



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2B

THE EUROPEAN INSOLVENCY REGULATION

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

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

ANSWER ALL THE QUESTIONS

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

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

Question 1.1

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

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

Question 1.2

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

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

Question 1.3

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

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

B was the correct answer.

Question 1.4

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

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

C was the correct answer.

Question 1.5

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

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

Question 1.6

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

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

Question 1.7

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

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

Question 1.8

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

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

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

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

C was the correct answer.

Question 1.9

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

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

Question 1.10

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

Assume that:

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

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

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

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks] 1

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

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

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

Statement 1: It relates to Recital 29 of EIR Recast which states that “*This Regulation should contain a number of safeguards aimed at preventing fraudulent or abusive forum shopping.*” and Recital 31 of EIR Recast which states “*With the same objective of preventing fraudulent or abusive forum shopping, the presumption that the centre of main interests is at the place of the registered office, at the individual's principal place of business or at the individual's habitual residence should not apply where, respectively, in the case of a company, legal person or individual exercising an independent business or professional activity, the debtor has relocated its registered office or principal place of business to another Member State within the 3-month period prior to the request for opening insolvency proceedings, or, in the case of an individual not exercising an independent business or professional activity, the debtor has relocated his habitual residence to another Member State within the 6-month period prior to the request for opening insolvency proceedings.*”

Statement 2: It relates to Recital 45 of EIR Recast which states that “*... this Regulation should provide for the possibility that the court temporarily stays the opening of secondary insolvency proceedings, when a temporary stay of individual enforcement proceedings has been granted in the main insolvency proceedings, in order to preserve the efficiency of the stay granted in the main insolvency proceedings. The court should be able to grant the temporary stay if it is satisfied that suitable measures are in place to protect the general interest of local creditors. In such a case, all creditors that could be affected by the outcome of the negotiations on a restructuring plan should be informed of the negotiations and be allowed to participate in them.*” and Article 38(3) of EIR Recast which states that “*Where a temporary stay of individual enforcement proceedings has been granted in order to allow for negotiations between the debtor and its creditors, the court, at the request of the insolvency practitioner or the debtor in possession, may stay the opening of secondary insolvency proceedings for a period not exceeding 3 months, provided that suitable measures are in place to protect the interests of local creditors.*”

Statement 1 refers to the concept of COMI (Article 3).

Question 2.2 [maximum 3 marks] 3

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

The following three provisions of the EIR Recast mandates co-operation and communication in the context of main and secondary insolvency proceedings:-

Article 41 of EIR Recast mandates the co-operation and communication between insolvency practitioners which states that “Where the law of the Member State where secondary insolvency proceedings have been opened allows for such proceedings to be closed without liquidation by a restructuring plan, a composition or a comparable measure, the insolvency practitioner in the main insolvency proceedings shall be empowered to propose such a measure in accordance with the procedure of that Member State.”

Article 42 of EIR Recast mandates the co-operation and communication between courts which states that “In order to facilitate the coordination of main, territorial and secondary insolvency proceedings concerning the same debtor, a court before which a request to open insolvency proceedings is pending, or which has opened such proceedings, shall cooperate with any other court before which a request to open insolvency proceedings is pending, or which has opened such proceedings, to the extent that such cooperation is not incompatible with the rules applicable to each of the proceedings.”

Article 43 of EIR Recast mandates the co-operation and communication between insolvency practitioners and courts which states that “an insolvency practitioner in main insolvency proceedings shall cooperate and communicate with any court before which a request to open secondary insolvency proceedings is pending or which has opened such proceedings; an insolvency practitioner in territorial or secondary insolvency proceedings shall cooperate and communicate with the court before which a request to open main insolvency proceedings is pending or which has opened such proceedings; and an insolvency practitioner in territorial or secondary insolvency proceedings shall cooperate and communicate with the court before which a request to open other territorial or secondary insolvency proceedings is pending or which has opened such proceedings.”

Question 2.3 [maximum 3 marks] 3

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

The EIR Recast is more rescue-oriented than EIR 2000. The following provisions of EIR Recast demonstrates its intention.

In Article 1 of EIR Recast, it states “This Regulation shall apply to public collective proceedings, including interim proceedings, which are based on laws relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation”.

In Article 56(c) of EIR Recast, it states “In implementing the cooperation set out in paragraph 1, insolvency practitioners shall consider whether possibilities exist for restructuring group members which are subject to insolvency proceedings and, if so, coordinate with regard to the proposal and negotiation of a coordinated restructuring plan.

