



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.

Question 1.7

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

- (a) Claim to hold a director of the insolvent company liable for causing its insolvency.
- (b) Claim of the insolvent company against its contracting party, arising from non-performance of the (pre-insolvent) contractual obligations by the latter.
- (c) *Actio pauliana* claim filed by the insolvency practitioner.
- (d) Claim of the advance payment for the costs of the insolvency proceedings.

Question 1.8

The dispute in the main proceedings, pending before the Spanish court, is between Abogados SA (Spain) and Fema GmbH (Germany), concerning an action to set aside two payments (“contested payments”) in the amount of EUR 800,000, made pursuant to a sales agreement of 10 September 2019, governed by English law. The contested payments had been made by Abogados SA to Fema GmbH before the former went insolvent. The insolvency practitioner of Abogados SA claims that under applicable Spanish law the contested payments shall be set aside. This is due to the fact that Fema GmbH must have been aware that Abogados SA was facing insolvency at the time that the payments were made.

Considering the facts of the case and relevant provisions of the EIR Recast, which one of the following statements is the **most accurate**?

- (a) The contested payments shall not be avoided if Fema GmbH proves that such transactions cannot be challenged on the basis of the insolvency provisions of English law (Article 16 EIR Recast).
- (b) To defend the contested payments Fema GmbH can rely solely, in a purely abstract manner, on the unchallengeable character of the payments at issue on the basis of a provision of the *lex causae*.
- (c) The contested transactions cannot be avoided if Fema GmbH can prove that the *lex causae* (including its general provisions and insolvency rules) does not allow any means of challenging the contested transactions, and provided that the parties did not choose that law for abusive or fraudulent ends.
- (d) The insolvency practitioner will always succeed in his claim if he can clearly prove that under the *lex concursus*, the contested payments can be avoided (Article 7(2)(m) EIR Recast).

Question 1.9

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

- (a) Where the decision to open the insolvency proceedings was taken in flagrant breach of the right to be heard, which a person concerned by such proceedings enjoys.
- (b) The judgment, subject to recognition, was passed with incorrect application of the applicable substantive law.
- (c) The court, which has opened insolvency proceedings (originating court), most certainly did not have international insolvency jurisdiction to do so under the EIR Recast.
- (d) The rule applied by the court, which has opened insolvency proceedings (originating court), is unknown or does not have an analogue in the law of the jurisdiction, in which recognition is sought.

Question 1.10

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

Assume that:

- Under French law, creditors (except employees) must file proof of their claim within two (2) months from the publication in the French legal gazette of a notice of the judgment opening the insolvency proceedings.
- Under Irish law, the period within which creditors must file their claims is 15 days, as set in the order opening secondary insolvency proceedings against LPZ Corp.

The French tax authority intends to file its claim in the Irish proceedings. Within which time period can the French tax authority do so?

- (a) Within two (2) months following the publication date, as guaranteed by the French law (law applicable to the creditor).
- (b) Within 15 days, as stipulated in the applicable *lex concursus secundarii* (law of the insolvency proceeding at issue).
- (c) Within 30 days following the publication of the opening of insolvency proceedings in the insolvency register of Ireland.
- (d) Within the time limit prescribed by the *lex concursus* of the main insolvency proceeding (Spanish law).

C was the correct answer.

Marks awarded: 9 out of 10.

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks] 0

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 is related to COMI and preventing fraudulent or abusive forum shopping, pursuant Recital 29. The statement is not expressly in the EIR Recast. However, according to the guide page 15, quote 28, in Case C-106/16, *Polbud – Wykonawstwo*, the Court of Justice of European Union recognized that "*the transfer of a registered office to acquire the benefit of more favorable (company) legislation without change of the real head office enjoyed the protection of the freedom of establishment and did not constitute abuse*".

Statement 2 is related to Secondary Insolvency Proceedings, pursuant Recital 23 of the EIR Recast.

Statement 1 was referring to Article 3 and 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.

- Article 41 establishes cooperation and communication between insolvency practitioners
- Article 42 establishes cooperation and communication between courts
- Article 43 establishes cooperation and communication between insolvency practitioners and courts.

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.

