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.

C was the correct answer.

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).

Marks awarded: 8 out of 10.

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks] 1

The following **two (2) statements** relate to particular provisions / concepts to be found in the EIR Recast. Indicate the name of the provision / concept (as well as the relevant EIR Recast article), addressed in each statement.

Statement 1. "The possibility for companies to move their COMI is a legitimate exercise of the freedom of establishment."

Statement 2. "This concept provides an instrument which makes allowance for special, domestic privileges while maintaining the procedural integrity of the main proceeding, thus preserving the principle of unity."

Statement 1: This is the concept of "insolvency forum shopping" as mentioned in Recital 29 of EIR Recast.

Statement 2: This is the "stay of the opening of secondary insolvency proceedings" as stipulated in Article 38(3) of the EIR Recast.

Statement 1 refers to Article 3.

Question 2.2 [maximum 3 marks] 3

Where several insolvency proceedings have been opened against the same company, there should be proper co-operation between the actors involved in these proceedings. The EIR Recast has introduced co-operation and communication obligations. List **three (3) provisions** (articles) of the EIR Recast, which mandate co-operation and communication in the context of main and secondary insolvency proceedings.

The following Articles of the EIR Recast mandate the co-operation and communication between various actors involved in the main and secondary insolvency proceedings:-

Article 41 of the EIR Recast mandates the co-operation and communication between insolvency practitioners in main and secondary insolvency proceedings, subject to the applicable rules to the respective proceedings. This can be done by any forms, for instance, conclusion of agreements or protocols. Under this Article, the insolvency practitioners must communicate the relevant information to other proceedings with each other as soon as possible. And the insolvency practitioner in secondary proceedings has to provide proposal on the realisations or use of assets in the secondary insolvency proceedings to the main insolvency practitioner in an early opportunity pursuant to Article 41(2)(c) of the EIR Recast.

Article 42 of the EIR Recast mandates the co-operation and communication between courts. To preclude any abusive forum shopping, the courts which facing a request to open insolvency proceedings and the courts which has opened an insolvency proceedings are obliged to co-operate and communication with each other. Co-operation applies to all sorts

of proceedings under this section, including the appointment of insolvency practitioners, administration and supervision of the debtor's assets and affairs, by various means such as joint hearings or electronic communication methods.

Article 43 of the EIR Recast mandates the co-operation and communication between insolvency practitioners and courts. Under the following three situations, the duties of court-to-insolvency practitioner obligations arise:-

(a) The main insolvency proceedings practitioner must co-operate and communicate with the court which the request of opening secondary insolvency proceedings is pending or which has opened such proceedings;
(b) The secondary insolvency proceedings practitioner must co-operate and communicate with the court which the request of opening main insolvency proceedings is pending or which has opened such proceedings;
(c) The secondary insolvency proceedings practitioner must co-operate and communicate with the court which the request of opening secondary insolvency proceedings is pending or which has opened such proceedings.

Question 2.3 [maximum 3 marks] 3

The EIR Recast is more rescue-oriented than its predecessor the EIR 2000. Name **three (3) provisions** (articles) of the EIR Recast which explain why this statement is true.

The above statement can be demonstrated by the following three provisions of the EIR Recast:-

Recital 10 and Article 1 of the EIR Recast:
Under Article 1 of the EIR Recast, it extends the traditional liquidation-oriented procedures to a more rescue-oriented purpose. It stipulates that the EIR Recast applies to proceedings in the aim of rescue, adjustment of debt, reorganization or liquidation, for instance public collective proceedings and interim proceedings of it. As mentioned in Recital 10 of the EIR Recast, the applicable proceedings include those financially distressed businesses aiming for rescuing economically viable. One of the measures are to provide stay of individual creditor's action for protecting the interests of the general body of creditors. It also applies to proceedings of restructuring of a debt when there is only likelihood of insolvency or to proceedings which allow the debtor to have full or partial control of its assets and affairs. This broadened coverage of proceedings concur with the trend in Europe that to promote effective restructuring measures for maximizing the value for creditors, increasing investments and job opportunities.

