



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2B

THE EUROPEAN INSOLVENCY REGULATION

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

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

ANSWER ALL THE QUESTIONS

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

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

Question 1.1

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

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

Question 1.2

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

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

Question 1.3

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

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

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

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

(d) Article 7 EIR Recast ("Applicable law").

B was the correct answer.

Question 1.4

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

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

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

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

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

C was the correct answer.

Question 1.5

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

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

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

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

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

A was the correct answer.

Question 1.6

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

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

Question 1.7

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

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

Question 1.8

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

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

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

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

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

C was the correct answer.

Question 1.9

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

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

Question 1.10

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

Assume that:

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

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

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

(d) Within the time limit prescribed by the *lex concursus* of the main insolvency proceeding (Spanish law).

Marks awarded: 6 out of 10.

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks] 2

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

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

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

Answer 2.1: Statement 1: The movement of COMI from one member state to other was crucial to prevent practice of abusive forum shopping, wherein, the Debtor moves its assets, personnel or registered office. The idea of Debtor is to obtain a more favourable legal position in insolvency to the detriment of Debtors General Body of Creditors. Notably, Recital 29 does not address insolvency forum shopping as such but only its harmful or abusive forms, causing damage or putting creditors to disadvantage.

The movement of Insolvency Venue to seek a successful restructuring or a streamlined and advantageous sale of business is not per se prohibited. It is pertinent to mention here that in two cases this issue has been addressed: 're Ocean Rig UDW Inc' and 'Polbud- Wykonawstwo sp. Z.o.o.'

Statement 2: The instrument mentioned in the Question is an Undertaking in reference to stay of opening secondary insolvency proceedings. There could be two possible ways to prevent opening of secondary insolvency proceedings. The first one being a stay granted in the main insolvency proceedings. The said stay does not take place automatically but requires a request from the insolvency practitioner and this stay maybe imposed for a period not exceeding three months with a condition that appropriate measures are in place to put it in the interest of local creditors.

In the case of undertaking the Court requested to issue a stay under Article 38(3) EIR recast does not have to refrain from opening the secondary proceedings. Thus, if general interest of local creditors is safeguarded an undertaking can provide a shield against the opening of secondary proceedings for a period exceeding three months. This way procedural integrity of main proceedings can be preserved.

Question 2.2 [maximum 3 marks] 3

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

Answer 2.2: Under EIR 2000, there was only one Article which mandated Insolvency Practitioners in main and secondary proceedings to talk to each other. However, a

comprehensive framework for cooperation and communication between practitioners has been introduced under EIR Recast in Article 41. Another Article 42 provides for framework of communication between the Courts. Further, Article 43, lays down a framework for interactions and communications between Insolvency Practitioners and Courts. While introducing these articles, it was expected that this kind of arrangement should enable efficient and effective utilisation of Debtor's assets and protection of creditors right. For insolvency proceedings of group companies, similar articles 56-59 have been introduced in EIR Recast.

Question 2.3 [maximum 3 marks] 2

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

Answer 2.3: While we read Article 1 of EIR Recast, it shows that the provisions are applicable not only to traditional liquidation related procedures, but it also covers proceedings intended at rescuing economically viable businesses which are financially distressed. It further provides for ways for stay of individual creditors' actions for the purpose of protecting the interest of general body creditors. EIR Recast lays more emphasis on restructuring as against EIR 2000 which was intended as partial or total divestment of a debtor and appointment of a Liquidator.

Secondly, annexure A to Article 2 (4) provides list of names of insolvency proceedings for all 27 countries covered by EIR Recast. Almost 112 procedures have been included in Annexure A. It further explains that EIR Recast be applied without any further examination by the Courts of another member states as to whether the conditions set out in the regulations are met. It is implicit that proceedings mentioned in Annexure A automatically fall within the material scope of EIR Recast.

Some entities specially (a) insurance undertakings, (b) Credit institutions, (c) investment firms have been specifically excluded from the personal scope of the EIR Recast. Such listed entities are subject to special arrangements and national supervisory authorities can intervene in the event of their insolvency. The idea is if the insolvency of such an important financial institution is not nationally supervised, it may lead to global financial crises. **How is this relevant to the rescue orientation of the Regulation?**

Question 2.4 [maximum 2 marks] 2

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

Answer 2.4: The first instrument is the concept of an "Establishment" and article 2 (10) EIR Recast states that any place of operations where a debtor carries out or has carried out in the three-month period prior to request to open main insolvency proceedings a non-transitory economic activity with human means and assets.

