



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2B

THE EUROPEAN INSOLVENCY REGULATION

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

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

ANSWER ALL THE QUESTIONS

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

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

Question 1.1

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

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

Question 1.2

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

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

Question 1.3

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

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

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

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

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

Question 1.4

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

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

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

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

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

Question 1.5

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

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

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

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

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

Question 1.6

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

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

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

Question 1.7

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

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

Question 1.8

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

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

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

Question 1.9

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

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

Question 1.10

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

Assume that:

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

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

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

Marks awarded: 10 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	Name of the provision/concept	Relevant EIR Recast article
Statement 1. “The possibility for companies to move their COMI is a legitimate exercise of the freedom of establishment.”	Forum shopping	It is pertinent to highlight that the EIR Recast does not directly address forum-shopping issues. However, article 3 establishes a series of presumptions related to the determination of the debtor’s COMI, which may be rebutted in those cases that the registered office has been moved within the framework establishes as the "suspect period". In this regard, the CJEU has held that the transference of a registered office made to achieve a more favourable panorama for the company without change of the real head office is protected by the freedom of establishment and cannot be considered as a form of abuse (Wessels & Kokorin, 2020).
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.”	Right to give an undertaking to avoid secondary insolvency proceedings	Article 36 of the EIR Recast

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.

1. **Article 41 - Cooperation and communication between insolvency practitioners:** This article establishes the different ways in which the insolvency practitioners (of the main and secondary proceedings) shall cooperate with each other concerning insolvency proceedings of the same debtor (The European Parliament and the Council of the European Union, 2015).
2. **Article 42 - Cooperation and communication between courts:** Article 42 establishes the forms that the courts may take to communicate and cooperate with each other regarding the insolvency proceedings of the same debtor (The European Parliament and the Council of the European Union, 2015).
3. **Article 43 - Cooperation and communication between insolvency practitioners and courts:** Article 43 refers to the cooperation and communication between insolvency practitioners and the courts (The European Parliament and the Council of the European Union, 2015).

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.

Before listing the articles that allow us to state that the EIR Recast is more rescue oriented than its predecessor (EIR 2000), it is worth to highlight that **Recital 10** provides a general but fairly clear idea of what was intended with this regulation: to rescue distress businesses that can be considered as economically viable (The European Parliament and the Council of the European Union, 2015).

In connection with the above, the following articles of EIR Recast contain the innovations implemented to adopt a rescue-oriented perspective:

1. **Article 1:** The scope of the EIR Recast established in article 1 that the regulation was extended beyond the liquidation proceedings and includes those proceedings aimed at the recovery of economically viable businesses that are in financial distress. In fact, paragraph 2 of article 1 relates to situations where there is only a "probability" of insolvency and establishes as a top priority the avoidance of the debtor's insolvency (Wessels & Kokorin, 2020).
2. **Article 2:** In accordance with the provisions contained in article 2(4) and the scope defined in article 1, the EIR Recast applies to insolvency proceedings aimed at the recovery and rescue of the debtor. For example, in Annex A, for the case of Spain, the following proceedings were included in the scope of application: (i) Procedure for approval of refinancing agreements and (ii) proceedings for out-of-court payment agreements (The European Parliament and the Council of the European Union, 2015).
3. **Article 41:** This article provides the following measures related to the rescue of economically viable businesses that are in financial distress:
 - a. The insolvency practitioner shall coordinate the elaboration and implementation of a restructuring plan if there is any possibility to restructure the debtor.
 - b. In addition, insolvency practitioners shall communicate the information on the measures related to the rescue and restructuring of the debtor (Wessels & Kokorin, 2020).

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.

