



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”).

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.

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.

D was the correct answer.

Question 1.7

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

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

Question 1.8

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

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

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

of challenging the contested transactions, and provided that the parties did not choose that law for abusive or fraudulent ends.

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

Question 1.9

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

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

Question 1.10

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

Assume that:

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

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

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

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 is in connection with the Centre of Main Interest concept and opening of main insolvency proceedings. Article 3(1) of EIR Recast provides for Centre of Main Interest. It is also important to highlight that debtor moving their registered office to seek a favorable insolvency regime i.e. forum shopping is not discouraged. However, such forum shopping should not lead to harmful or abusive or causing damage or disadvantage to the debtor’s creditors. Consequently, statement 2 can also be attributed to forum shopping concept under EIR Recast.

Statement 2: This concept is in relation to the concept of the secondary proceedings. The secondary proceedings are intended to protect the interest of the domestic creditors in certain situations.

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.

As against earlier EIR 2000 Regulations, where a single article was dedicated for co-operation and co-ordination, EIR Recast has three articles for co-operation and co-ordination of the insolvency regulations. The following are the articles:

1. Article 41: Insolvency practitioners’ communication and co-ordination
2. Article 42: Communication and Co-ordination between the courts
3. Article 43: Communication and Co-ordination between the insolvency practitioners and courts.

It is also pertinent to highlight that Articles 56-59 of EIR Recast have similar provisions in connection with the group insolvency proceedings co-ordination and communication.

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 of EIR Recast provides for public collective proceedings including any interim proceedings, adjustment of debt and rescue of the corporate debtor. Consequently, Article 1 lays down the framework of EIR Recast being rescue oriented as against earlier EIR 2000 regulations, where debtor was divested of the control and a liquidator was appointed. Additionally, Annex A refers to a list of insolvency proceedings, where EIR Recast will be applicable to such proceedings without any further examination by the courts of another member state to check whether the conditions set out in the regulations are met.

Article 46 of EIR Recast provides for stay of the process of realisation of assets. This provision provides for stay on the realisation of the assets in the secondary insolvency proceedings. This stay will be on a request made by the insolvency practitioner of the main insolvency proceedings.

Article 47 of EIR Recast empowers the insolvency practitioner of the main insolvency proceedings to propose restructuring, compromise, or composition as per the procedure of the member state where the second proceedings have been opened if the law of that member state provides for such measures.

Article 52 of EIR Recast provides for preservation measures where a request to preserve the debtors' assets in another member state can be made.

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 opening of secondary proceedings will create a separate insolvency proceeding. The separate insolvency proceeding will lead to a creation of separate insolvency estate and the application of separate law i.e., law of the member state where the establishment is located. Consequently, this limits the applicability of the main proceedings – which proposes universalism and hence EIR Recast provides of “prevention of secondary proceedings” subject to certain conditions.

Right to give an undertaking: As per Article 38(2) of EIR Recast, if an insolvency practitioner of the main proceedings gives an undertaking in accordance with Article 36 then the court asked to open secondary proceedings shall not, based on the undertaking, open the second proceeding. However, such relief can be granted by the court only if the court is satisfied that the interest of the local creditors is adequately protected. This is called synthetic proceedings.

Stay of the opening of the secondary insolvency proceedings: As per Article 38(3), on request of the insolvency practitioner of main insolvency proceedings, a stay may be imposed for a period not exceeding three months' subject to the court satisfying itself that interest of the local creditors is protected. Additionally, the courts can also provide for additional measures such as mandating the main insolvency proceeding practitioner to not to remove the assets of the debtor.

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.

It took nearly 30 years for bringing in a harmonised cross border regulation. EIR 2000 introduced many concepts like centre of main interests for determining the main proceedings (Article 3(1) EIR 2000) and *lex concursus* i.e., law of the state of the opening of insolvency proceedings (Article 4 EIR 2000). However, it was not truly universal in nature. EIR 2000 also provided for the possibility of opening secondary proceedings, where debtor had an establishment – territorial in nature and co-ordination and co-operation between the main and secondary proceedings. Secondary proceedings covered assets falling under the secondary proceedings' jurisdiction unlike the main proceedings.

Article 46 of EIR 2000 mandated the European Commission to present a report on or before June 1, 2012, on application of EIR 2000 and proposal for adaptations if required. EIR 2000 was a success but there was a common acknowledgement that it required tweaking of the existing regulations to make it more effective and a completely different rules for certain areas. Consequently, EIR Recast was introduced and adopted in 2015 and it came into force in 2017.