The second crucial improvement brought about by EIR Recast is doing away with the requirement that secondary proceedings must be winding up proceedings. This limitation significantly hindered efforts to restructure businesses spanned across Europe with several establishments located in different member states.

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.

Answer 3.1: The European Commission was under obligation to present a report on success or otherwise of EIR 2000 in terms of Article 46 of EIR 2000. Though there was general satisfaction about EIR 2000's success, however, it had become clear that some of its provisions needed adjustments after 15 years of experience.

Some other developments warranted totally new rules. Compared to EIR 2000, EIR of 2015 attended to the needs of insolvency and some of the measures included were broadening scope to restructuring proceedings stronger rules for cooperation between Insolvency Practitioners and the Courts, possibility of proceedings about member group of companies. It also addressed to improvement of creditor information as well as general modernization of legal rules and data protection.

Question 3.2 [maximum 5 marks] 5

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

Answer 3.2:

1. It may please be observed the major insolvency proceedings are inherently connected to the Debtors' Centre of Main Interest (COMI). Such main proceedings should be opened in the territorial jurisdiction of Debtors' COMI. The EIR 2000 did not have a definition of COMI, it provided only guidance in its Recital 13. By way of major enhancement, the EIR Recast mandates that COMI shall be the place where the Debtor conducts the administration of its interests on a regular basis, and which is identifiable by third parties (Article 3(1)) of EIR Recast. Such words of EIR Recast are similar to the ones provided in Recital 13 of EIR 2000. By including them the main text of the Regulation, the definition of COMI has gained authority, since the Recital itself is not enforceable and rather provides guidance for interpretation by the Courts.
2. The second crucial improvement brought by EIR Recast is abolition of the requirement that secondary proceedings must be winding up proceedings, previously reflected in Article 3(3) of EIR 2000. This limitation under EIR 2000 significantly hindered efforts to restructure businesses spread across Europe and other several establishments situated in different member states.
3. The emphasis on restructuring is a noticeable improvement of the EIR Recast, as the EIR 2000 mentioned only proceedings entailing partial or total divestment of a Debtor and the appointment of the Liquidator Article 1, EIR 2000. The widened coverable of EIR Recast is in line with a general European thought process of promoting effective restructuring tools to maximise value for creditors, increase investment and job opportunities in the single market.

Question 3.3 [maximum 5 marks] 4

Select **two (2)** major flaws and / or omissions of the EIR Recast. Explain why you consider them to be flaws and / or omissions and how they can be corrected or remedied.

Answer 3.3: As per our understanding, the first major flaw is incongruence B/w Article 1 & Annex A of EIR Recast. About 112 procedures have been included in Annex A.

It is clear if the proceedings are covered under Annex A, it automatically without any further examination falls within the material scope of EIR Recast.

When Annex A is a determining factor for application of EIR Recast, the definition of an Insolvency Proceedings in Article 1 loses its salience, significance and becomes a guidance for National Policy makers to consider introducing new National Insolvency Proceedings to Annexure A. To cover this flaw, no of procedures should be increased or reviewed every year by taking feedback from the Member States of the EIR Recast. This will enhance the efficacy of disposal of Insolvency Proceedings in the Member States. Otherwise, they have to handle 2 different Insolvency laws in one state.

The second flaw noticed by me is recital 35 which states that Actions for performance of obligations under a contract concluded by the debtor prior to the opening of proceedings do not derive directly from the Insolvency proceedings. Consequently, claim of Insolvent debtor against its own debtors usually escape attraction by the Insolvency forum. In a decided case related to this matter [reference?], the CJEU concluded that claim in question goes not in action related to Insolvency and it could have been brought by the creditor (Insolvent Company) itself before the opening of Insolvency Proceedings. In that context, the action would have been governed by rules concerning jurisdiction applicable in civil and commercial matter. It is the nature of claim and its legal basis which were given the determinative force. In our opinion, this is a double whammy. On the one hand, the Insolvent Corporate Debtor is not able to pay its creditors and on the second, it will (as a creditor) escape attraction of Insolvency Forum. Our suggestion is that recital 35 should be amended appropriately to protect the rights of Insolvent Debtor.

Marks awarded: 14 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] 2

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

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jurisdiction.) Your answer should contain references to the applicable law and the relevant CJEU jurisprudence.

Answer 4.1: Under EIR 2000, Article 3(1) established that Insolvency proceedings could be initiated at the place of Debtors Centre of Main Interest (COMI). Initiation of such proceedings had a universal scope, and it encompassed all assets of the Debtor throughout the European Union. Article 4 of EIR 2000 prescribed that Law of the state of opening of Insolvency proceedings (The Lex Concursus) will determine effects of such proceedings. This law also covered respective powers of "Debtor" and "Liquidator", ranking of creditors' claim, impact of proceedings on current contracts and creditors rights after closure of Insolvency Proceedings.

