



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2B

THE EUROPEAN INSOLVENCY REGULATION

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

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

ANSWER ALL THE QUESTIONS

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

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

Question 1.1

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

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

Question 1.2

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

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

Question 1.3

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

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

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

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

(d) Article 7 EIR Recast (“Applicable law”).

Question 1.4

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

(a) The EIR Recast is more rescue-oriented because it harmonises substantive aspects of domestic proceedings.

(b) The EIR Recast is more rescue-oriented because all domestic rescue procedures fall within its scope.

(c) The EIR Recast is more rescue-oriented because its scope was extended to cover pre-insolvency proceedings and secondary proceedings can be rescue proceedings.

(d) It is incorrect to say that the EIR Recast is more rescue-oriented than the EIR 2000, as the latter was already heavily focused on rescue.

Question 1.5

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

(a) Where an insolvency practitioner in the main insolvency proceedings has given an undertaking in accordance with Article 36, the court asked to open secondary proceedings should not, at the request of the insolvency practitioner, open them if they are satisfied that the undertaking adequately protects the general interests of local creditors.

(b) Where secondary proceedings are opened, synthetic proceedings mean that these secondary proceedings are automatically rescue proceedings, as opposed to liquidation proceedings.

(c) Synthetic proceedings mean that insolvency practitioners in all secondary proceedings should treat the proceedings they are dealing with as main proceedings for the purpose of protecting the interests of local creditors.

(d) Synthetic proceedings mean that for the case at hand, several main insolvency proceedings can be opened, in addition to several secondary proceedings.

Question 1.6

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

(a) The COMI of the debtor is not presumed to be “at the place of the registered office” anymore and the debtor will need to confirm where his COMI is before the beginning of each case.

- (b) Although the COMI of a debtor is still presumed to be “at the place of the registered office”, it is now possible to rebut this presumption, albeit only by the courts.
- (c) The rule that a company’s COMI conforms to its registered office is now an irrefutable presumption.
- (d) Although the COMI of a debtor is still presumed to be “at the place of the registered office”, it should now be possible to rebut this presumption based on Article 3 EIR Recast and Recital 31.

Question 1.7

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

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

Question 1.8

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

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

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

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: 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.”

ANSWER

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

Article 3 of the EIR Recast – International Jurisdiction and specifically Article 3(1) and Recital 29 – states the EIR Recast should contain safeguards aimed at discouraging/preventing fraudulent or abusive forum shopping.

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.”

Article 36 of the EIR Recast – Right to give an undertaking in order to avoid secondary insolvency proceedings (“Synthetic” secondary proceedings)

Question 2.2 [maximum 3 marks] 3

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

ANSWER

Three provisions of the EIR Recast, which mandate co-operation and communication in the context of main and secondary insolvency proceedings are as follows:

Article 41 of the EIR Recast – Co-operation and communication between insolvency practitioners

Article 42 of the EIR Recast – Co-operation and communication between courts

Article 43 of the EIR Recast – Co-operation and communication between insolvency practitioners and courts

Question 2.3 [maximum 3 marks] 3

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

ANSWER

The EIR Recast is more rescue-oriented than its predecessor the EIR 2000 because of the following:

Article 1 of the EIR Recast – Scope – vis-a-vis EIR 2000, the scope of the EIR (Recast) has been extended to include situations where there is likelihood of insolvency and pre-insolvency. Rescue and re-organisation of economically viable but financial distressed businesses is initiated giving a lifeline or a second chance and through adjustment of debt for rescue of private individuals.

Article 41(2) (a) and (b) of the EIR Recast – Communication between insolvency practitioners on measures related to the debtor's rescue and restructuring. Also, for exploring possibility of restructuring the debtor by collaborating on the implementation of the restructuring plan.

Article 47 of the EIR Recast – Power of the insolvency practitioner to propose restructuring plans – Insolvency professional in the main proceeding is empowered to propose a restructuring plan, a composition or a comparable measure in the secondary proceeding so that the principal aim of the business rescue is accomplished.

