



**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2B**  
**THE EUROPEAN INSOLVENCY REGULATION**

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

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

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

## **INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT**

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

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

## **ANSWER ALL THE QUESTIONS**

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

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

#### **Question 1.1**

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

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

#### **Question 1.2**

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

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

#### **Question 1.3**

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

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

#### Question 1.4

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

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

#### Question 1.5

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

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

#### Question 1.6

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

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

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

### Question 1.7

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

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

### Question 1.8

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

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

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

### Question 1.9

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

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

### Question 1.10

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

Assume that:

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

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

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

C was the correct answer.

Marks awarded: 9 out of 10.

## QUESTION 2 (direct questions) [10 marks]

### Question 2.1 [maximum 2 marks] 0

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: This concept is not part of the EIR Recast. Instead, this statement relates to non-insolvency related forum shopping for company law, i.e. the transfer of a company's registered office within the EU for the purpose of changing the law applicable to the company. **Yes but it is indirectly linked to the concept of forum shopping and the COMI ie Article 3.**

Statement 2: Concept of modified universalism, Article 3 EIR Recast **No, this relates to Articles 36 and 38.**

### 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.

According to Article 41(1) EIR Recast, the insolvency practitioner in main insolvency proceedings and the insolvency practitioner(s) in secondary proceedings concerning the same debtor shall co-operate 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.

Article 42(1) EIR Recast: 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. For that purpose, the courts may, where appropriate, appoint an independent person or body acting on its instructions, provided that it is not incompatible with the rules applicable to them.

Article 42(3) EIR Recast: In implementing the cooperation set out in Article 41(2) EIR Recast, the courts, or any appointed person or body acting on their behalf, as referred to in Article 41(2) EIR Recast, may communicate directly with, or request information or assistance directly from, each other provided that such communication respects the procedural rights of the parties to the proceedings and the confidentiality of information.

Article 43 EIR Recast: 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.

### **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.

This statement is true for the reasons below:

1. The EIR 2000 mentioned only proceedings entailing partial or total divestment of a debtor and the appointment of a liquidator (Article 1 EIR2000) while according to Article 1 EIR Recast, the EIR Recast extends not only to “traditional” liquidation – oriented procedures, but also to proceedings aimed at rescuing economically viable but financially distressed businesses, such measures include providing for a stay of individual creditor’s actions for the purpose of protecting the general body of creditors. It also extends to proceedings which provide for restructuring of debtor at a stage where there is only a likelihood of insolvency and to proceedings which leaves the debtor fully or partially in control of its assets and affairs.
2. Article 32(1) EIR Recast establishes that judgements covered by it (e.g. insolvency-related judgements) must be enforced in accordance with Articles 39-44 (Article 39: A judgement given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required; Article 40: An enforcement judgement shall carry with it by operation of law the power to proceed to any protective measures which exists under the law of the Member State addressed, etc.) and 47-57 of Brussels I Recast (Refusal of enforcement and Common Provisions). This was not the case under EIR2000, which referred to Articles 31 of the Brussels Convention, which mandated the declaration of enforceability from the court in the Member State in which enforcement was sought.
3. The exercise of the right to file claims is dependent on the creditors knowledge about the opening of insolvency proceedings. While the EIR2000 left it to the discretion of the liquidator to publish information on the opening of the insolvency proceedings in other Member States (Article 21 EIR 2000), Article 28(1) EIR Recast obliges the insolvency practitioners or debtors in possession to publish notices on the opening of insolvency proceedings, whether main or secondary, at the place of the debtor’s establishment in accordance with the publication procedures provided for in that Member State.
4. The abolition of the requirement that secondary proceedings must be winding-up proceedings, previously contained in Article 3(3) EIR 2000 in the EIR Recast as this limitation significantly hindered attempts to restructure businesses across Europe with several establishments located in different Member States.

The EIR Recast also co-exists with the newly introduced Directive on Preventive Restructuring (2019/1023) of the European Parliament and of the Council of 20 June 2019 on preventive



restructuring frameworks, on discharge of debt and disqualifications and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive EU (2017/1132). This Directive sets out the minimum standards for preventive restructuring procedures which enables debtors across Member States facing financial difficulty to restructure at an early stage in order to avoid insolvency. This was not previously available under EIR2000.

**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. As the opening of territorial proceedings disrupts the otherwise coherent insolvency estate by creating a separate insolvency estate carved out from the main insolvency proceedings and its *lex concursus*, EIR Recast states that secondary proceedings can only be opened in a Member State where the debtor has an establishment.

Per Article 2(10) EIR Recast, "establishment" is defined as "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". By defining "establishment", greater legal certainty and foreseeability concerning the court authorised to open insolvency proceedings can be achieved as ambiguity is lessened.

