



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2B

THE EUROPEAN INSOLVENCY REGULATION

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

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
4. You must save this document using the following format: **[student number.assessment2B]**. An example would be something along the following lines: 202021IFU-314.assessment2B. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the word “studentnumber” with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
- 6.1 If you selected Module 2B as one of your **compulsory modules** (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is **23:00 (11 pm) GMT on 1 March 2021**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2021. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
- 6.2 If you selected Module 2B as one of your **elective modules** (see the e-mail that was sent to you when your place on the course was confirmed), you have a **choice** as to when you may submit this assessment. You may either submit the assessment by **23:00 (11 pm) GMT on 1 March 2021** or by **23:00 (11 pm) BST on 31 July 2021**. If you elect to submit by 1 March 2021, you **may not** submit the assessment again by 31 July 2021 (for example, in order to achieve a higher mark).
7. Prior to being populated with your answers, this assessment consists of **9 pages**.

ANSWER ALL THE QUESTIONS

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

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

Question 1.1

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

- (a) True, before the EIR 2000, the EU has not sought to harmonise the insolvency laws of EU Member States.
- (b) False, there was another EU Regulation regulating insolvency law at EU level before the EIR 2000.
- (c) False, an EU Directive regulating insolvency law at EU level existed before the EIR 2000.
- (d) **False, the EU sought to draft Conventions with a view to harmonising the insolvency laws of EU Member States as early as the 1960s, but these initiatives failed.**

Question 1.2

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

- (a) Through its case law, the CJEU had altered the literal meaning of several provisions of the EIR 2000. Newly formulated rules, in line with the CJEU interpretation, were therefore needed.
- (b) **The EIR 2000 was generally regarded as a successful instrument in the area of European insolvency law by the EU institutions, practitioners and academics. However, a number of its shortcomings were identified by an evaluation study and a public consultation.**
- (c) The fundamental choices and underlying policies of the EIR 2000 lacked support from the major stakeholders (businesses, public authorities, insolvency practitioners, etc.). A new Regulation was therefore needed to meet their expectations.
- (d) The EIR 2000 proved to be inefficient and incapable of promoting co-ordination of cross-border insolvency proceedings in the EU.

Question 1.3

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

- (a) Article 18 EIR Recast (“Effects of insolvency proceedings on pending lawsuits or arbitral proceedings”).
- (b) Article 31 EIR Recast (“Honouring of an obligation to a debtor”).
- (c) Article 40 EIR Recast (“Advance payment of costs and expenses”).
- (d) Article 7 EIR Recast (“Applicable law”).

B was the correct answer.

Question 1.4

Why can it be said that the EIR Recast is more “rescue-oriented” than the EIR 2000?

- (a) The EIR Recast is more rescue-oriented because it harmonises substantive aspects of domestic proceedings.
- (b) The EIR Recast is more rescue-oriented because all domestic rescue procedures fall within its scope.
- (c) The EIR Recast is more rescue-oriented because its scope was extended to cover pre-insolvency proceedings and secondary proceedings can be rescue proceedings.
- (d) It is incorrect to say that the EIR Recast is more rescue-oriented than the EIR 2000, as the latter was already heavily focused on rescue.

Question 1.5

The EIR Recast introduced the concept of “synthetic proceedings”. What are “synthetic proceedings”?

- (a) Where an insolvency practitioner in the main insolvency proceedings has given an undertaking in accordance with Article 36, the court asked to open secondary proceedings should not, at the request of the insolvency practitioner, open them if they are satisfied that the undertaking adequately protects the general interests of local creditors.
- (b) Where secondary proceedings are opened, synthetic proceedings mean that these secondary proceedings are automatically rescue proceedings, as opposed to liquidation proceedings.
- (c) Synthetic proceedings mean that insolvency practitioners in all secondary proceedings should treat the proceedings they are dealing with as main proceedings for the purpose of protecting the interests of local creditors.
- (d) Synthetic proceedings mean that for the case at hand, several main insolvency proceedings can be opened, in addition to several secondary proceedings.