Article 56(2)(c) of the EIR Recast – Dealing with exploring possibilities for group restructuring through a co-operative mechanism for a co-ordinated restructuring plan.

Recital 29 of the EIR Recast – The change in insolvency venue for the benefit of having a successful reorganisation is not per se prohibited.

Recital 48 of the EIR Recast – Main insolvency professional can propose a restructuring plan or composition in the secondary insolvency proceedings.

Recital 53 of the EIR Recast – To enhance chances of a successful rescue, the court have an option to consolidate insolvency proceedings of members of the same group in a single jurisdiction where it finds that the COMIs of group companies are located in a single member state.

Question 2.4 [maximum 2 marks] 2

It is widely accepted that the opening of secondary proceedings can hamper the efficient administration of the debtor's estate. For this reason, the EIR Recast has introduced a number of legal instruments to avoid or otherwise control the opening, conduct and closure of secondary proceedings. Provide **two (2) examples** of such instruments and briefly (in 1 to 3 sentences) explain how they operate.

ANSWER

Legal instruments to avoid or otherwise control the opening, conduct and closure of secondary proceedings are as follows:

Article 36 of the EIR Recast – Right to give an undertaking in order to avoid secondary insolvency proceedings – a proper procedural framework; the insolvency professional in the main proceeding may give an unilateral undertaking to the local creditors covering assets located in the member state where requested secondary proceedings could hamper the efficient administration of the debtor's estate. The undertaking is a commitment to distribute the debtor's local asset pool in accordance with the distribution and priority rights that local creditors would have enjoyed under the national law where secondary proceedings were sought to be opened. The undertaking needs to be approved by known local creditors with

the voting rules that apply to the adoption of restructuring plans under the laws of the member state where secondary proceeding could have been opened.

Recital 45 of the EIR Recast – The stay on secondary insolvency proceedings provides breathing space for the debtor to deal with its creditors when court is satisfied that suitable measures to protect the interests of local creditors are in place so that there is no disruption of the debtor's efficient restructuring and a cohesive restructuring plan can provide optimal returns to creditors. The stay may be imposed for a period not exceeding three (3) months with suitable measures to safeguard interests of local creditors and the stay can be lifted in event there is debtor-creditor agreement on restructuring plan or where a continuation of stay is detrimental to creditors and there is deadlock in discussions.

Marks awarded: 10 out 10.

QUESTION 3 (essay-type questions) [15 marks in total]

In addition to the correctness, completeness (including references to case law, if applicable) and originality of your answers to the questions below, marks may be awarded or deducted on the basis of your presentation, expression and writing skills.

Question 3.1 [maximum 5 marks] 5

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

ANSWER

Since 1960, work begun on developing a bankruptcy convention for the European Union. The common market states formed a committee of experts to deliberate and develop a convention on bankruptcy and for over three decades draft conventions were developed under different under the auspices of various European bodies examining cross-border insolvencies.

On May 29, 2000, the European Council adopted European Insolvency Regulations (EIR 2000), which was the logical culmination of efforts of over four decades in the field resulting into a binding EU instrument. The EIR 2000 came into effect on May 31, 2002.

As mandated by Article 46 of the EIR 2000 – Reports; after a decade of operation, a report on the application of EIR 2000 and proposed adjustments or adaptation was initiated for the European Commission (EC). While EIR 2000 was regarded as a successful instrument in the area of European cross-border insolvency by various stakeholders, some areas were identified for adjustments, refinement and improvement by the evaluation study of the EC and further through public consultations. Additionally, a new EIR was necessitated for factoring new developments in the fields of international insolvency not covered in EIR 2000. As a consequence, a revised insolvency regulation was adopted in 2015, the EIR Recast, which came into force on June 26, 2017. The EIR Recast contained 89 recitals, 92 articles in 7 chapters and four annexes which was almost the double the EIR 2000.