In the EIR Recast there are some provisions explaining that statement as following:

1. **Recital 10 of the EIR Recast** establishes a possibility to extend the scope to rescue proceedings: "*The scope of this Regulation should extend to proceedings which promote the rescue of economically viable but distressed businesses and which give a second chance to entrepreneurs. It should, in particular, extend to proceedings which provide for restructuring of a debtor at a stage where there is only a likelihood of*

insolvency, and to proceedings which leave the debtor fully or partially in control of its assets and affairs. It should also extend to proceedings providing for a debt discharge or a debt adjustment in relation to consumers and selfemployed persons, for example by reducing the amount to be paid by the debtor or by extending the payment period granted to the debtor. Since such proceedings do not necessarily entail the appointment of an insolvency practitioner, they should be covered by this Regulation if they take place under the control or supervision of a court. In this context, the term ‘control’ should include situations where the court only intervenes on appeal by a creditor or other interested parties.”

2. **Article 46 of the EIR Recast** allows to stay realisation of debtor’s assets to grant interest of creditors: “1. *The court which opened the secondary insolvency proceedings shall stay the process of realisation of assets in whole or in part on receipt of a request from the insolvency practitioner in the main insolvency proceedings. In such a case, it may require the insolvency practitioner in the main insolvency proceedings to take any suitable measure to guarantee the interests of the creditors in the secondary insolvency proceedings and of individual classes of creditors. Such a request from the insolvency practitioner may be rejected only if it is manifestly of no interest to the creditors in the main insolvency proceedings. Such a stay of the process of realisation of assets may be ordered for up to 3 months. It may be continued or renewed for similar periods.*”
3. **Article 47 of the EIR Recast** allows to propose reorganization plans in a secondary insolvency proceeding: “*Where the law of the Member State where secondary insolvency proceedings have been opened allows for such proceedings to be closed without liquidation by a restructuring plan, a composition or a comparable measure, the insolvency practitioner in the main insolvency proceedings shall be empowered to propose such a measure in accordance with the procedure of that Member State. (...)*”

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.

The first example is provided in article 36 of the EIR Recast by which the insolvency practitioner in the main insolvency proceedings may give a unilateral undertaking in respect to the assets located in the Member State in which secondary insolvency proceedings could be opened.

In this scenario, the undertaking may establish options to realise the debtor’s assets and the distribution in favor to local creditors pursuant to distribution and preference rules of the applicable law of the Member State in which secondary insolvency proceedings could have been opened. It is known as “synthetic” secondary proceedings.

The second example is a temporary stay of the opening of secondary insolvency proceedings, pursuant to article 38.3 of the EIR Recast. The stay will be extended to no more than 3 months. It will be necessary a request from the debtor in possession or the insolvency practitioner. It will be necessary to provide suitable measures to protect the interests of the local creditors, for example, banning insolvency practitioners from removing or disposing of any assets situated at the place of the debtor’s establishment, unless this is done in the ordinary course of business.

Marks awarded: 8 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 EU Convention No. 1346/2000 of May 29 of 2000 on insolvency proceedings (“EIR 2000”) suffered many modifications during 15 years and the judicial practice demonstrated that some adjustments were needed to implement practical insolvency proceedings. Pursuant to article 46 of the EIR 2000, European Commission had to file on June 1st of 2012, information related to application and modifications needed of the EIR 2000. Case law development for the CJEU was relevant to perform the EIR Recast.

Indeed, European Commission considered that cross-border insolvency proceedings should operate efficiently and effectively (Recital 3, EIR Recast). Thus, EIR Recast’s scope extended to some aspects not included by the EIR 2000, as ruling for “Bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings and actions related to such proceedings” (Recital 7, EIR Recast).

In addition, EIR Recast expanded its effects to rescue proceedings, even before the debtor will be in face of financial distress and want to enter in a rescue proceeding to prevent a real default and to restructure its business plan (Recital 17, EIR Recast).

EIR Recast also included more rules regarding cooperation and coordination effects. It created Annex A by which established insolvency proceedings covered by EIR Recast’s effects. It is almost 112 proceedings. Thus, the court or authority in charge of recognizing insolvency proceedings under EIR Recast has to verify that the proceeding in a Member State is deemed an insolvency proceeding in Annex A without more considerations.

Finally, among measures not implemented in the EIR 2000 but necessary to get an efficient cross-border framework was coordination and cooperation rules. EIR 2000 just included one article in regard, but EIR Recast includes rules to cooperation between courts, insolvency practitioners and courts, and between insolvency practitioners. However, it left a mistake that will be explained in point 3.3 of this document regarding the insolvency of corporate groups.