Question 1.6

The EIR Recast kept the concept of the “centre of main interests” (COMI) of the debtor, which already existed in the EIR 2000. What were the amendments adopted in relation to this concept?

- (a) The COMI of the debtor is not presumed to be “at the place of the registered office” anymore and the debtor will need to confirm where his COMI is before the beginning of each case.
- (b) Although the COMI of a debtor is still presumed to be “at the place of the registered office”, it is now possible to rebut this presumption, albeit only by the courts.
- (c) The rule that a company’s COMI conforms to its registered office is now an irrefutable presumption.
- (d) Although the COMI of a debtor is still presumed to be “at the place of the registered office”, it should now be possible to rebut this presumption based on Article 3 EIR Recast and Recital 31.

Question 1.7

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

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

Question 1.8

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

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

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

(d) The insolvency practitioner will always succeed in his claim if he can clearly prove that under the *lex concursus*, the contested payments can be avoided (Article 7(2)(m) EIR Recast).

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] 2

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

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

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

Statement 1: COMI presumption and safeguard against forum shopping under Article 3(1) of EIR Recast – The COMI of a company shall be the place where the debtor conducts the administration of its interest on a regular basis and which is ascertainable by third parties. For a corporation, the place of registered office shall be the presumed COMI and the presumption only applies if the registered office has not been moved to another Member State within the 3-month period prior to the opening of the insolvency proceeding. Recital 28 envisages the movement of COMI.

Statement 2: The possibility to open a secondary insolvency proceeding in the Member State where the debtor has an establishment when its COMI is in another Member State under Article 3(2) of EIR Recast – The opening of the main insolvency proceeding would result in the universal application of the law of the Member State of the main insolvency proceeding to be applicable to all other Member States (including the distribution of assets) and hence a unity approach. However, the opening of secondary insolvency proceeding is allowed but it is limited to the assets of the debtor situated in the Member State where the secondary insolvency proceeding is opened. According to Recital 40, the secondary insolvency proceeding would serve to protect the local interest by safeguarding the expectation of local creditors (such as priority and ranking).

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 of EIR Recast which mandates the insolvency practitioners of the main insolvency proceeding and the insolvency practitioners of the secondary insolvency proceedings concerning the same debtor to cooperate and communicate.

Article 42 of EIR Recast which mandates the courts in insolvency proceedings (extending to the time before the insolvency proceedings are opened) to cooperate and coordinate.

Article 43 of EIR Recast which mandates the insolvency practitioners of the main insolvency proceeding to cooperate and communicate with any court before which a secondary insolvency proceeding is pending or has opened, as well as the insolvency practitioners of the secondary insolvency proceedings to cooperate and communicate with (a) the court before

which a request to open a main insolvency proceeding is pending or which has opened; and
(b) any court before which a secondary insolvency proceeding is pending or has opened.

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.

Article 1(1) of EIR Recast states that EIR Recast applies to public collective proceedings, which include proceedings made for the purpose of rescue and reorganisation (when the predecessor Article 1 of EIR 2000 states that EIR 2000 only applies to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator).

Article 38(3) of EIR Recast empowers the court to stay the opening of secondary insolvency proceedings for a period of not exceeding 3 months, provided that suitable measures are in place to protect the interests of local creditors, when a temporary stay of individual enforcement proceedings has been granted in order to allow for negotiations between the debtor and its creditors. The stay can be made at the request of the insolvency practitioner or the debtor in possession and the stay must be lifted if a negotiation between the debtor and its creditors has been concluded. This would avoid the opening of secondary insolvency proceeding which may frustrate the negotiation process and undermine the business rescue (no such mandatory stay in EIR 2000).

Articles 41(1) and (2)(b) of EIR Recast require the communications between insolvency practitioners of the main insolvency proceeding and the secondary insolvency proceedings in relation to the exploration of the possibility of restructuring the debtor and where such a possibility exists, to co-ordinate the elaboration and implementation of a restructuring plan (when the predecessor Article 31 of EIR 2000 made no mention to the communication related to the debtor's restructuring and rescue).