Amendments in the EIR Recast addressed the following key areas:

- Extending the scope of insolvency to cover pre-insolvency or hybrid proceedings or schemes
- Stepping away from the original intent of EIR 2000 viz, liquidation and liquidation procedures to focus on a culture of rescue, rehabilitation and recovery and allowing businesses to continue as going concerns viz debtor in possession
- Abolition the requirement that secondary proceedings must be winding-up proceeding
- Renaming liquidators as insolvency practitioners

- Strengthening provisions of COMI by including a definition of COMI in the body of EIR Recast and casting a duty on courts to carefully determine genuineness of COMI and discourage fraudulent, abusive forum shopping
- Effective rules for co-operations of all the actors in the cross-border insolvency and between main and secondary proceedings
- Introduction of a chapter on group insolvencies
- Possibility for proceedings with regard to group companies
- Improved sharing of information with creditors through inter-connected insolvency registers and modernisation of data protection rules
- Introducing the idea of opening-up of synthetic or virtual secondary proceedings
- Abolishing requirements, that secondary proceedings must be winding up proceedings
- Need for publicizing opening of proceedings and lodgment of claims

Question 3.2 [maximum 5 marks] 5

Compare the EIR Recast with the EIR 2000: choose **three (3)** major improvements and / or innovations of the EIR Recast. Explain how these improvements and / or innovations should stimulate a more efficient administration of insolvency proceedings spanning across several EU Member States.

ANSWER

Three (3) major improvements and / or innovations of the EIR Recast that stimulate a more efficient administration of insolvency proceedings spanning across several EU Member States:

1. Inclusion of chapter on group proceedings and co-ordination by group co-ordinator

EIR Recast has introduced Chapter V on Insolvency Proceedings Of Members Of A Group Companies, allowing for co-ordination of insolvency proceedings at an EU level. Chapter V also provides the procedural framework under Articles 56 – 60 for co-operation and communication between insolvency practitioners and courts involved with the aim to enhance the effectiveness of EU wide insolvencies.

Recital 53, addressed the possibilities of consolidating group insolvencies into a single jurisdiction where the court finds that several companies in the group have the same COMI viz, in the single member state. This reduces the costs of the insolvency as well as it leads to efficient administration of the proceedings through centralised control.

There is also a new procedure for group insolvencies through a group co-ordinator appointed to facilitate, oversee and co-ordinate insolvency proceedings across groups. This co-ordinator is an insolvency practitioner who is independent of individual proceedings in the group. While participating in a group proceeding, he can mediate in disputes and draw-up a group co-ordination plan.

The group proceeding is voluntary and offers each office-holder the option of opting out of the group proceeding. The office-holders are obliged to consider the group co-ordinator's recommendation, however are not required to adhere to it.

Co-ordinated group insolvencies facilitated by proper co-operation and communication helps value maximisation and prevents evaporation of value for the creditors of each entity under duress. Interdependent groups' entities require group-wide solutions. Group co-ordination and group proceedings go a long way in the smooth resolution of complex cross border insolvencies as seen in Nortel Networks, Lehman Brothers and in KPN Qwest, the opposite

outcome resulted where value was lost in the insolvency proceeding due to lack of co-operation between separate proceedings.

2. Opening-up of synthetic or virtual secondary proceedings by giving an undertaking

Opening of a secondary proceedings has the potential to undermine the process of business restructuring and destabilize negotiations in the main proceedings hindering administration. To address this, Article 36 of the EIR Recast provides the insolvency practitioner a statutory framework, a right to give an undertaking in order to avoid secondary insolvency proceedings. This unilateral undertaking in relation to assets where secondary proceedings could be opened, undertakes to comply with the distribution and priorities waterfall under local insolvency laws and has to be approved by all known local creditors by the requisite qualified majority (for approving resolution plans) as determined by the local laws of member state where secondary proceedings would otherwise have been opened.