Article 56 of the EIR Recast:
This provision governs the duties of co-operation and communication between insolvency practitioners under the group insolvencies. Pursuant to subsection 2(a), (b) and (c) of this provision, it stipulates that the appointed insolvency practitioners must communicate to each other of any information might be relevant to the other proceedings; must consider any possible co-ordination to administer and supervise the affairs of the enterprise group members; and must consider any possible restructuring for the group members. These encourages companies rescue rather than liquidation as oriented in the EIR 2000.

Article 61 of the EIR Recast:
This provision is another provision which assist group enterprise. Pursuant to Article 61, a group co-ordination proceedings can be requested by an appointed insolvency practitioner in the proceedings opened against any enterprise group member, in the aim of facilitate an effective administration of insolvency proceedings between the enterprise group members.

In the request, the insolvency practitioner has to nominate the co-ordinator and provides an outline of the proposed group co-ordination. Unlike the traditional court-driven insolvency proceedings, this provision allows more private law mechanism, and provides a more restructuring-friendly environment.

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.

To prevent secondary insolvency proceedings, the EIR Recast has introduced "the Right to give an undertaking" and "stay of the opening of secondary insolvency proceedings".

Pursuant to Article 36 of the EIR Recast, the main insolvency proceedings practitioner may give a unilateral undertaking that he will distribute the realised assets according to the priority rights as if the secondary insolvency proceedings commenced in the Member State.

Pursuant to Article 38(3) of the EIR Recast, court, may at its discretion and upon the request from the insolvency practitioner or the debtor in possession, stay the opening of secondary insolvency proceedings, in the condition to protect the local creditors' interests.

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] 4

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

After the launching of EIR 2000, the European Commission had to present a report to adapt the EIR 2000 by 1 June 2012. Adjustments and developments were required based on the following reasons:-

Firstly, there was the need to broadening the scope of insolvency, including encouraging of restructuring, cooperation between insolvency practitioners and courts and group proceedings. To facilitate cross-border insolvency proceedings, principles and guidelines on co-operation and communication between various stakeholders of the insolvency proceedings were set out by those international authorities, for instance, the United Nations Commission on International Trade Law (UNCITRAL), Eurpean Communication and Cooperation Guidelines for Cross-Border Insolvency (CoCo Guidelines, October 2017, revised on 2019), the EU Cross-Border Insolvency Court-to-Court Communications Principles and Guidelines (EU JudgeCo Principles and Guidelines, December 2014) and the UNCITRAL Practical Guide on Cross-Border Insolvency Cooperation (2009). More importantly, lack of co-operation and communication may lead to inconsistent judgments, violation of paritas creditorum principle and diminishing the maximum value of the debtor's

assets. To comply with these modernised regulations, centralisation and universalism of insolvency proceedings was emerging.

Secondly, improvement of creditor's information was required. Under the EIR 2000, Member States had their own insolvency registration system with uncertain inter-connection between these registers. Nevertheless, exchange of information between insolvency practitioners, courts and creditors was crucial to cross-border insolvency proceedings. More importantly, under the concept of lex concursus, the creditors had to file their claims within the prescribed period of time. It was important for the information of insolvency proceedings publicly accessible by both local and foreign creditors to prevent any negative influence on their priority.