Instrument	Article – EIR Recast	Description of the instrument
Right to give an undertaking in order to avoid secondary insolvency proceedings	Article 36	<p>Through this instrument, the insolvency practitioner of the main proceeding gives a unilateral undertaking regarding the assets located in the member state where the secondary proceeding may be opened (Wessels & Kokorin, 2020).</p> <p>By virtue of the undertaking, the insolvency practitioner will distribute the assets located in the member state observing the local laws related to distribution and priority rights. In this sense, the local creditors will be treated as if the secondary proceeding had been opened (Wessels & Kokorin, 2020).</p>
Stay the opening of secondary insolvency proceedings	Article 38 (3)	<p>Under this instrument, the debtor in possession or the insolvency practitioner may ask for a temporary stay of the opening of the secondary insolvency proceedings, the granted term cannot be superior to 3 months (Wessels & Kokorin, 2020).</p> <p>This instrument can be used when in the main proceeding a temporary stay of individual enforcement proceeding has been granted (Wessels & Kokorin, 2020).</p>

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] 2.5

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

First, it is pertinent to highlight that the recommendation of the European Commission is based on article 46 of the EIR of 2000. In accordance with the aforementioned provision, by

June 1, 2012, the European Commission was obligated to submit a report on the application of the provisions contained in the EIR 2000. The purpose of this analysis was to determine the necessary modifications to be made to the EIR 2000 (Wessels & Kokorin, 2020).

In its report, the European Commission concluded that, although in general terms the regulation was functioning well, it was desirable to improve the regulation to achieve a better way to perform the administration of cross-border proceedings. Additionally, the initiative to create a new regulatory body arose due to the multiple reforms made to the EIR 2000 (Wessels & Kokorin, 2020).

By virtue of the above, it is possible to conclude that the report presented by the European Commission was the backbone of EIR Recast since it provided a vision of the ideal regulation that was required.

Yes but it would have made your answer stronger had you listed the five elements that were identified as specifically in need of reform.

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.

1. **Communication and co-operation:** EIR Recast introduced several provisions that broaden the scope of communication and cooperation between the parties involved in the insolvency proceedings of the same debtor (Wessels & Kokorin, 2020). The above-mentioned because the provisions contained in the EIR 2000 were insufficient, and a proper administration and realization of the assets require fluid communication and cooperation between the courts and the insolvency practitioners. This is related to the fact that an efficient administration of insolvency proceedings requires a holistic view of the role played by each party and the contribution it makes from its position.
2. **COMI:** The determination of the COMI can be easily done thanks to the COMI's presumptions established in EIR Recast. By virtue of the above, it is simpler and faster to point out the main proceeding by just following a set of rules (Wessels & Kokorin, 2020).
3. **Synthetic proceedings:** This instrument stimulates a more efficient administration of insolvency proceedings taking into account that:
 - a. Acknowledges the need for a tool of such nature evidenced in several cases as Collins & Aikman Europe S.A.
 - b. Allows to centralized and control the decisions over the same debtor.
 - c. Meets the needs of the "local" creditors by applying the relevant local insolvency laws regarding the distribution and priority rules.

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.

Flaw No.1: In the EIR Recast, no article defines in a proper way the concept of COMI. I believe this is an important omission because this term is the key to determine the main insolvency proceedings. Although the presumptions established in Article 3 are useful for the establishment of the COMI, the special relevance of this concept merited a

precise definition in Article 2 to clarify any doubts in this regard. For the above reasons, I believe that this flaw can be fixed adding the COMI's definition in article 2.

Flaw No.2: I considered that the data protection issues should be addressed by an independent regulation taking into account that this particular field changes rapidly and the EIR Recast was designed to last at least until 27 June 2027 (according to the review clause of article 90). In this sense, I consider that the most appropriate approach would be an open clause referring to the regulations in force on the issue.

Marks awarded: 12.5 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] 3.5

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

To determine if the Strasbourg court has international jurisdiction over the safeguard, proceeding filed by PAJ it is necessary to answer the following questions:

- **¿Does the EIR 2000 apply in this case?**
In accordance with the information provided in the question, the EIR 2000 is the applicable regulation to the case.
- **¿Is the debtor excluded from the scope of application of the EIR 2000?**
Under Recital 9 of the EIR 2000 and due to the activities developed by PAJ, it is possible to conclude that its insolvency proceeding is included in the scope of application of the EIR 2000.
- **¿The proceeding is listed in Annex A of the EIR 2000?**
Yes, the *procédure de sauvegarde* is included in Annex A of the EIR 2000 [No it was not. It is included in the EIR Recast though]. It is pertinent to highlight that the original version didn't include such proceeding and it was added through an amendment (Pannen, 2011).