In Article 60(1)(b) of EIR Recast, it states “An insolvency practitioner appointed in insolvency proceedings opened in respect of a member of a group of companies may request a stay of any measure related to the realisation of the assets in the proceedings opened with respect to any other member of the same group, provided that:

- (i) a restructuring plan for all or some members of the group for which insolvency proceedings have been opened has been proposed under point (c) of Article 56(2) and presents a reasonable chance of success;

- (ii) such a stay is necessary in order to ensure the proper implementation of the restructuring plan;
- (iii) the restructuring plan would be to the benefit of the creditors in the proceedings for which the stay is requested”

Hence, EIR Recast is more rescue-oriented than EIR 2000 as it –

- extends the scope to include proceedings which promote the rescue of economically viable;
- requests the insolvency practitioners to consider possibilities exist for restructuring group members; and
- grants the power to insolvency practitioner appointed in insolvency proceedings to request a stay of any measure related to the realisation of the assets in order to implement the restructuring plan.

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.

EIR Recast has introduced the following legal instruments to avoid or otherwise control the opening, conduct and closure of secondary proceedings:-

1) Under Article 36 of EIR Recast, the insolvency practitioner in the main insolvency proceedings could give a unilateral undertaking in respect of the assets located in the States where secondary insolvency proceedings could be opened. The insolvency practitioner in the main insolvency proceeding will comply with the distribution of assets and priority rights under law that creditors would have as if secondary insolvency proceedings were opened in that State. This approach centralizes the control over the major decisions affecting the debtor and the insolvency estate and safeguards the rights and legitimate expectations of the local and preferential creditors by ensuring compliance with the priority rights guaranteed under local insolvency laws.

2) Under Article 38(3) of EIR Recast, the insolvency practitioner or the debtor in possession can request a stay of the opening of secondary insolvency proceedings. Upon the court’s discretion, a stay of the opening of secondary insolvency proceedings for a period not exceeding 3 months may be granted provided that suitable measures are in place to protect the interests of local creditors.

Marks awarded: 9 out of 10.

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

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

Question 3.1 [maximum 5 marks] 3.5

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

After the implementation of EIR2000 for 15 years, some of the provisions are required to be adjusted so as to progress of insolvency industry. Instead of winding-up, a rescue-oriented approach for restructuring was becoming more advocated than liquidation oriented. Therefore, a new European regulation was needed and recommended by the European Commission to enhance the old ones and be more in line with the trend of promoting effective restructuring tools to maximize value for creditors, increase investment and job opportunities.

Due to development of easy transportation and internet, it has become an economic reality for a corporation with various establishment in different locations in respect of globalization. Hence, there was a need for insolvency practice to broaden the scope of restructuring proceeding and encourage cooperation between insolvency practitioners and courts so as to avoid inconsistency of judgment and ensure fairness within the EU.

Furthermore, there was a need to improve the creditor's information in different locations and modernize the legal rules for the rapid changing requirement of data protection and data privacy which ensures the priority and ranking of creditors in different locations enjoys the same priority

It would have made your answer stronger had you listed the specific 5 elements identified as needing 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.

One of the major improvements for EIR Recast is that it extends not only to cover traditional liquidation-oriented procedures, but also covering proceedings to rescue the financially distressed corporation. Also, EIR 2000 did not contain a definition of COMI except some guidance in Recital 13 while the EIR Recast mandates the centre of main interest being the place where the debtor conducting the administration of its interest on a regular basis with reference to Article(3)1 of EIR Recast. In Article 1 of EIR Recast, it states "This Regulation shall apply to public collective proceedings, including interim proceedings, which are based on laws relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation". It allows a debtor fully or partially in control of its assets and affairs at the stage of restructuring and provides for a stay of individual creditors' actions for the sake of protecting the general body of creditors in EIR Recast which not only provides a breathing space for the corporation to negotiate with its creditors, but also protecting the general body of the creditors. Hence, this major improvement provides an economically viable option for the corporation.

Another major improvement or innovations of the EIR Recast is that it establishes the legal framework for co-operation and communication in group insolvencies. In Recital 54 of EIR Recast, it states "with a view to further improving the coordination of the insolvency proceedings of members of a group of companies, and to allow for a coordinated restructuring of the group, this Regulation should introduce procedural rules on the coordination of the insolvency proceedings of members of a group of companies. Such coordination should strive to ensure the efficiency of the coordination, whilst at the same time respecting each group member's separate legal personality." This rule offers a co-ordination mechanism for group co-ordination proceedings which ensure the efficiency of the co-ordination while allowing personality of separate legal entity of each group member.

One of the major improvements is that the information of the proceedings will be publicly published. In Article 24 of EIR Recast, it states “Member States shall establish and maintain in their territory one or several registers in which information concerning insolvency proceedings is published (‘insolvency registers’). That information shall be published as soon as possible after the opening of such proceedings.” According to Article 54 of EIR Recast, it states that “as soon as insolvency proceedings are opened in a Member State, the court of that State having jurisdiction or the insolvency practitioner appointed by that court shall immediately inform the known foreign creditors.” Thus, the timely notification, visibility of insolvency proceedings and the establishment of insolvency registers avoided the duplication / conflict of insolvency proceedings and promoted the equality of the creditors.

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.

