



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2B

THE EUROPEAN INSOLVENCY REGULATION

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

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

ANSWER ALL THE QUESTIONS

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

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

Question 1.1

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

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

Question 1.2

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

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

Question 1.3

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

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

B was the correct answer.

Question 1.4

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

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

Question 1.5

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

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

Question 1.6

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

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

D was the correct answer.

Question 1.7

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

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

Question 1.8

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

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

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

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

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).

C was the correct answer.

Marks awarded: 6 out of 10.

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 – International Jurisdiction – Article 3(1) of the EIR Recast
Statement 2 -] **This was relating to Article 36.**

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(1) of the EIR Recast states:

“The insolvency practitioner in the main insolvency proceedings and the insolvency practitioner or practitioners in secondary insolvency proceedings concerning the same debtor shall cooperate with each other to the extent such cooperation is not incompatible with the rules applicable to the respective proceedings. Such cooperation may take any form, including the conclusion of agreements or protocols.”

2. Article 43(1) of the EIR Recast states:

“1. In order to facilitate the coordination of main, territorial and secondary insolvency proceedings opened in respect of the same debtor:

- (a) 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;
- (b) 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
- (c) 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;

to the extent that such cooperation and communication are not incompatible with the rules applicable to each of the proceedings and do not entail any conflict of interest.”]

3. Article 56 of the EIR Recast states:

- “1. Where insolvency proceedings relate to two or more members of a group of companies, an insolvency practitioner appointed in proceedings concerning a member of the group shall cooperate with any insolvency practitioner appointed in proceedings concerning another member of the same group to the extent that such cooperation is appropriate to facilitate the effective administration of those proceedings, is not incompatible with the rules applicable to such proceedings and does not entail any conflict of interest. That cooperation may take any form, including the conclusion of agreements or protocols.
2. In implementing the cooperation set out in paragraph 1, insolvency practitioners shall:
 - (a) as soon as possible communicate to each other any information which may be relevant to the other proceedings, provided appropriate arrangements are made to protect confidential information;
 - (b) consider whether possibilities exist for coordinating the administration and supervision of the affairs of the group members which are subject to insolvency proceedings, and if so, coordinate such administration and supervision;
 - (c) 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.

For the purposes of points (b) and (c), all or some of the insolvency practitioners referred to in paragraph 1 may agree to grant additional powers to an insolvency practitioner appointed in one of the proceedings where such an agreement is permitted by the rules applicable to each of the proceedings. They may also agree on the allocation of certain tasks amongst them, where such allocation of tasks is permitted by the rules applicable to each of the 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.

[1. Article 1 of the EIR Recast states the following:

“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:

- (a) a debtor is totally or partially divested of its assets and an insolvency practitioner is appointed;
- (b) the assets and affairs of a debtor are subject to control or supervision by a court; or
- (c) a temporary stay of individual enforcement proceedings is granted by a court or by operation of law, in order to allow for negotiations between the debtor and its creditors, provided that the proceedings in which the stay is granted provide for suitable

measures to protect the general body of creditors, and, where no agreement is reached, are preliminary to one of the proceedings referred to in point (a) or (b).”

2. Article 41(2)(a) which states the following:

In implementing the cooperation set out in paragraph 1, the insolvency practitioners shall:

(a) as soon as possible communicate to each other any information which may be relevant to the other proceedings, in particular any progress made in lodging and verifying claims and all measures aimed at rescuing or restructuring the debtor, or at terminating the proceedings, provided appropriate arrangements are made to protect confidential information;

2. Article 47(1) which states the following:

“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.”]

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.

[1. Article 3(2) of the EIR recast deals with secondary proceedings. In order to control the opening, conduct and closure of the secondary proceeding, it limits the scope of secondary proceedings to creditors who possess an establishment within the territory of the other member state. Furthermore the proceeding will only be restricted to winding up the assets of the debtor situated in the territory of the secondary member state.

2. Article 3(4) also controls the opening, conduct and closure of the secondary proceeding by allowing only one instance wherein secondary proceedings may be open prior to the opening of main proceedings. This is due to the conditions laid down by the law of the member state within which the debtors COMI is situated causing a prevention of the opening of the main proceeding.]