2. The EIR Recast also allows for the prevention of Secondary Proceedings as secondary proceedings may complicate the operation of an insolvent debtor, resulting in additional costs and / or may disrupt the debtor's efficient restructuring or streamlined liquidation.
  - a) According to Article 38(2) EIR Recast, where the 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 it is satisfied that the undertaking adequately protects the general interests of local creditors.
  - b) In order to avoid the opening of secondary insolvency proceedings, the insolvency practitioner in the main insolvency proceedings may give a unilateral undertaking in respect of the assets located in the Member State which secondary insolvency proceedings could be opened, that when distributing those assets or the proceeds received as a result of their relations, he/she will comply with the distribution and priority rights under national law that creditors would have if secondary insolvency proceedings were opened in the Member State.
  - c) This allows for the centralisation of control and safeguards the rights and expectations of local and preferential creditors by ensuring compliance with priority rights guaranteed under the relevant local insolvency laws.
  - d) Furthermore, Recital 48 EIR Recast allows for the Insolvency Practitioner in main insolvency proceedings to intervene in secondary insolvency proceedings which are pending at the same time, through proposal of a restructure plan or composition, or apply for a suspension of the realisation of assets in secondary proceedings.

**Marks awarded: 8 out of 10.**

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

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

#### **Question 3.1 [maximum 5 marks] 2.5**

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

EIR Recast promotes the rescue of economically viable but distressed businesses and facilitates pre-insolvency restructuring procedures. The following provisions were introduced in the EIR Recast which were not previously available under the EIR 2000. Consequently, whilst EIR2000 has been regarded as a success, the below reasons depicts and supports the general requirement for an “update” to the EIR2000 to account for the need for the EIR to modernise and evolve:

1. Group insolvencies – as the world becomes increasingly connected, it is now the norm for businesses, especially larger corporates to have offices and operations that spans across various States within the EU (Member States).
  - a. Under the EIR 2000, the insolvency of the group was dealt with on an entity by entity basis rather than approached and dealt with as a group. This was regarded as diminishing the prospects of a successful restructuring as this piecemeal approach may not preserve the group’s value and is therefore not viable economically.
  - b. The EIR Recast introduced a whole chapter (Chapter V) dedicated to group insolvencies, with over twenty articles. Further, there is also the introduction of a new important Recital 53 which addresses the possibility of jurisdictional consolidation. This is made possible through a court opening insolvency proceedings for several companies belonging to the same group in a single jurisdiction if that court finds that the COMIs of these various companies are located in a single Member State.
  - c. Further, under Recital 50, there also exists the possibility for the appointment of a single insolvency practitioner for several insolvency proceedings concerning the same debtor or for different member of a group of companies, provided that this is compatible with the rules applicable to each of the proceedings, in particular with any requirements concerning the qualification and licensing of the insolvency practitioner.
2. Synthetic proceedings – The EIR Recast also allows for the prevention of Secondary Proceedings as secondary proceedings may complicate the operation of an insolvent debtor, resulting in additional costs and / or may disrupt the debtor’s efficient restructuring or streamlined liquidation. EIR Recast now allows for the circumvention of the opening of secondary proceedings through Article 36 which states that the Insolvency Practitioner in the main insolvency proceeding can provide an undertaking in favour of the secondary insolvency proceeding, as follows:
  - a. EIR Recast provides for the ability of the Insolvency practitioner to give an undertaking that local creditors would be treated “as if” insolvency proceedings have been opened in their jurisdiction;
  - b. This undertaking acts as an assurance that proceeds received from the disposal of assets located in the Member State will be distributed in accordance with any distribution/ priority rights which creditors in the secondary proceedings would have otherwise enjoyed under the National Law if these secondary insolvency proceedings were in fact opened in that Member State.

Yes but this is not sufficient. Policy documents produced before the drafting highlighted 5 areas in need of improvement. You were required to discuss these 5 aspects.