Some entities are explicitly excluded from the EIR Recast such as insurance undertakings, credit institutions and investment firms and other firms. The omission in the EIR Recast being not covered created loopholes which is suggested to be corrected/ remedied. EIR Recast applies to all Member States excepted Denmark. When the debtor’s COMI is located outside the EU or in Denmark, the EIR Recast does not apply. Under this circumstances, national conflict of law rules and insolvency laws of the EU Member states will determine jurisdictional outcomes. However, this treatment for debtor’s COMI being located outside EU or in Denmark could be included in the EIR Recast.

Another omission of the EIR Recast is that EIR Recast does not explicitly require insolvency practitioners to give reasons for their objection. Pursuant to Article 64(1)(a) and (2) of EIR Recast, an insolvency practitioner appointed in respect of any group member may object to its inclusion in the group coordination proceedings within 30 days of receipt of the notice. However, it might be more preferable if it demands the objecting insolvency practitioner to provide a reasonable statement which substantiated with reasons for the objection in respect of legal calculation and external perspective of how creditors or markets will react if he decides to exclude himself from the coordinated effort to reach the maximum value for the group.

Marks awarded: 13.5 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] 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.

Prêt A Jouer (PAJ) was a France-registered toy shop company which opened its first store in Strasbourg, where situated at the eastern border of France. Assume that the EIR 2000 applies. Strasbourg Court should have the international jurisdiction to open the safeguard proceedings (procédure de sauvegarde) in France.

Though EIR 2000 did not contain the definition of the centre of main interest (“COMI”), it provided some guidance in Recital 13 which states that “(The “centre of main interests” should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.” Also, in the case *Re Eurofood IFSC Ltd*, Eurofood IFSC Limited (“Eurofood”), which has the registered office in Ireland was a wholly owned subsidiary of a Italian incorporated company, Parmalat SpA. The Irish high Court confirmed that Eurofood’s COMI to be in Ireland and refused to recognize the judgment of the Italian Court. Court of Justice of the European Union highlighted the autonomous meaning of the term COMI and confirmed that with reference to Article 3(1) of EIR 2000 where stated that “the courts of the Member State within the territory of which the centre of a debtor’s main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.” The centre of main interests of that subsidiary is situated in the Member State where its registered office is situated, can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which location at that registered office is deemed to reflect

Hence, since Prêt A Jouer (PAJ) was a France-registered toy shop company, Strasbourg Court should have the international jurisdiction to open the safeguard proceedings (procédure de sauvegarde) in France.

Question 4.2 [maximum 5 marks] 5

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

To determine whether EIR Recast is applicable, we should consider the definition of judgment opening insolvency proceedings, the time of the opening of proceedings (temporal scope), the nature of the debtor (personal scope), the types of the proceedings (material scope) and the location of the debtor whose centre of main interests (geographical scope).

According to Article 2(7) of EIR Recast, judgment opening insolvency proceedings includes: (i) the decision of any court to open insolvency proceedings or to confirm the opening of such proceedings; and (ii) the decision of a court to appoint an insolvency practitioner. According to Article 2(3) of EIR Recast, the time of the opening of proceedings means the time at which the judgment opening insolvency proceedings becomes effective, regardless of whether the judgment is final or not. EIR Recast only applies to the debtor which was not a bank, insurance company or another excluded undertaking. Also, EIR extends to those proceedings that are included in Annex A and the proceedings in respect of a debtor whose centre of main interests is located in the EU except Denmark.

Assume that the Strasbourg Court confirmed the opening of the safeguard proceedings (procédure de sauvegarde) on 29 June 2017 (i.e. after 26 June 2017). Since safeguard

proceedings (sauvegarde) was included in Annex A of EIR Recast and the centre of main interest of Prêt A Jouer (PAJ), a France-registered toy shop company which was not an excluded industry with establishment in Madrid (Spain), being located in EU, the EIR Recast should be applied.

Question 4.3 [maximum 5 marks]

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.

Since Prêt A Jouer (PAJ) was a France-registered toy shop company which opened its first store in Strasbourg, the centre of PAJ was situated in France which was within the territory of the member state. PAJ not only established one of its warehouses located in Madrid (Spain) and maintained a bank account in Spain, PAJ also had a line of credit agreement with a Spanish bank and also renting out the warehouse in Spain to other toy companies which generated rental income. Also, PAJ had negotiations with distributors in Spain which might have entered into contracts.

Under Article 3(2) of EIR Recast, where the centre of the debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if it possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State. According to Article 2(10) of EIR Recast, establishment was any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets.

Therefore, the Spanish bank could file a petition to open secondary insolvency proceedings in Spain as PAJ possessed an establishment within Spain more than 4 years before PAJ filed a petition to open safeguard proceedings (procédure de sauvegarde) in France. However, the opening of the secondary insolvency proceedings in Spain separated the estate in Spain from France.

Although your discussion is sound, the 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: 43 out of 50.