It is important to highlight that the primary objective of EIR Recast was to make it more rescue oriented as against liquidation of the company without giving a chance to economically viable companies. EIR Recast introduced many provisions in relation to restructuring of the corporate debtor i.e., pre-insolvency proceedings. It also introduced detailed provisions on co-ordination and co-operation between the courts, insolvency practitioners and courts-insolvency practitioners as against a single article in EIR 2000. The concept of group proceedings and co-operation and co-ordination in this regard has also been introduced. Overall, even though EIR 2000 was successful, aided with judgements from the Court of Justice of European Union, the stakeholders believed that EIR Recast should be introduced to promote the European Union objectives such economic recovery, sustainable growth, and promotion of entrepreneurship.

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.

Centre of Main Interest (COMI)

EIR 2000 did not provide a definition of COMI in articles. However, it only provided some guidance in its Recital 13. As recitals are only guiding principles, EIR Recast introduced the definition of COMI into the regulations. Article 3(1) of EIR Recast provides that “the COMI shall be the place where the debtor conducts the administration of its interests on a regular basis and ascertainable by the third parties”. This definition is like EIR 2000 recital and backed by the settled case law from Court of Justice for European Union, Eurofood IFSC Ltd (Case C-341/04, ECLI:EU:C:2006:281 (May 2, 2006)). Consequently, by introducing COMI in the Article, the COMI principle, which is fundamental for determining the main proceedings, EIR Recast moved towards achieving certainty in definition.

Secondary Proceedings

EIR 2000 provided for secondary proceedings, which were limited to winding up proceedings (listed in Annex B of EIR 2000). This feature was widely criticised as it restricted companies from being rescued. Under EIR Recast, secondary proceedings can be opened against a debtor in any member state where it possesses an establishment (Article 3(2) EIR Recast). The opening of second proceedings in such member states will lead to creation of a separate insolvency estate and the application of a separate *lex concursus secundarii*. It is also important to highlight that as against EIR 2000, EIR Recast specifically provides provisions for avoidance of the secondary proceedings such as Right to give an undertaking under Article 38(2) of EIR Recast and stay of the opening of the secondary insolvency proceedings under Article 38(3) subject to court being satisfied that the interest of the local creditors is protected, and the opening of secondary proceedings will lead to significantly compromising the rescue culture. This is a significant innovation and progress in the regulations as it tries to balance the interest of local creditors and address the impediments caused due to opening of the secondary proceedings.

Co-ordination and Co-operation Articles

Under EIR Recast, much importance has been given to co-ordination and co-operation. EIR 2000 had a single article mandating insolvency practitioners in main proceedings and secondary proceedings to communicate and share information between each other. EIR Recast has provided a series of articles to address co-operation and co-ordination aspects in the insolvency proceedings. This concept is fundamental for an effective implementation of the insolvency proceedings. EIR Recast provides for co-operation and communication between insolvency practitioners (Article 41 EIR Recast), between courts and insolvency practitioner (Article 43 EIR Recast) and between courts (Article 42 EIR Recast). EIR Recast also provides for similar articles in Article 56-59 for group insolvency proceedings co-operation and communication. Consequently, this is a significant progress in EIR Recast in the co-operation and communication concept. The Articles make references to best practices to be adopted.

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.

A major shortcoming in the EIR Recast is the lack of provisions for group insolvency i.e., insolvency of multiple companies which are part of the same corporate group. The EIR Recast introduces a voluntary regime such as “group co-ordination proceedings”. Under this, an independent insolvency practitioner may be appointed as a group co-ordinator. This new regime shortcoming is it being optional. Initiation of group coordination proceedings is optional; an IP appointed in respect of any group member cannot be compelled to participate in the group proceedings against his or her will. Group proceedings are already taking place (such as Nortel) outside the regulations. Consequently, unless the group proceedings are mandated instead of keeping it as optional, the group proceedings will remain academic.

One of the exceptions to the application of *lex concursus* principle is that it does not apply to contract of employment. This is provided in Article 13 of EIR Recast, which states that the effects of the insolvency proceedings on employment contracts and relationships shall be governed under the law of member state applicable to such contracts and relationships. However, the EIR Recast does not define what “employment” means. This is a significant gap as it may lead to different interpretation. To solve this, EIR Recast may provide for interpretation linked to national legislations or provide judicial interpretation. This should be

linked to national legislations as labour related matters are sensitive to each country and allowing any autonomous or judicial interpretation may lead to a conflict situation with the member states.

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.

EIR 2000 provides for international jurisdiction for insolvency cases within EU. It designates the Member State, the courts of which may open the insolvency proceedings. EIR 2000 allows for opening of main and secondary proceedings. For opening of the main proceedings, the debtors i.e., PAJ's centre of main interest will have to be proved. EIR 2000 does not contain a definition of COMI. However, prior to considering COMI, it is important to consider whether the *sauvegarde* was included EIR 2000. As per Annex A, under France heading, *sauvegarde* is not part of the list of the proceedings. Consequently, EIR 2000 will not be applicable.