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 3 major improvements or innovations of the EIR Recast was the following:

1. EIR Recast applies not just to liquidation proceedings, but also, to rescue proceedings. EIR Recast implemented rescue proceedings as secondary insolvency proceedings. For that reason, the professional designated will be an insolvency practitioner, not just a liquidator. Its rule allows to maximize assets' value, promotes efficiency in the insolvency proceedings, increases employments and investments in distressed companies.
2. EIR 2000 did not provide a definition for Center of Main Interests (COMI) in any article but in a recital. However, EIR Recast provides presumptions to establish the COMI. For that purpose, EIR Recast collected positions provided through the case law of CJEU, for instance, positions held in cases as *Interedil Srl c. Fallimento Interedil Srl*, *Eurofood IFSC Ltd.* among others.
3. Article 28 of the EIR Recast establishes as mandatory due to inform creditors fixing a notice on the opening of insolvency proceedings. EIR 2000 did not establish a uniform way to do a publication, thus, EIR Recast establishes a proceeding to fix the notice. Additionally, EIR Recast establishes complete rules regarding cooperation and communication between courts, and between insolvency practitioners and the Court (articles 42 and 43).

Another improvement of the EIR Recast was article 36 by which establishes synthetic secondary proceedings or the right to give an undertaking explained in point 2.4 above.

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.

First: In the event of an insolvency of Group of Companies Indeed, recital 56 establishes voluntary coordination and cooperation of proceedings. In addition, article 64 (1) of the EIR Recast allows the insolvency practitioner to reject to be part of a coordinated insolvency proceeding if such cooperation does not commercial sense. Given that standard is broad it is difficult to determine limits for reject cooperation and coordination measures.

Furthermore, if the insolvency practitioner allows the coordination because accept it expressly or does not reject the cooperation between the prescribed period of 30 days; it is not mandatory to follow the coordination plan neither instructions of the coordination pursuant to article 70 of the EIR Recast.

The broad spectrum in coordination and cooperation rules of group-corporation insolvency proceedings of the EIR Recast could obstruct successfully reorganization of them; and even in liquidation proceedings, the not coordination of insolvency proceedings avoid a due distribution of assets between all creditors. That is contrary to the efficiency principle of a cross-border insolvency framework.

As explained in the Guide, from a point of view of commercial treatment, companies function as one entity, but in face of an insolvency proceeding, the limited liability will operate, appointing an insolvency practitioner and a court for each proceeding. Not cooperation in many scenarios prevents the preservation of the economic value of the company and difficult efficiency insolvency.

A way to solve it is trying to celebrate protocols or agreements to determine relevant measures to grant at least essential points of cooperation.

Second: Another mistake of EIR Recast was not granting rights to creditors either to the court to activate cooperation or coordination measures. In fact, only insolvency practitioners could promote coordination of group-corporations insolvency proceedings. Nonetheless, domestic law could impose some majorities from creditors to allow insolvency practitioners for requesting cooperation and coordination measures. However, that mechanism is not enough to ensure active participation, for example, from affected creditors.

Marks awarded: 15 out of 15.

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

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

However, like many other toy businesses, PAJ has faced the challenges of increased fixed costs and it has underestimated competition with web-based companies and an increasing preference for video games. For a few years now, PAJ has been beset by financial difficulties and, having witnessed the ongoing demise in revenue and fall in profits, it decided to file a petition to open safeguard proceedings (*procédure de sauvegarde*) in France. The petition was filed with the Strasbourg Court on 23 June 2017.

Question 4.1 [maximum 5 marks] 4.5

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.

Scope of EIR 2000 does not depend only on the time of request filing but also depends on the material, personal and territorial scope. First, pursuant to article 92 of EIR Recast, it applies from 26 June 2017, thus apparently the EIR 2000 will be the framework applicable.

Second, pursuant to article 1 of EIR 2000, it applies to “collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator”. In addition, article 2(a) of the EIR 2000 defines “insolvency proceedings” as “the collective proceedings referred to in Article 1(1). These proceedings are listed in Annex A”. The “*procédure de sauvegarde*” is listed in Annex A. **[It was not listed under EIR 2000]**

In the fact of *Bank Handlowy w Warszawie SA, PPHU 'ADAX'/Ryszard Adamiak, v Christianapol sp. z o.o.*, (judgement of November 22, 2012), the Court recognized the “*procédure de sauvegarde*” within the scope of EIR 2000, in means that is an insolvency proceeding pursuant to EIR 2000.

Third, PAJ is not excluded from the EIR 2000 scope, pursuant to Article 1 (2). Finally, Strasbourg is a city of France and that country is a member of the EU.