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 the right to give undertaking under Article 36 of EIR Recast. Under Article 36, when the insolvency practitioner in the main insolvency proceeding gives a unilateral written undertaking in accordance with the prescribed requirements in respect of the assets located in the Member State which the secondary insolvency proceedings can be opened (distribution of assets or proceeds received in accordance with the distribution and priority rights in accordance with national law), no secondary insolvency proceeding is allowed if the court in the relevant Member State is satisfied that the undertaking adequately protects the general interest of local creditors. The undertaking shall be approved by the local creditors in accordance for the adaptation of the restructuring plans in the place where the secondary insolvency proceeding is intended to be opened.

The second example is the right of the court to stay the opening of the secondary insolvency proceeding at the request of the insolvency practitioner or debtor in possession not exceeding 3 months where a temporary stay of individual enforcement proceedings has been granted in order to allow for negotiations between the debtor and its creditors under Article 38(3) of EIR

Recast. The court where the secondary insolvency proceeding would require the suitable places to be put in place to protect the interest of local creditors for such stay to be granted, which may include not to remove or dispose of any assets located in the Member State unless in the ordinary course of business. The court is required to lift the stay when a negotiation has been concluded and may lift the stay if the continuation of the stay is detrimental to the creditors' right.

Marks awarded: 10 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.

When EIR 2000 was adopted by the European Council in May 2000, Article 46 of EIR 2000 imposes an obligation of the European Commission to prepare a report on the operation of the EIR 2000 not later than 1 June 2012 and every 5 years thereafter. The report must contain a proposal for adaptation (if needed). A detailed study of the operation of the EIR 2000 in 26 Member States was conducted with an impact assessment and a public consultation.

According to the *European Insolvency Law: The Heidelberg-Luxembourg-Vienna Report*, the Commission concluded that EIR 2000 was a successful instrument for co-ordination of cross-border insolvency proceedings within the EU. Recommendations however were made to include amendments on the scope of the regulation, the jurisdiction to open proceedings falling within the regulation's scope as well as the lodgement of claims. The Commission also proposed to introduce provisions on insolvency involving corporate groups.

Since the introduction of EIR 2000, the EU has introduced other regulations which deal with cross-border matters, such as the Brussels I Recast, in relation to jurisdiction, recognition and enforcement of judgments in civil and commercial matters. Brussels I Recast is not applicable to bankruptcy, proceedings relation to the winding up of insolvent companies, judicial arrangements, compositions and analogous proceedings when they are within the ambit of the Insolvency Regulation. EIR Recast is needed to set out clearly the relationship and interaction among various instruments.

In addition, the insolvency world has shifted its focus to reorganization and rescue (including pre-insolvency rescue). The concept of rescue is not expressly included in EIR 2000. However, it is now widely accepted that winding up is a costly exercise and could lead to other social issues, such as unemployment. It would be to the benefit of the society as a whole if a successful rescue can be made. EIR Recast hence has expanded its scope to include rescue procedures and become more rescue oriented.

Finally, with the closer economic tie and business relationships among the EU member states, the strong emphasis of the entity shielding and legal separability (as reflected in the case *Rastelli Davide e C. Snc v Jean-Charles Hidoux* Case C-191/10) and the lack of group insolvency provision, EIR 2000 fails to address the group insolvency provision. EIR 2000 adopts the traditional model which requires each legal entity of a group to be subject to a separate insolvency proceeding with a separate insolvency estate. This could lead to

suboptimal results and are detrimental to both the creditors and the debtor as piecemeal realization is carried out when the entities are working as a group in reality. This would also reduce the possibility of a successful rescue. The group insolvency provisions in EIR Recast help address the problems

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 first improvement is the introduction of a suspect period for the definition of centre of main interest ("COMI") in Article 3(1) of EIR Recast. In both EIR 2000 and EIR Recast, the COMI for a corporate is presumed to be the registered office in the absence of proof to the contrary. In the CJEU case of *Susanne Staubitz-Schreiber* Case C-1/04, CJEU confirmed that the COMI of a debtor was to be determined at the time when the debtor lodges the request to open insolvency proceedings. As a result, this provides opportunity for the debtor to manipulate the insolvency forum by shifting its registered office (and hence COMI) shortly before the actual insolvency filing. Under EIR Recast, Article 3(1) now indicates that the presumption of the registered office to be the COMI of a corporate debtor would only be applicable if the debtor's registered office has not been moved to another Member State within the 3-month period prior to the request for the opening of insolvency proceeding.