Thirdly, to cope with modern economic reality, development of the relevant insolvency regulations was required. In recent years, businesses increasingly operate across national borders by interconnected companies. They often operate as one single unit. Enterprise group members become an important issue to be tackled to ensure a fair and efficient administration of cross-border insolvency proceedings. Under the EIR 2000, there was no provision related to dealing with insolvency of different enterprise group members. Furthermore, UNCITRAL issued a Legislative Guide on Insolvency Law on 2010 which addressed that there was lack of guidance on how to deal with the insolvency issue on different enterprise group members in a more comprehensive manner and how to treat the group members differently from a single corporate entity. The problem of overlooking the complex multinational enterprise had been illustrated in the Eurofood IFSC Limited case in 2004. In this case, the problem to ascertain COMI of the debtor was in questioned. Influencing by the liquidation-oriented nature of EIR 2000, it was held that entity-by-entity approach was adopted when the debtor was a subsidiary company whose registered office was different from the one of its parent company. This hindered successful restructuring of a enterprise group in a whole and diminish the principle of universalism, procedural efficiency, equal treatment of creditors and value maximisation of the debtor's assets.

In view of the above, the new European regulation was needed and recommended to cater for the latest development in insolvency issues.

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.

Comparing the EIR Recast with the EIR 2000, the three major improvements or innovations of the EIR Recast for a more efficient administration of insolvency proceedings across the EU Member States are as the followings:-

One of the improvements is that the EIR Recast mandates that the centre of man interest (COMI) of the debtor should be the place where the debtor administers its interest on a regular basis and is ascertainable by other parties as stipulates under Article 3(1) of the EIR Recast. This is different from the EIR 2000 which did not define COMI. By defining COMI, the EIR Recast enables this regulation to be enforceable and more predictable. But the EIR Recast also provides flexibility on the definition by offering several rebuttable presumptions. Firstly, the COMI is presumed to be the registered office, subject to no movement to other Member State within 3 month prior to the request for opening of the insolvency proceedings, i.e. the suspect period, under Article 3(1) of the EIR Recast. The notion of suspect period is to prevent fraudulent manipulation of the insolvency forum shopping. Another presumption

is the principal place of business, subject to the suspect period which is applicable to individuals with independent business or professional activity. For the individual consumer, it is presumed that the place of the individual's habitual residence with no contrary evidence, subject to 6 months suspect period. With these provisions, insolvency forum shopping is expected to be reduced and other parties are now able to ascertain and predict the COMI under such more consistent definition and therefore carry-out appropriate action.

Another improvement is that the EIR Recast mandates the duty to inform creditors and enhances the insolvency register system which provides better knowledge to the creditors. Previously, it was the discretion of the liquidator to publish information of the opening of insolvency proceedings under the EIR 2000. Nevertheless, it obliges the insolvency practitioner or the debtor in possession to request publication of the notice on the opening of insolvency proceedings, no matter main or secondary, at the debtor's establishment under Article 28(1) of the EIR Recast. The contents of the notice should be complied with the requirements stipulated under Article 28(2) of the EIR Recast. Furthermore, the insolvency practitioners are now required to inform the known foreign creditors inside or outside the EU, in a standard form with requested contents, immediately upon the opening of the insolvency proceedings pursuant to Article 54 and 55 of the EIR Recast. More importantly, an innovated register system is introduced under Article 24 and 25 of the EIR Recast. Member States must establish, maintain and publish their own registers concerning the insolvency information and interconnected the registers between Member States in the European e-Justice Portal, i.e. the central public electronic access search engine, for the ease of insolvency search. Together with the innovated registers system under the EIR Recast, these facilitate a decentralised system in accessing insolvency information. The interests of the creditors, no matter located in EU Member States or outside the EU, are now more secured by having more information on the insolvency proceedings. This greatly assists the creditors to file their claim before the prescribed period of time as under the lex concursus requirements. And therefore facilitates the equality of creditors.

There is also an improvement regarding the enforcement of insolvency and related judgments. Under the EIR 2000, it mandated the declaration of enforceability from court was required. In the contrast, the judgment enforceable in one Member State should be enforceable in another Member State without any declaration of enforceability or approval under the EIR Recast. This further promotes the modified universalism in cross-border insolvency proceedings.

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.