Under Article 38 (2) of the EIR Recast, basis the undertaking, the opening of the secondary insolvency proceedings can be refused where court is satisfied that it protects the general interest of local creditors. This instrument aids in achieving two objectives, firstly preparation of cohesive restructuring plan since decision making is centralised in the main proceeding. Secondly, it guarantees protection of the priority rights of local creditors under the national insolvency laws 'as if' secondary proceedings have been opened. Since insolvency procedures are complex, this instrument removes some of the obstacles smooth administration of the insolvency proceedings.

3. Information for creditors through an electronic search engine and standardization of the procedure for lodgment of claims

Article 24 of the EIR Recast provides for the creation of national or central insolvency registers. Article 25 of the EIR Recast mandates inter-connectivity of insolvency registers and establishment of national electronically searchable database. Certain minimum and mandatory information must be published after the opening of the insolvency proceedings. The main goal of insolvency registers is to register, record, verify and publish about insolvency proceedings of corporates and individuals which can improve the provision of information relevant to creditors and courts and to prevent opening of parallel insolvency proceedings. The system is also mandated to have search services in all official languages of member states. Inter-connected insolvency registration system, European e-Justice portal with the national insolvency register and provides users with single, unified search platform aiding in efficient administration of insolvency proceedings.

Article 55 of the EIR Recast also mandates creation of a standard claims form across Europe for filing claims in any member state creating a level playing field and ensures equal treatment of local and foreign creditors. The unification of form filing simplifies access of foreign creditors', particularly of small and medium business creditors to cross-border insolvencies across the member states by giving all the relevant information, appropriate legal translation and administrative support which in-turn lowers their cost of pursuing the insolvency and adds to information certainty. When an insolvency spanning across several EU Member States is opened under EIR Recast, all creditors have to provide the same essential information to the insolvency practitioner, giving the administrator a clear view of the outstanding liabilities of the debtor and helps creditors protect their rights under the process.

4. Abolition of the requirement that secondary proceedings must be winding-up proceeding (Article 3(3) of EIR 2000).

Article 3(3) of EIR 2000 hindered restructuring and rescue procedures across the EU and was a crucial improvement for efficient administration of insolvency proceedings spanning several

EU countries where main proceeding was a pre-insolvency, rescue or reorganisation procedure allowing for alignment of objectives between both 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.

ANSWER

Two (2) major flaws and / or omissions of the EIR Recast are as follows:

1. Shorter look-back or suspect period for shifting COMI is likely to encourage insolvency tourism – one of the aims of EIR Recast is to prevent abusive forum shopping with the presumption being that the jurisdiction of the registration does not apply if the registered office was shifted within three (3) months of the opening of the insolvency proceedings (Recital 31 of the EIR Recast).

Typically, corporate insolvencies arise over periods more than three months possibly between 18-24 months prior to filings for insolvency. Corporations may use this (3 months) shorter suspect period for the migration of COMI and this would represent bad faith manipulation of COMI. The public perception about migration of COMI prior to the suspect period already has a negative connotation and insolvency courts in any case try to determine that the COMI shift is real and done for the purpose of maximising value, preserve going concern value, saving jobs and for effective restructuring of the corporate.

The Ocean Rig UDW Inc, 570 B.R. 687 (Bankr S.D.N.Y) case has laid down a judicially tested steps that a debtor should take to ensure that COMI migration is legitimate vs in the case of Creative Finance, 543 B.R 498 (Bankr S.D.N.Y) or Case C – 106/6, Polbud – Wykonawstwo sp z.o.o ECLI:EU:C 2017:804. Additionally, a longer look back period of between 18 - 24 months creates safeguard against fraudulent migration of COMI and may improve public sentiment against such migration prior to insolvency.

2. Article 64 of the EIR Recast – Objections raised by insolvency practitioners about inclusion within group co-ordination proceedings of the insolvency proceedings in which he/she is appointed or about the person proposed as co-ordinator. The opt-out provision requires the insolvency practitioner to opt out in 30 days of receipt of notice of the request for the opening of the group consolidation proceedings. Article 64 does not require that reasons be provided to the court for the objections raised.