The starting point of this analysis is the decision issued by the CJEU in the case of *Bank Handlowy w Warszawie SA v Christianapol sp. z o.o.*, in which the inclusion of the proceeding in Annex A determined the scope of the EIR 2000 (Wessels & Kokorin, 2020).

- **¿Is it possible to state that the debtor has its COMI in Strasbourg?**
Pursuant Recital 27 of the EIR 2000 the court should examine if the COMI of the debtor or the debtor's establishment is located in its jurisdiction. Due to the fact that PAJ has a store in Strasbourg, it is possible to establish Strasbourg as the COMI of PAJ.
- **Conclusion:** The Strasbourg Court indeed has international jurisdiction to open the requested insolvency proceeding.

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.

To determine if the EIR Recast can apply to the proceeding opened by the Strasbourg Court, it is necessary to answer the following questions:

- **¿Does the EIR Recast apply in this case?**
Pursuant Article 90 of the EIR Recast, such regulation applied from 26 June 2017. Therefore, the procedure is within the temporal scope of the EIR Recast because the Strasbourg Court opened the proceeding on 29 June 2017.
- **¿Is the debtor excluded from the scope of application of the EIR 2000?**
In accordance with the provisions contained in the recitals that defined the excluded proceedings from the scope of application (recitals 7, 19, and 13 of the EIR Recast) and due to the activities developed by PAJ, it is possible to conclude that its insolvency proceeding is included in the scope of application of the EIR Recast.
- **¿The proceeding is listed in Annex A of the EIR Recast?**
Yes, the *procédure de sauvegarde* is included in Annex A of the EIR Recast. As I indicated in the previous question of the guide, the starting point of this analysis is the decision issued by the CJEU in the case of *Bank Handlowy w Warszawie SA v Christianapol sp. z o.o.*, in which the inclusion of the proceeding in Annex A determined the scope of the EIR 2000 (Wessels & Kokorin, 2020).
- **¿Is it possible to state that the debtor has its COMI in Strasbourg?**
Pursuant Recital 27 of the EIR Recast the court should examine if the COMI of the debtor or the debtor's establishment is located in its jurisdiction (The European Parliament and the Council of the European Union, 2015). Due to the fact that PAJ has a store in Strasbourg, it is possible to establish Strasbourg as the COMI of PAJ.
- **Conclusion:** EIR Recast applies to this case.

Yes but you fail to name the different scopes discussed (material, temporal etc.)

Question 4.3 [maximum 5 marks] 3.5

A Spanish bank files a petition to open secondary insolvency proceedings in Spain with the purpose of securing a Spanish insolvency distribution ranking. Given the facts of the case, can such proceedings be opened in Spain under the EIR Recast? Your answer should contain references to the applicable law and the relevant CJEU jurisprudence.

To determine if a secondary proceeding can be opened in Spain it is necessary to answer the following questions:

- **¿Is there a main insolvency proceeding that has already commenced in another member state against the PAJ?**
The facts of the case do not permit such conclusion. However, for the purposes of the analysis, it will be assumed that in fact, there is a main proceeding located in Strasbourg.
- **¿Does the company has an establishment in Spain?**

Pursuant to the definition of establishment provided in article 2(10), PAJ does not have an establishment in Spain because the activities carried out by PAJ cannot be classified in the category of the activities by which the debtor develops its economic activity -In *In re Creative Finance Ltd* (Wessels & Kokorin, 2020).

Good but it would have made your answer stronger had you gone further in depth with your answer.

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.

References

- Pannen, K. (2011). *European Insolvency Regulation: De Gruyter commentaries on European Law*. Berlin.
- The European Parliament and the Council of the European Union. (20 de May de 2015). Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015. EIR Recast.
- Wessels, B., & Kokorin, I. (September de 2020). *European Insolvency Regulation*. London, United Kingdom.

Marks awarded: 11 out of 15.

*** End of Assessment ***

Marks awarded: 43.5 out of 50.