Looking the EIR Recast, it may also face some imperfect matters. The flaws or omissions are discussed in the followings:-

One of the flaws is in relation to the alleged impractical timeframe for those newly added presumptions for ascertaining COMI. The COMI for companies or individuals carrying out professional activity is presumed to be the principal place of business, in the condition that the principal place of business has not been moved to another Member State within 3 months period prior to the request for the opening of insolvency proceedings. The prescribed period is being criticized to be too short and not reflecting stability. Relocation of COMI may require a few weeks or months to complete. This makes difficulty to identify the exact moment when there is relocation of COMI. To ease the difficulty in application of such prescribed period rule, it is suggested to have a longer period of 6 months, being the same requirement for the presumption for the COMI of individual (consumer).

Another flaw is on the opt-out scheme under the group co-ordination proceedings. Pursuant to Article 64(1) of the EIR Recast, each insolvency practitioner has the right to object against, within 30 days of receipt of the notice, the inclusion within group co-ordination proceedings without explicitly required to provide reasons. Furthermore, under Article 69(1)(a) and (b) of the EIR Recast, the objecting insolvency practitioner can request to participate in the group co-ordination proceedings subsequently, subject to the approval of the Co-ordinator. This may impose significant repercussions for the co-ordination plan as a whole. This voluntary basis on the opt-out procedure with the non-binding co-ordinator's recommendations may also bring low incentive to contribute in the group co-ordination proceedings by those passive insolvency practitioners. To provide better incentive for the insolvency practitioners among the Member States, it is suggested requiring the objecting insolvency practitioner to provide substantiated statement explaining the reason of its objection. And to set out the requirements for the initial objecting insolvency practitioners who request to participate into the group co-ordination proceedings subsequently. By doing so, it is expected that the insolvency practitioner would take more serious consideration when choose to object its inclusion and thus to increase the efficiency and reduce the operating cost when implementing the group co-ordinating proceedings.

Marks awarded: 14 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.

To decide whether the Strasbourg Court have international jurisdiction to open the insolvency proceeding requested by PAJ, it should first decide whether Strasbourg is the centre of main interests ("COMI") of PAJ. Under the EIR 2000, there was not definition of COMI. But under its Recital 13 which did not have enforceable effect, the COMI should be "the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties". Without formal definition stipulated in the provision, the autonomous meaning of COMI was then interpreted in one of the important cases of the Court of Justice of the European Union ("CJEU").

In the case of Eurofood IFSC Ltd, the CJEU stressed that the COMI must be identified in an objective way and be ascertainable by third parties. It must be uniform between the Member States so as to ensure legal certainty and foreseeability. To apply the same in the case of PAJ, it is a France-registered company which opened its first store in Strasbourg in 2011.

Regarding the factor of ascertainable, the interpretation was further clarified in the judgment in Interedil Srl v Fallimento Interedil Srl case. In this case, the CJEU held 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", that is ascertainable by third parties and the registered office presumption is irrefutable. Applying the same in the PAJ case, PAJ's first store was opened in Strasbourg in 2011. There might be a doubt in whether PAJ conducts the administration of its interest on a regular basis in Strasbourg. From the facts, it just mentioned that PAJ had plans to expand to the Spanish adult gaming market two years after the opening of its first store in Strasbourg. It did not mention whether PAJ still maintains its regular operation and its first store at Strasbourg in 2013. Thus, if PAJ can prove his regular administration of interest at Strasbourg which is ascertainable by third parties, the Strasbourg Court should be able to open the requested main insolvency proceedings under international jurisdiction.

Question 4.2 [maximum 5 marks] 5

Assume that the Strasbourg Court opens the respective proceeding on 29 June 2017. Will the EIR Recast be applicable? Your answer should address the EIR Recast's scope and contain **all** steps taken to answer the question.