Now, pursuant to article 3 (1) of EIR 2000, “*The courts of the Member State within the territory of which the centre of a debtor’s main interests is situated shall have jurisdiction to open insolvency proceedings*”. It means that is necessary to determine whether the PAJ’s main interests (COMI) are situated in Strasbourg or in another territory of a Member State. If COMI is situated in Strasbourg, the proceeding will be deemed as the main proceeding, but if it is situated in the territory of another Member State the safeguard proceeding could be opened limited to the assets in Strasbourg.

EIR 2000 does not include a definition for COMI. However, the European Court of Justice (ECJ) (now named CJEU) held in the case of *Eurofood IFSC Ltd* that the presumption of the place of the registered office as the center of its main interests allows the proof to the contrary. It is possible only if factors that are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect. For instance, “*in the case of a ‘letterbox’ company not carrying out any business in the territory of the Member State in which its registered office is situated*”.

In this case, is possible to conclude that since 2011 PAJ had a toy store in France, which means that PAJ has not only a “letterbox” but also that they carrying out its business in the territory of Strasbourg. In consequence, the Strasbourg Court will have international jurisdiction to open the requested insolvency proceeding under EIR 2000.

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.

Pursuant to article 92 of EIR Recast, it applies from 26 June 2017, thus if the Strasbourg Court opens the respective proceeding on 29 June 2017, the EIR Recast will be applicable. For that purpose, the scope of EIR Recast will be applicable since the time of the opening of proceedings, which means, the time at which the judgment opening insolvency proceedings becomes effective, regardless of whether the judgment is final or not (Article 2 (8) EIR Recast). Indeed, proceedings opened before that date will be governed by EIR 2000.

Answered the first question to determine if EIR Recast is applicable (temporal scope), now it is necessary to determine if is applicable since material, personal and territorial scope. Regarding material scope, the “*sauvegarde*” proceeding is listed in Annex A. Second, in respect of personal scope, PAJ is not excluded from the EIR Recast because is not a proceeding related to insurance undertakings; credit institutions; investment firms, and other firms, institutions, and undertakings covered by Directive 2001/24/EC; or collective investment undertakings.

Third, with regard to territorial scope, France is a Member State of the European Union. Pursuant to article 3 of EIR Recast the center 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. That regulation includes rules development in case law. Indeed, EIR Recast includes the scope of the case *Eurofood IFSC Ltd*.

Thus, in this case, is possible to conclude that COMI of PAJ is in France because since 2011 PAJ had a toy store in there, which means that PAJ has not only a “letterbox” but also that they carrying out its business in the territory of Strasbourg. In consequence, the Strasbourg Court will have international jurisdiction to open the requested insolvency proceeding under EIR Recast.

In conclusion, it is possible to conclude that the “*sauvegarde*” proceeding falls into the EIR Recast Scope and the Strasbourg Court has international jurisdiction to know that proceeding as the main proceeding. Notwithstanding it is important to mention that the case does not determine if economic problems are just in Spain, in Strasbourg, or in general. For that reason, if the economic problems are just in Spain, the Strasbourg Court may reject the request of beginning a “*sauvegarde*” proceeding.

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.

Article 2 of EIR Recast defines an ‘establishment’ as “*any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets*”. Its effects are limited to the Spain territory and assets located there.

In this case, PAJ has a bank account in Spain. In 2013, PAJ started negotiations with local distributors and signed some Memorandums of Understandings. According to facts, PAJ has not a “place” opened to the public. Nonetheless, in the case *Burgo Group SpA v Illochroma SA, in liquidation* ECLI:EU:C:2014:2158 (Sep. 4, 2014), the CJEU held that though “*the presence alone of goods in isolation or bank accounts does not, in principle, satisfy the requirements for classification as an ‘establishment’ (...) it is not disputed that there is no reference in the definition in Article 2(h) of that regulation to the place of the registered office of a debtor company or to the legal status of the place in which the operations in question are carried out*”.

Thus, for the purpose to determine if it is possible to open a secondary insolvency proceeding in Spain, the Court has to take into account that PAJ has not a place of the registered office there, neither any specific place in which the operations in question are carried out. However, PAJ neither has just credit with a bank in Spain, but has business with local distributors, and has subscribed some MOUs with them. Therefore, the Court may open a secondary insolvency proceeding just if there are assets in Spain to granting, an issue that is not clear in the case given as an example.

In the event that PAJ has not assets in Spain, the Court may not open a secondary insolvency proceeding because there will be no measures to decree in favor to local creditors to grant a distribution ranking (article 3(2) EIR Recast). In that case, the Bank should be part of the main insolvency proceeding.

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 out of 15.

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*** End of Assessment ***

Marks awarded: 43 out of 50.