**Question 3.2 [maximum 5 marks] 5**

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

1. Group insolvencies – as the world becomes increasingly inter-connected, it is now the norm for businesses, to have offices and trading partners across various Member States within the EU Bloc. Under the EIR 2000, the insolvency of the group was dealt with on an entity by entity basis rather than approached and dealt with as a group. This was regarded as diminishing the prospects of a successful restructuring as this piecemeal approach may not preserve the group's value and therefore may not be viable economically. The below Articles within the EIR Recast, are just some examples of a much more cohesive and predictable insolvency proceeding, in lieu of a fragmented insolvency proceeding, opened against individual members of the corporate group, can be achieved:
  - a. Chapter V – Insolvency Proceedings of Members of a Group of Companies, dedicated to group insolvencies, has over twenty articles supporting the insolvency efforts of group(s) of companies.
  - b. Recital 53 introduces rules on the insolvency proceedings of groups of companies which should not limit the possibility for a court to open insolvency proceedings for several companies belonging to the same group in a single jurisdiction if the court finds that the COMI of those companies is located in a single Member State.
  - c. Recital 50 notes the possibility for the appointment of a single insolvency practitioner for several insolvency proceedings concerning the same debtor or for different members of a group of companies
2. Synthetic proceedings – It is recognised that multiple insolvency proceedings in respect of the same entity can be detrimental to creditors and to the efficient administration of the insolvent estate. By the insolvency practitioner in the main insolvency proceeding providing an undertaking to the secondary proceeding in accordance with Article 36, the opening of secondary proceedings can be circumvented. This allows for the centralisation of control over the major decisions affecting the debtor and the insolvency estate leading to a more predictable insolvency proceeding as rights of creditors are safeguarded.
3. Communication and co-operation – whilst the EIR 2000 contained only one article mandating insolvency practitioners in main and secondary proceedings to communicate information to each other (Article 31 EIR 2000), the EIR Recast prescribes a more thorough framework for coordination and cooperation; by and between:
  - a. Insolvency Practitioners (Article 41 EIR Recast)
  - b. Courts (Article 42 EIR Recast);
  - c. Insolvency Practitioner and Courts (Article 43 EIR Recast)This translates to an efficient and effective management of the debtor's assets resulting in not only preservation of value but may also result in the successful restructuring/ rescue of the entity.

**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.

1. Group co-ordination proceeding- Only Insolvency Practitioner appointed in proceedings against a group member can request the opening of a group proceeding.  
**Flaw:** The inability for creditors, including public authorities to initiate the opening of a group proceedings is an omission of the EIR Recast.

In consideration of the increasing interconnectedness of States from an economic perspective, the probability that the debtor being a Multinational Corporation (“MNC”) that will have at least one creditor who renders services to multiple entities within the Group across the EU is high.

While the EIR Recast precipitates entity-by-entity COMI determination, this undoubtedly would give rise to not only a duplication of effort through the appointment of multiple Insolvency practitioners (to determine COMI prior to grouping members within a corporate group into a single jurisdiction) to coordinate amongst each other the merits of bringing members of a corporate group into a single jurisdiction.

Not to mention not all member States currently publish data on insolvent entities within its State on the European e-Justice Portal i.e. this exercise will undoubtedly incur large amounts of avoidable costs.

**Remedy:** Allow creditors to request opening of a group proceeding against a debtor. This would not only reduce this duplication of effort requiring IPs to group together to discuss the merits of opening a group co-ordination proceeding. This would mean a group co-ordination proceeding can be opened swiftly by the creditor on the basis of a common COMI whilst minimizing costs as doing so effectively removes the step of IPs of multiple states having to debate the merits of opening a group co-ordination proceeding.

2. Duty to inform creditors

**Flaw:** EIR Recast is silent on the consequences of a late filing of claims by creditors. Creditors are therefore subjected to different consequences and its claim face different treatment depending on the respective Member State. This creates unpredictability.

**Remedy:** A uniform approach in regards to a late filing would ensure consistency and predictability (and perhaps even punctuality) across all States.

**Marks awarded: 12.5 out of 15.**

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

Prêt A Jouer (PAJ) is a France-registered toy shop company. The company opened its first store in Strasbourg in 2011. One of PAJ’s warehouses is in Madrid (Spain) and PAJ rents out this warehouse to other toy companies. In 2013, PAJ concluded a line of credit agreement with a Spanish bank where it maintains a bank account. During the same year, PAJ announced that it had plans to expand to the Spanish adult gaming market, as the latter was expected to grow annually by over 10%. As a result, PAJ started negotiations with local distributors and some (non-binding) memoranda of understanding have been signed.

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

**Question 4.1 [maximum 5 marks] 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.

While the EIR 2000 may designate France for the opening of insolvency proceedings, it is a matter of territorial jurisdiction on whether the Strasbourg Court is a competent national court to open such proceedings.

As the EIR 2000 did not contain a definition of COMI, guidance is provided through Recital 13, backed by the settled case law of *Eurofood IFSC Ltd (Case C-341/04, ECLI:EU:C:2006:281 (May 2, 2006))* which notes that COMI has an autonomous meaning and must therefore be interpreted in a uniform way independently of what a similar term may mean in national legislation (paragraph 31).

Consequently, in determining the COMI of Pret a Jouer (“PAJ”), regard must be given to paragraph 33 whereby the CJEU highlighted the autonomous meaning of the term COMI and the emphasis where COMI must be identified by reference to criteria that are both objective and ascertainable by third parties.