The second improvement is the introduction of a comprehensive communication and cooperation framework under EIR Recast. In EIR 2000, there was only 1 article (Article 31) which requires the insolvency practitioners of the main insolvency proceeding and the second insolvency proceedings to communicate information to each other. Under EIR Recast, a comprehensive framework is made for cooperation and communication between (a) insolvency practitioners in the main insolvency proceeding and second insolvency proceedings (Article 41 of EIR Recast); (b) courts (including the time before the insolvency proceedings are opened) (Article 42 of EIR Recast); and (c) courts and insolvency practitioners (Article 43 of EIR Recast). The comprehensive communication model significantly facilitates coordination and reduces unnecessary cost of repetitive work when there are multiple proceedings in different Member States (which is allowed under EIR Recast) against the same debtor. A timely communication would also improve the insolvency results, including a higher chance of rescue and a better coordination of asset management and sales.

The third improvement and innovation is a new chapter (Chapter V) in EIR Recast on group insolvencies. The EIR 2000 applied a single entity approach and contained no provision to tackle the situation of insolvency of multinational enterprise groups. However, a number of EU cross border insolvency cases are related to enterprise group members in different Member States. EIR Recast now provides (a) duties of cooperation and communication for courts and insolvency practitioners involved in insolvency proceedings against different members of a group; and (b) a group co-ordination proceeding. This approach is considered to be very innovative as EIR Recast pre-dates the UNCITRAL group insolvency model law. Indeed, there is a pressing need for EU to introduce a group insolvency mechanism given that it is common for a corporate group to establish different entities across Member States for operation and in reality, the close economic ties and business relationships are very often merged and operated together among entities. Yet, during insolvency, it is viewed separately. This would lead to undesirable results, such as parallel insolvency proceedings and piecemeal realization of assets. This would also make rescue difficult when the business is operated in an integrated manner but insolvency takes a single entity view.

Question 3.3 [maximum 5 marks] 5

Select **two (2)** major flaws and / or omissions of the EIR Recast. Explain why you consider them to be flaws and / or omissions and how they can be corrected or remedied.

The first major omission is concerned with the failure to stipulate the consequences to inform the creditors for the opening of the insolvency proceedings. Under Article 28 of EIR Recast, an insolvency practitioner or a debtor in possession has the duty to publish a notice of the opening of insolvency proceedings against the debtor in all Member States where the debtor has an establishment. A similar obligation is imposed under Article 54 of EIR Recast to mandate the court which opens the insolvency proceedings or the insolvency practitioner appointed by that court to inform all foreign creditors in relation to the opening of insolvency proceeding. However, the EIR Recast does not stipulate the consequences for violation and the consequences would be determined by *lex concursus*. Unfortunately, there is no unified practice across Member States. Some Member States take the view that the unnotified creditors should not be affected by the claim bar date while some do not adopt such view. These appear unsatisfactory since EIR Recast aims to provide a unified approach to tackle insolvency of a debtor but the current practice would give creditors different treatments in relation to the failure of the creditors to obtain the notice. It should be noted that given the geographical size (and the number of languages used) of the EU and the number of creditors, it would not be practical for creditors, in particular small suppliers to keep monitoring the status of their debtors. The different consequences towards failure to give notice (which may bar the creditors' claims at all) hence would be unsatisfactory and discriminate the creditors based on its location. The solution to the omission would be to provide an express unified consequence in the EIR (overriding the national law regime) in order to provide a fair treatment to all creditors located in different Member States.