In a case, where the insolvency practitioner has raised objections under Article 64, he is well advised to file detailed statement substantiating reasons for raising objections and demonstrating significant positive financial impact of staying out of the group co-ordinated proceedings.

Marks awarded: 15 out of 15.

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

Prêt A Jouer (PAJ) is a France-registered toy shop company. The company opened its first store in Strasbourg in 2011. One of PAJ's warehouses is in Madrid (Spain) and PAJ rents out this warehouse to other toy companies. In 2013, PAJ concluded a line of credit agreement with a Spanish bank where it maintains a bank account. During the same year, PAJ announced that it had plans to expand to the Spanish adult gaming market, as the latter was

expected to grow annually by over 10%. As a result, PAJ started negotiations with local distributors and some (non-binding) memoranda of understanding have been signed.

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

Question 4.1 [maximum 5 marks] 5

Assume that the EIR 2000 applies. Does the Strasbourg Court have international jurisdiction to open the requested insolvency proceeding? (Explain why it does or does not have jurisdiction.) Your answer should contain references to the applicable law and the relevant CJEU jurisprudence.

ANSWER

Assuming that the EIR 2000 applies to this case, the Strasbourg Court has the internal **[international]** jurisdiction to open the requested insolvency proceeding under the petition filed on 23 June 2017.

Sauvegarde are re-organisation/pre-insolvency proceedings, French law provides for three types of insolvency proceedings, which are listed in annex A to the Regulations, sauvegarde proceedings, redressement judiciaire and liquidation judiciaire. Sauvegarde proceedings are governed by Article L 620-1 et seq of the French Commercial Code as amended by Law No 2005-845 of July 26, 2005. However, since, sauvegarde is listed in Annex A of EIR as an insolvency proceedings the Spanish court has to accept the sauvegarde as a proceeding within the meaning of article 1 of EIR, which applies to collective insolvency proceedings and article 2(a) defines insolvency proceedings as collective proceedings referred in article 1(1) and are listed Annex A.

The decisive role of annex A is confirmed by CJEU in the Bank Handlowy case, where the court noted that once proceedings are listed in annex A to the EIR, they must be regarded as coming within the scope of the EIR. Inclusion in the annex A of EIR has the direct, binding effect attaching to the provisions of a regulation. The CJEU in the Bank Handlowy case laid emphasis on the need for co-operation between courts. The principle of sincere co-operation laid down in article 4(3) aims to ensure efficient and effective cross-border insolvency proceedings through mandatory co-ordination of the main and secondary proceedings guaranteeing the priority of the main proceedings.

As discussed in the Eurofoods IFSC case, the CJEU highlighted the autonomous meaning of the term COMI and emphasised that it must be identified by reference to criteria that are both objective and ascertainable by 3rd parties. The French court's based it's jurisdiction on the fact that the debtor has it is COMI in France and for the Spanish court to exercise jurisdiction would first have to establish that the debtor's COMI is in Spain, in accordance article 3(1).

Question 4.2 [maximum 5 marks] 5

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

ANSWER

The EIR Recast applies to all new insolvencies from June 26, 2017 onwards.

Under the EIR Recast's scope, the step by step evaluation of the petition to open safeguard proceedings (*procédure de sauvegarde*) in France will be as follows:

Firstly, it is necessary to locate and determine the debtor's COMI as per Article 1(1) of EIR Recast. The EIR Recast applies only when the COMI is in the EU (barring Denmark). As per the facts given in the case, PAG is a company registered in France. In order to lend an element of certainty to the predictability of COMI, the EIR Recast contains a registered office presumption (Article 3(1) of the EIR Recast), viz, that the insolvent company's COMI is presumed to be the jurisdiction in the country where such a company has been registered and this can be rebutted only if it is proved by objective factors indicate that administration of debtor's interest happen in different geography. Since PAG is registered in France and the France is principal place of business the territorial or geographical scope is satisfied.