The EIR Recast (Article 92) is applicable with effect from June 26, 2017, and the petition in the question paper has been filed by PAJ with the Strasbourg Court on 23 June 2017. The EIR Recast also clearly mentions that proceedings before June 26, 2017, will be governed by EIR 2000. Proceedings opened before June 26, 2017, shall be governed by EIR 2000. Assuming that the petition has been made admitted/effective on June 23, 2017; the EIR 2000 will have jurisdiction and will be applicable in this case. Having regard to the Jurisprudence of CJEU, a European Union (EU) must ensure that EU Law is interpreted and applied in the same way in every member state. Authoritative interpretation by CJEU of the EIR 2000 continues to be relevant even for application for EIR Recast. **You fail to answer the question. The question was not whether the EIR 2000 applies but whether the court in Strasbourg has jurisdiction to open proceedings.**

Question 4.2 [maximum 5 marks] 5

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

Answer 4.2: The EIR Recast has repealed and replaced the EIR 2000. EIR Recast is effective from June 26, 2017 (Article 92), with small exceptions. Besides, the provisions of EIR Recast shall apply only to insolvency proceedings which are opened after that date (Article 84 (1)). There is another condition stipulated which says that proceedings opened before this date shall be governed by EIR 2000. Moreover, time of opening of insolvency proceedings means the time on which the judgement opening insolvency proceedings becomes effective, regardless of whether the judgement is interim or final.

As per Recital 9 of EIR Recast in context of national procedures contained in Annexure A, it is explained that EIR Recast should apply without any further examination by the Courts of another Member State as to whether the conditions set out in the regulations are met. Surprisingly, the National Insolvency Procedures not included in Annexure A are not covered by EIR Recast.

If the Insolvency Proceedings initiated by Strasbourg Court are opened on June 29, 2017; the EIR Recast shall be applicable, however, subject to meeting other conditions as mentioned in the above para.

Material Scope: In terms of Article 1, EIR Recast covers public collective proceedings (including interim proceedings) for the purpose of rescue, adjustment of Debt, reorganisation or liquidation. Further, EIR Recast does not extend, not only to traditional liquidation-oriented procedures but also to proceedings intended to rescue financially viable distressed businesses.

Personal Scope: The EIR Recast applies if the conditions set out are met irrespective of whether debtor is a natural person or a legal person, a trader or a consumer. Some institutions of National importance such as insurance, credit institutions, investment firms etc. have been explicitly excluded.

Territorial Scope: Being binding piece of EU Legislation, EIR Recast is directly applicable to all member states except Denmark.

Question 4.3 [maximum 5 marks] 2

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

Answer 4.3: Article 3(2) of EIR Recast permits opening of one or more secondary insolvency proceedings against a debtor in any member state where it possesses an establishment. The effects of Secondary proceedings are restricted to assets of the Debtor in member state where secondary proceedings have been opened

For opening the secondary proceedings, the concept of an establishment is mandatory. Article 2(10) defines establishment as any place of operations where the debtor conducts or has conducted in three months period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets.

Now we come to the problem question, PAJ had opened their warehouse and had also in the year 2013 concluded the line of credit agreement with a Spanish Bank and has also maintained its Bank Account. Further it had plans to expand to Spanish adult gaming market. For a few years PAJ faced financial difficulties and filed safeguard proceedings in 2017. Thus, it can be concluded that PAJ has an establishment in Spain. As Spain is a member of EIR Recast, therefore, the secondary insolvency proceedings can be opened in Spain.

For a long time, it was considered that territory of EIR 2000 covers intra community effects of Insolvency proceedings, and its provisions are limited to relations between member state. However, in *Ralph Schmid V Lilly Hertel*, the CJEU took the opposite view. This case dealt with action brought by a liquidator of assets of a German Debtor against a person living in Switzerland, to have a transaction set aside and seeking recoveries. **Irrelevant.**

Earlier in *Christopher Seagon V Deko Marty Belgium*, CJEU decided that the Courts of member state where insolvency proceedings have been opened have jurisdiction to consider an action to set a transaction aside that is brought against a person whose registered office is in another member state. In this case, Switzerland not being part of EU was not a member state. **Irrelevant.**

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: 9 out of 15.

*** End of Assessment ***

Marks awarded: 38 out of 50