if it is manifestly of no interest to the creditors in the main insolvency proceedings. Article 47 of the recast EIR gives the insolvency practitioner in the main proceedings the right to propose measures available under local law that put an end to second liquidation procedures。

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.

Answer:

The Strasbourg Court have international jurisdiction to open the requested insolvency proceeding. Because France is PAJ's COMI.

According Recital 13 EIR 2000 and CJEU's interpretation in *Eurofood IFSC Ltd*, the insolvent company's COMI is presumed to be the jurisdiction (of the country) where such company has been registered. This presentation can be reprinted only if the objective factors indicate that the administration of the debtor's interest happens in a state difference from the state of the registered office mple, in the case of a "letterbox" company. The CJEU also emphasised that it must be identified by reference to criteria that are both objective and ascertainable by third parties.Ascertainability or visibility by third parties (mainly creditors) is closely related to the time factor. In other words, the activity of the debtor in a particular Member State should be regular and lasting to create COMI.

In this case PAJ is a France-registered company, thus, France shall be presumed to be the place of COMI.

And the rebut reason is no enough. In *Interedil Srl v Fallimento Interedil Srl,* the CJEU ruled that when 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 taken in that same place in a manner that is ascertainable by third parties, the registered

office presumption is irrefutable.What is clear from the arguments put forward by the court , is that the mere presence of some assets (for example, bank accounts, movable or immovable assets) will not be sufficient to rebut the registered office presumption. So in this case , just an warehouse and business in Spainish is no enough to rebut the registered office presumption.

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.

Answer:

Firstly, it is necessary to look for the COMI. The EIR Recast applies only when the debtor's COMI is located within the EU (excluding Denmark). In this case, it is directly stated that PAJ is a France-registered company and opened its first store in Strasbourg. France is an EU Member State.Thus, the requirement of the geographical scope is satisfied.

Secondly, one needs to check whether the personal scope of the EIR Recast is complied with.As PAJ is neither a bank,nor any other excluded entity,it falls within the personal scope of the EIR Recast.

Thirdly, in order to fall within the scope of the EIR Recast,an insolvency proceeding has to be listed in Annex A (material scope). The proceeding of PAJ is mentioned in Annex A.Therefore,it falls within the material scope of the EIR Recast.

Fourthly, temporal scope must be checked. This scope requires that the insolvency proceeding is opened after 26 June 2017 (the entry of the EIR Recast into force). The facts of the case indicate that the insolvency proceeding in question was opened on 29 June 2017, that is within the temporal scope of the EIR Recast.

Having studied the facts of the case against the background of the EIR Recast, we can conclude that the EIR Recast is applicable to the insolvency proceeding opened for PAJ.

Question 4.3 [maximum 5 marks] 4

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

Answer:

Such proceedings can be opened in Spain under the EIR Recast.

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

2. The concept of an "establishment" is essential to the opening of secondary proceedings,as such proceedings can only be opened in a Member State in which the debtor has an establishment.According to Article 2(10)EIR Recast,"establishment" means any place of operations where a debtor carries out or has carried out in the three-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human

means and assets. In this case ,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. PAJ also have some assets in Spanish. Thus the problem is if the signed memoranda and business plan is "establishment" .

3. In *Interedil* the CJEU examined the concept and concluded that the fact that the definition connects the pursuit of an economic activity to the presence of human resources,shows that a minimum level of organisation and a degree of stability are required.It follows that,conversely,the presence alone of goods in isolation or bank accounts does not,in principle,satisfy the requirements for classification as an "establishment". The rationale behind the introduction of the establishment characteristics is similar to the one of COMI – ensuring legal certainty and foreseeability concerning the court authorised to open insolvency proceedings."Non-transitory economic activity with human means and assets" puts forward objective factors which are assumed to be ascertainable by third parties.

4. The non-transitory character of the debtor's activities indicates a certain degree of continuity and stability. A purely occasional place of operations cannot be classified as an establishment.The negative formula (" non-transitory ") aim to avoid minimum time requirements. The specific factor is how the activity appears externally, in the perception of third parties, and not the intention of the debtor (paragraph 71 Virgos Schmidt Report). The presence of human means and assets is another criterion for determining the establishment. It shows that the debtor shall conduct its activities with the involvement of human resources (people) and assets, which together strengthen the organizational presentation in the forum. The EIR Recent does not require the establishment to have any official (corporate) form, for example, a branch or a representative office. In this respect the organizational presentation can imply any form of external business activity by the debtor, As long as it is feasible by third parties and meet the definition of Article 2(10) EIR Recent.

According the facts show in the case, I believe that PAJ's negotiations with local distributors and signed memoranda are certain degree of continuity and stability activities. So, the proceedings can be opened in Spain under the EIR Recast.

While your discussion is very thorough, the answer 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: 14 out of 15.

*** End of Assessment ***

Marks awarded: 47 out of 50.