Secondly, it is necessary to determine whether PAG falls in the exempted or excluded undertaking. Since PAG is toy shop (retailer), it does not fall into the exemptions which is limited to banks, insurance companies, credit institutions, other non-banking finance companies (covered by Directive 2001/24/EC) and hence it is covered by personal scope of the EIR Recast.

Thirdly, it is necessary to check the material scope of the EIR Recast, Article 1 extends not only to traditional liquidation process but also to rescue or pre-insolvency procedures. The *procédure de sauvegarde* is one out of 112 insolvency proceedings listed in Annex A referred in 2(4) of the EIR Recast. The petition to open safeguard proceedings (*procédure de sauvegarde*) in France is covered by the material scope of the EIR Recast.

Finally, the temporal scope needs to be checked. This requires that the insolvency proceedings be opened after June 26, 2017 (the date EIR Recast came into force). The rescue petition was filed with the Strasbourg Court on June 29, 2017 and is within the temporal scope of the EIR Recast.

Since the petition filed by PAG before the Strasbourg Court on June 29, 2017 complies with all steps listed above, EIR Recast is applicable to the given case.

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.

ANSWER

The EIR Recast allows (provides an option) for opening secondary insolvency proceedings running parallel with the main proceedings (Recital 23 and Article 3(2) of EIR Recast). EIR Recast – Chapter III, Secondary Insolvency Proceedings, Article 34, opening of proceedings states that where main proceedings have been opened by a court of a member state and recognised in another member state, a court of that other member state which has jurisdiction pursuant to Article 3(2) may open secondary insolvency proceedings in accordance to the provisions of Chapter III.

The effects of secondary proceedings are territorial and are limited to the assets located in the member state of secondary proceedings. Article 3(4) of EIR Recast, permits the opening of

secondary proceeding prior to opening of the main proceedings under exceptional circumstances.

Secondary proceedings can be opened in an EU member state where the debtor has an establishment as defined in Article 2(10) of EIR Recast and “means a place of operations where a debtor carries out or has carried out a non-transitory economic activity with human means and assets”.

Like COMI, EIR Recast allows for autonomous interpretation of the concept of establishment. Through the *Interedil* case, CJEU examined the concept of establishment and connecting it to economic activity, presence of human resources, minimum level of organisation and degree of stability.

The rationale for EIR Recast allowing territorial proceedings is enshrined in Recital 40 of the EIR Recast. Firstly, territorial proceedings allow for protection of local interests by safeguarding their position in creditors ranking (also covered in para 32 of the Virgos-Schmit Report), secondly, it leads to creation of a separate insolvency estate governed by the law of the member state where establishment is located, thirdly, it facilitates participation of promoters of micro/medium and small creditors who otherwise would be put-off by exorbitant costs of the foreign main proceedings, fourthly, it leads to improved administration of the complex insolvency estate and finally it supports the main proceeding.

In the *Bank Handlowy* case, question was raised whether protective procedure in the main proceeding could be aligned with secondary proceeding involving winding-up procedures. The CJEU considered that “secondary proceedings, although intended to protect local interests, may also serve other purposes, which is why they *may be opened* at the request of the liquidators in the main proceedings, *when the efficient administration of the estate so requires*”. CJEU in its judgement in the *Bank Handlowy* case, emphasised optionality to determine the local court’s role in opening secondary through phrases such as “*may be opened*” and “*when the efficient administration of the estate so requires*”.

Considering the facts of the case and the insolvency practitioner not providing and undertaking to the local court in accordance with Article 36 (Right to give an undertaking in order to avoid secondary insolvency proceedings), territorial proceedings can be opened in Spain under the EIR Recast.

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: 13.5 out of 15.

*** End of Assessment ***

Marks awarded: 47.5 out of 50