The second major omission is related to the voluntary nature of the group co-ordination proceeding newly introduction under Chapter V of EIR Recast. While the concept is clearly innovative (well before UNCITRAL publishes a model law on group insolvency), the group co-ordination proceeding is voluntary and only at the request of the insolvency practitioner of a group member (see Recital 56 and Article 61 of EIR Recast). Moreover, the insolvency practitioner appointed in respect of any group member can choose to opt out easily under Article 64 of EIR Recast. Indeed, the EIR Recast even does not expressly require the insolvency practitioner to give any reasons for opting out and there is no mandatory duty for the insolvency practitioner to seek views from the creditors before opting out. While the regime appears to preserve the national regime of each law and avoids complex issues, it is noted that in an enterprise group, different entities work and cooperate with each other. However, in the context of insolvency, the issues are resolved on an entity basis and synergy among group members are ignored. This could lead to suboptimal results in restructuring and lack of coordination in management and sale of assets (leading to loss of creditors). A group insolvency indeed aims to resolve the single entity approach by allowing the group insolvency to be co-ordinated. Although group insolvency in general provides a better outcome, we also need to respect the choices of individual creditors. The solution to this issue is to increase the threshold of insolvency practitioners opting out from group insolvency. For example, the insolvency practitioner must make recommendations to the creditors on the choice and seek approvals from the creditors before making an election of opting out. Further, the EIR may provide routes for unsatisfied creditors or other members of the group of the company to challenge any opting out decision on the basis of bad faith or so.

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.

According to Article 1(1) of EIR 2000, EIR 2000 applies to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator. Under Article 3(1) of EIR 2000, the courts of the Member State within the territory of which the centre of the debtor's main interest ("COMI") is situated should have jurisdiction to open insolvency proceedings. Article 2(a) of EIR 2000 defines "insolvency proceedings" as collective insolvency proceedings referred to in Article 1(1) with these proceedings listed in Annex A. In *Bank Handlowy w Warszawie SA v Christianpol sp. z o.o.* C-116/11, CJEU confirmed that the list of proceedings in Annex A has a decisive role. Accordingly, if a proceeding is not listed in Annex A, the proceeding is not covered under EIR 2000.

For France, safeguard proceedings (*procédure de sauvegarde*) are NOT included in Annex A to EIR 2000. Accordingly, the Strasbourg Court in France would NOT have international jurisdiction to open the requested insolvency proceedings under EIR 2000 even if PAJ has its registered office, which is presumed to be the COMI, in France.

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 EIR Recast applies, there are four steps.

The first step is that the relevant proceeding should be opened after 26 June 2017 as Article 92 of EIR Recast states that EIR recast only applies from 26 June 2017 (except for Articles 23(1), 25 and 86, however these 3 articles are unrelated to international jurisdiction and hence can be ignored for the present purpose (known as the temporal scope requirement)).

In this case, as the proceeding is opened on 29 June 2017, after EIR Recast takes. The temporal scope requirement is satisfied.

The second step is the territorial scope. Article 3(1) of EIR Recast requires the debtor to have the centre of main interest ("COMI") in a Member State of the EU other than Denmark. COMI

is defined as the place where the debtor conducts the administration of its interest on a regular basis and which is ascertainable by third parties. Article 3(1) provides that the COMI shall be presumed to be the place of registered office in relation to a corporate debtor in the absence of proof to the contrary. The presumption is only applicable if the registered office has not been moved to another Member State 3 months prior to the request to the opening of insolvency proceedings.

In this case, PAJ has its registered office in France and there appears no evidence to conclude that PAJ has conducted its administration on a regular basis and ascertainable to others in any other place. There is also no evidence to indicate the change of registered office 3 months prior to the insolvency proceedings. Accordingly, the presumption applies and PAJ has its COMI in France. The territorial scope is satisfied.

The third step is the personal scope. Article 1(2) of EIR Recast states that EIR Recast does not apply to insurance undertakings, credit institutions, investment firms and other firms, institutions and undertakings to the extent covered by Directive 2001/24/EC or collective investment undertakings.