Question 4.2 [maximum 5 marks] 4

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.

As mentioned above, like EIR 2000, EIR Recast provides international jurisdiction for insolvency cases within the EU i.e., member states can open insolvency proceedings (Recital 26). It is important to highlight that Annex A of EIR Recast includes *sauvegarde*, consequently EIR Recast will be applicable. Article 3(1) of EIR Recast states that a member state within the territory of which the centre of main interest of debtor is located, will have jurisdiction to open insolvency proceedings. This proceeding has universal scope and aim at encompassing all the debtor's assets. COMI is determined by referencing it to both objective and ascertainable by the third parties. EIR Recast also introduces presumptions in COMI. It is presumed that the place of registered office of the debtor will be the place of COMI (*Article 3(1) of EIR*).

Consequently, given that PAJ is registered in France, and it opened its first store in Strasbourg and the registered office registration being outside the suspect period, the Strasbourg court can open the insolvency proceedings under EIR Recast.

You failed to name each of the scope discussed.

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.

EIR Recast allows for opening of the secondary insolvency proceedings if the proceedings against a debtor in any member state if such state possesses an establishment (Article 3(2) of EIR Recast). Secondary proceedings are restricted to assets of the debtor situated in such member state. In the current scenario this will be restricted to its warehouse in Madrid, Spain, if the establishment condition is satisfied.

According to Article 2(10) of EIR Recast, 'establishment' means any place of operations where a debtor carries out or has carried out, in the three-month period prior to opening of the main insolvency proceedings. EIR Recast adheres to the autonomous interpretation of the concept of establishment. In *Interedil* case, the CJEU concluded that to establish the 'establishment concept', the applicant is required to prove that the debtor had presence of human resources, minimum level of organisation and a degree of stability. The most decisive factor is how the establishment will appear in front of the third parties.

Consequently, in the present case, the following factors will be relevant for determining 'establishment': (a) PAJ's warehouses in Madrid, Spain (assets); (b) PAJ concluding a line of credit agreement with Spanish Bank, maintaining a bank account; (c) PAJ announcing plans to expand to the Spanish adult gaming market; and (d) PAJ signing non-binding MoUs. (b) (c) and (d), significantly point towards the fact that how third parties were viewing PAJ has having an establishment in Spain as it aimed to conduct and expand business with its warehousing assets. Hence, the Spanish courts can open the secondary insolvency proceedings.

While your discussion is sound, your answer is incorrect.

Based on the facts, it would seem that the finding of an establishment would not be made out in Spain, as these facts do not qualify as "non-transitory economic activity with human means and assets" (Article 2(10) of the EIR Recast). The EIR Recast does not have requirements as to form i.e. that there has to specifically be a corporate branch or representative office, in order for there to be an establishment. The EIR Recast places more importance on the substance, looking at both human resources and assets. Nevertheless, the facts of the case suggest that the threshold for there to be considered an establishment in Spain has not been reached, as there is only a bank account and intentions to expand into the adult gaming market in Spain, and the signing of some non-binding memoranda of understanding.

In the CJEU decision in *Interedil Srl v Fallimento Interedil Srl*, the Court stated at paragraph 64 that the term "establishment" under the EIR Recast requires the presence of a structure consisting of a "minimum level of organisation and a degree of stability necessary for the purpose of pursuing an economic activity. The presence alone of goods in isolation or bank accounts does not, in principle, meet that definition." Although there is no explicit time limit on how long the activity has gone on for, an occasional place of operations would not be considered as an establishment. This assessment is an objective one, rather than viewed through the subjective lens of the debtor (see paragraph 71 of the Virgós-Schmit Report).

Applied to this case, this is significant because it cannot be said that because there was the intention to enter the Spanish market (by signing non-binding MOUs), that this demonstrated sufficient connection for there to be an establishment in Spain.

The same *Interedil* decision also held that if the bodies responsible for the management and supervision of the debtor are in the same place as its registered office, and the management decisions of the company are in fact taking place there, the registered office presumption (i.e. the COMI is presumed to be the same place as the registered office) cannot be refuted. In this case, the facts do not expressly say that the management takes place in France, although given that the first store was opened there, this is possible.

In this case, in consideration of the facts and the relevant case law, it appears that the minimum level of organization and stability has not been demonstrated for Spain. Therefore, it would not be possible to open secondary insolvency proceedings in Spain.

Marks awarded: 12.5 out of 15.

*** End of Assessment ***

Marks awarded: 44.5 out of 50