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] 5

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

[Firstly, in terms of Article 46 of the EIR 2000 the European communities were obliged to “No later than 1 June 2012, and every five years thereafter, the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Regulation. The report shall be accompanied if need be by a proposal for adaptation of this Regulation”¹.

Although the EIR 2000 was a great and successful starting point for cross border European insolvency Regulation, it was clear that adaptations needed to be made to broaden the course and scope of the Regulation. “Essentially, problems have been identified in relation to the scope of the Regulation, the rules on jurisdiction, the relation between main and secondary proceedings, the publicity of insolvency-related decisions and the lodging of claims.”² The EIR 2000 did not recognise restructuring procedures or pre-insolvency or hybrid proceedings, which was becoming a very popular alternative to liquidation and recognised by many European National laws.

Furthermore, the Commission found discrepancies in relation to the proceedings listed in the Annexes compared to the conditions stipulated in Article 1(1) of the EIR 2000 which needed amending.

A third problem identified by the Commission related to instances where national procedures listed in the Annexes were changed by states without any notification of the amendments to the Commission therefore creating uncertainty as to which procedures was correct and corresponded with Article 1(1).

The Commission also sought to broaden and re-enforce the definition and determination of the debtor’s centre of main interests (COMI) and a public consultation study approved the use of the COMI to locate the main proceedings. The Commission also sought to close the gap in the wording of Article 3(1) which did not speak about the COMI of individuals.

Finally, the Commission found that there was much more needed in terms of the co-ordination between main and secondary proceedings. There was an absence of specific rules for the opening of secondary proceedings which needed to be addressed as well as the fact that secondary proceedings were limited to winding up procedures which excluded the option of restructuring which was seen as a large impediment to secondary proceedings.

Question 3.2 [maximum 5 marks] 5

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

[the first major improvement of the EIR recast was found in the definition of article 1 which extended the scope to not only liquidation procedures but also introduced and recognised

¹ Article 46 COUNCIL REGULATION (EC) No 1346/2000 on insolvency proceedings - 29 May 2000

² REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE on the application of Council Regulation (EC) No 1346/2000 - 29 May 2000 (p4)

restructuring procedures which was very important considering the worldwide phenomenon of the business rescue procedure as opposed to liquidation.

Secondly, the updating of Annex A which related to insolvency proceedings and provided a list of names of insolvency proceedings for all the countries covered by the recast. This provided clarity to no less than 112 procedures and essentially meant that if a proceeding was not part of Annex A, then it would not fall within the scope of the recast.

Thirdly, the recast provided a definition of a debtors Centre of Main interests (COMI) and mandated that “The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties”³. This definition was important as was seen in the *Eurofood IFSC Ltd*⁴ case which involved jurisdictional questions relating to a company based in different jurisdictions and set out the objective criteria ascertainable to third parties as well as the registered office presumption which was very important in determining jurisdiction.]

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.

[In my opinion one of the major flaws in the EIR recast is the fact that although Article 1 serves to broaden the scope of the Regulation it applies to *inter alia* public collective proceedings (which includes insolvency or pre insolvency proceedings). Although this allows creditors to become aware of these proceedings, member states can still maintain confidentiality in their own national proceedings and in terms of their state laws. In essence this can make it very difficult for creditors from different jurisdictions to know about the insolvency proceedings which could be occurring in the different state. The EIR could correct this in the future by stipulating that national laws must be in line with the EIR recasts and national law proceedings which have foreign creditors must be made public. If that is too drastic of a step then a compromise could be, in order to maintain confidentiality, the new Recast could also stipulate that the proceedings be made “public” only to those foreign creditors.

There is also no section to determine any recourse following the writing off of a natural persons debts in their member state. Therefore, if a debtor’s debts are written off in one member state without any provision made to benefit or pay out made to creditors, then there is no recourse for foreign creditors in terms of the EIR Recast. A provision should be made to protect foreign creditors by allowing them to consent or reject the writing off of a natural person’s debt.]

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.