In the present case, there is nothing to suggest that PAJ falls within one of the categories of the undertakings in Article 1(2). Accordingly, the personal scope is satisfied.

The fourth and final step is the material scope. Under Article 1(1) of EIR Recast, EIR Recast applies to public collective proceedings, including interim proceedings, which are based on laws relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganization or liquidation. The proceedings are listed in Annex A. In *Bank Handlowy w Warszawie SA v Christianpol sp. z o.o.* C-116/11, CJEU confirmed that the list of proceedings in Annex A to EIR 2000 has a decisive role. Accordingly, if a proceeding is not listed in Annex A, the proceeding is not covered under EIR 2000. The CJEC decision is reflected in Recital 9 to EIR Recast, which states that the insolvency proceedings covered under EIR Recast are listed exhaustively in Annex A to EIR Recast. The proceedings of *sauvegarde* are included in Annex A.

In this case, the concerned proceedings are safeguard proceedings (*procédure de sauvegarde*) and are included in Annex A. The material scope is fulfilled.

In conclusion, the EIR Recast would be applicable and the Strasbourg Court in France has the international jurisdiction to open the requested insolvency proceeding under EIR Recast.

Question 4.3 [maximum 5 marks] 2.5

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.

Under Article 3(2) of EIR Recast, when the debtor's centre of main interest ("COMI") is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings (known as territorial or secondary insolvency proceedings) against the debtor only if the debtor possesses an establishment within the territory of that other Member State.

An "establishment" is defined under Article 2(10) of EIR Recast 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". The existence of establishment hence is assessed at the time when the secondary insolvency proceedings are opened.

In *Interedil Srl, In Liquidation* C-396/09, CJEU held that the definition of "establishment" is connected with the pursuit of an economic activity to the presence of human resources and needs to show that a minimum level of organisation and a degree of stability are required. Conversely, the existence of goods in isolation or bank accounts alone would not satisfy the requirement. According to paragraph 71 of Virgos-Schmit Report, the non transitory character of a debtor's activities indicates a certain degree of continuity and stability. A pure occasional place of operations hence cannot be regarded as an establishment. This has to be assessed in the eyes of the third parties, and not based on the intention of the debtor

In this case, PAJ has owned a warehouse in Spain and rents out to other toy companies since 2011. Since 2013, it has kept a bank account and has concluded a line of credit agreement with a Spanish bank. In 2013, PAJ also started negotiations with local distributors and entered into some non binding memorandum of understanding. Accordingly, it is submitted that PAJ has been operating for 4 years (until 2017) in Spain and hence has a degree of stability. Moreover, PAJ does not passively exist in Spain by only possessing a warehouse and a bank account. It negotiates actively with distributors and enters into some form of understanding. It is considered that the operation and activities in Spain by PAJ would no doubt involve human resources and assets. It is also apparent to third parties (such as distributors who deal with PAJ). In summary, it is considered that PAJ has an establishment in Spain within the 3-month period prior to the opening of the French insolvency proceedings, which are the main insolvency proceedings (as discussed in Question 4.2, PAJ has a COMI in France and the French insolvency proceedings would be regarded as the main insolvency proceedings under Article 3(1) of EIR Recast).

Accordingly, the Spanish Bank would be allowed to file a petition to open secondary insolvency proceedings, once the main insolvency proceedings in France are opened. The secondary insolvency proceedings would only have effect to the assets of the debtor situated in Spain under Article 3(2). "The Member State in which assets are situated" is defined in Article 2(9) to refer to a list of different assets, including cash held in accounts with a credit institution.

The Spain bank intends to open the secondary insolvency proceedings to securing a Spanish insolvency distribution ranking. Such purpose is allowed as Recital 40 in EIR Recast states clearly that secondary insolvency proceedings can be opened to protect local interests.

While your discussion is thorough, it is not correct.

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: 12.5 out of 15.

*** End of Assessment ***

Marks awarded: 46.5 out of 50.