To determine whether the EIR Recast is applicable, the following four steps should be considered:-

Firstly, we have to consider the territorial scope. According to Recital 25 of the EIR Recast, the EIR Recast applies to the proceedings in respect of the debtor whose COMI is located in the EU. Under Recital 27 of the EIR Recast, the court is required to examine whether the COMI of the debtor is actually located within its jurisdiction. In the case of PAJ, assume it is agreed that Strasbourg is the COMI of PAJ. France is am member country of the EU since 1 January 1958. Therefore, the territorial scope test is satisfied.

Secondly, regarding the personal scope test, the EIR Recast is not applicable to those entities explicitly excluded as stipulates in Article 1(2) of the EIR Recast. The list includes insurance undertakings, credit institutions, investment firms and other firms, institutions and undertakings covered by Directive 2001/24/EC, or collective investment undertakings. These entities are importance EU financial entities which require special arrangement and national supervisory authorities to minimise the influences of their failures. In the case of PAJ, it is a toy shop company and is not in the said excluded list. Therefore, it falls within the personal scope.

Thirdly, regarding the material scope test, under Recital 9 of the EIR Recast, the EIR Recast is automatically applicable when the insolvency proceeding is mentioned in Annex A of the EIR Recast which includes the public collective proceedings and interim proceedings. In the case of PAJ, the respective safeguard proceeding is kind of the proceedings as listed in Annex A of the EIR Recast. Thus, the PAJ proceeding falls within the material scope.

Lastly, regarding to temporal scope, pursuant to Article 84(1) of the EIR Recast, the EIR Recast shall apply to those insolvency proceedings opened after the indicated date. The indicated date is 26 June 2017 as stipulates in Article 92 of the EIR Recast. More specific, the time of opening means the judgment (final or not), i.e. the decision of court to open

insolvency proceedings or to confirm the opening the same or to appoint an insolvency practitioner. In the case of PAJ, the decision of the Strasbourg Court to open the respective proceeding was on 29 June 2017. Its judgment was held after the indicated date. Therefore, the temporal scope test is satisfied.

To conclude, as the above four steps are satisfied, the EIR Recast is applicable to the respective proceedings opened by the Strasbourg Court.

Question 4.3 [maximum 5 marks] 3.5

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.

To determine whether the secondary insolvency proceedings can be opened in Spain, the establishment concept is an essential element. Pursuant to Article 2(10) of the 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”.

Assume that PAJ carries out or has carried out the operations of its business in the three-month period prior to the request to open main insolvency proceedings, i.e. 23 June 2017. The major concerns are on “non-transitory economic activity” and “human means and assets”.

The non-transitory economic activity concept is an objective factor. It represents certain degree of continuity and stability. Purely occasional place of operations cannot be regarded as an establishment. In the case of PAJ, it had announced its expansion plan to Spanish adult gaming market since 2013. It appears that the PAJ’s operation in Spain was a non-transitory economic activity.

Regarding the element of “human means and assets”, the CJEU’s judgment in the case of Interedil Srl v Fallimento Interedil Srl interpreted that “the presence alone of goods in isolation or bank accounts does not, in principal, satisfy the requirement of establishment”. The debtor should conduct its activities with the involvement of human resources and assets. In the case of PAJ, it did not only have the expansion plan in Spain, it did have a bank account under the Spanish bank and concluded a credit agreement with it. Moreover, it had a rental agreement in relation to its warehouse in Madrid. All these demonstrate that PAK has conducted its activities with the involvement of human, i.e. the local distributors for its gaming business, and the assets, i.e. the warehouse in Madrid.

To conclude, by satisfying the definition as stipulates in Article 2(10) of the EIR Recast and in accordance to the interpretation of CJEU, the filing of secondary insolvency proceedings in Spain can be opened under the EIR Recast. And the effect of this secondary insolvency proceeding will be restricted to the assets of PAJ situated in Spain as mentioned in Recital 23 of the EIR Recast.

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: 13.5 out of 15

*** End of Assessment ***

Marks awarded: 44.5 out of 50