³ Article 3(1) of REGULATION (EU) 2015/848 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL insolvency proceedings (recast) – 20 May 2015

⁴ Case C-341/04, ECLI:EU:C:2006:281 (May 2, 2006).

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.

[Yes, the Strasbourg Court does have international jurisdiction to open the requested proceeding. Recital 13 of the EIR 2000 states the following “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’. In this scenario the company was registered in France and we shall assume has conducted the administration of its affairs in France. This assumption is based on the fact that despite it having a warehouse in Spain, the income derived from that warehouse was in the form of rental income and not as a result of selling toys.

Furthermore Article 3(1) of the EIR 2000 states “1. 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.”

This article was reaffirmed in the case of *Eurofood IFSC Ltd*⁵ where the presiding officer stated in paragraph 105

“I accordingly conclude in answer to the third question referred that, where insolvency proceedings are first opened by a court in the Member State in which a company’s registered office is situated and in which the company conducts the administration of its interests on a regular basis in a manner ascertainable by third parties, the courts of other Member States do not have jurisdiction to open main insolvency proceedings”

It is therefore clear from the articles in the case law mentioned above that the Strasbourg Court does have international jurisdiction to open the requested insolvency proceeding.]

Question 4.2 [maximum 5 marks] 4.5

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.

[in order to determine whether the recast applies it must follow the following steps in order to determine when does it apply in time (temporal), to whom does it apply (personal scope), which proceedings are covered by it (material scope) and what is the geographical limitations (scope) thereof.

⁵ Case C-341/04, ECLI:EU:C:2006:281 (May 2, 2006)

1. The first step involves the question does the debtor have COMI in a member state of the EU? – Yes it does as the company is registered in France, which is a member state of the EU.
2. The second step involves asking whether the debtor is not a bank, insurance company or other excluded undertakings? – Yes, the debtor is neither a bank nor any other excluded entity.
3. Thirdly one must ask whether the proceeding opened against the debtor is listed in Annex A to the EIR recast – no, the procédure de sauvegarde is not listed in Annex A therefore it does not fall within the material scope.
4. finally, the last question that must be asked is whether the proceeding is opened after 26 June 2017? The answer is yes as the respective proceeding was opened on 29th June 2017

Therefore, due to the fact that the proceeding is a restructuring proceeding and not an insolvency proceeding which does not form part of Annex A to the EIR Recast, it therefore does not fall within the scope and the EIR Recast would not apply.]

Yes but it would have made your answer stronger had you referred to the name of the scopes at stake (geographical, 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.

[Yes, such a proceeding can be opened in Spain under the EIR Recast. According to Article 3(2) of the EIR Recast which states:

“Where the centre of a 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 he 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.”

In the above scenario, PAJ possesses an establishment in the form of a warehouse in Madrid Spain, therefore has the necessary *locus standi* and jurisdiction to open secondary insolvency proceedings in Spain.

In the case of *Interedil Srl v Fallimento Interedil Srl*⁶ the Court stated in paragraphs 62 and 63 that:

“62. The fact that that definition links the pursuit of an economic activity to the presence of human resources shows that a minimum level of organisation and a degree of stability are required. It follows that, conversely, the presence alone of goods in isolation or bank accounts does not, in principle, satisfy the requirements for classification as an ‘establishment’.

63. Since, in accordance with Article 3(2) of the Regulation, the presence of an establishment in the territory of a Member State confers jurisdiction on the courts of that State to open secondary insolvency proceedings against the debtor, it must be concluded that, in order to ensure legal certainty and foreseeability concerning the de

⁶ Case C-396/09, ECLI:EU:C:2011:671 (Oct. 20, 2011).

termination of the courts with jurisdiction, the existence of an establishment must be determined, in the same way as the location of the centre of main interests, on the basis of objective factors which are ascertainable by third parties.”

It is clear from the above that PAJ possesses more than goods in isolation or a bank account and conducts business in Spain in the form of rental of its warehouse, therefore such proceedings can definitely be opened in Spain in terms of the EIR recast an above-mentioned case law.]

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 out of 15.

*** End of Assessment ***

Marks awarded: 43 out of 50.