Based on the fact that PAJ’s registered office is in France, France is PAJ’s COMI. Therefore, assuming the Strasbourg Court is a competent national court to open main insolvency proceedings according to national jurisdiction, the Strasbourg Court does have international jurisdiction to open the requested insolvency proceeding.

However, consideration and regard must be given to what “*procédure de sauvegarde*” in France entails as per Article 1 EIR 2000, EIR 2000 only applies to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator.

Therefore, if the purpose of the *procédure de sauvegarde* is to enable reorganisation and restructure of PAJ’s debts under the court’s protection (rather than to effect and result in the appointment of a liquidator) i.e. PAJ is yet to file for liquidation and therefore a liquidator is yet to be appointed, the EIR 2000 does not apply.

Notwithstanding this definition, consideration would also need to be given to the Annexes of EIR 2000. As the EIR 2000 should apply to insolvency proceedings, whether the debtor is a natural person or a legal person. The insolvency proceedings to which the EIR2000 applies are listed in the Annexes. Hence, it needs to be confirmed if *procédure de sauvegarde* is included in the Annexes.

Having said that, it is still a matter of territorial jurisdiction on whether the Strasbourg Court have international jurisdiction to open the requested insolvency proceeding.

**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.

Yes, the EIR Recast is applicable, assessed based on:



1. Material Scope - Per Article 1 EIR Recast, the scope of EIR Recast has expanded from EIR 2000 and applies to interim proceedings, which are based on laws relating to insolvency and in which, for the purposes of rescue, adjustment of debt, reorganisation or liquidation, the assets and affairs of a debtor are subject to control or supervision by a court. On that basis, the *procédure de sauvegarde* filed by PAJ falls within the scope of EIR Recast. Notwithstanding the definition of Article 1, consideration also needs to be given to Annex A ("Insolvency proceedings referred to in point (4) of Article 2) to ascertain if *procédure de sauvegarde* is a proceeding that is covered by the EIR Recast.
2. Temporal Scope – per Article 92 EIR Recast, the EIR Recast applies from 26 June 2017. According to Article 2(8) of the EIR Recast, the "time of the opening" of insolvency proceedings means the time at which the judgement opening insolvency proceedings become effective, regardless of whether the judgement is final. The EIR Recast goes on to define "judgement opening insolvency proceedings" as the decision of any court (in this case Strasbourg Court) to open insolvency proceedings or to confirm the opening of such proceedings. On the basis that the *procédure de sauvegarde* was open by the Strasbourg Court on 29 June 2017, the EIR Recast will apply despite the petition being filed with the Court prior to 26 June 2017.
3. Personal Scope – As noted above, assuming *procédure de sauvegarde* is included under Annex A, the EIR Recast will be applicable to PAJ's proceeding. This is as PAJ's operations do not fall under the list of entities/ proceedings that are explicitly excluded from the personal scope of the EIR Recast per Article 1(2) EIR Recast.
4. Territorial scope – per Recital 25, the EIR Recast applies to proceedings in respect of a debtor whose COMI is located in the EU. As contemplated and determined under Question 4.1 above, PAJ's COMI is in France. Therefore, in accordance with Recital 25, the EIR Recast will apply in PAJ's safeguard proceedings.

It is further noted that the EIR Recast can co-exist with the newly introduced *Directive on Preventive Restructuring (2019/1023)*: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019L1023#:~:text=Directive%20\(EU\)%202019%2F1023,amd%20amending%20Directive%20\(EU\)%202017](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019L1023#:~:text=Directive%20(EU)%202019%2F1023,amd%20amending%20Directive%20(EU)%202017)

This ability to co-exist reinforces the EU's intention of promoting effective corporate restructuring with the aim of rescuing (to the extent possible) distressed debtors.

#### **Question 4.3 [maximum 5 marks] 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.

EIR Recast allows for the opening of secondary insolvency proceedings against a debtor in any Member State where it possesses an establishment (Article 3(2) EIR Recast). In determining if secondary insolvency proceedings can be opened in Spain, consideration needs to be given to the definition of "Establishment".

According to Article 2(10) EIR Recast, "establishment" means any place of operations where a debtor carries out or has carried out in the three-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets.

The concept of establishment is further examined by the CJEU in *Interedil Srl v Fallimento Interedil Srl (Case C-396/09, ECLI:EU:C:2011:671 (Oct. 20, 2011))* which concluded that the fact that the definition connects 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 when determining if the debtor has an establishment in the Member State.

In considering the facts of this case, the mere presence of goods in isolation (warehouse in Spain) or bank accounts does not satisfy the requirements for classification as an “establishment” (according to para. 62).

However, on the basis that an announcement was made by PAJ of its intention to expand into the Spanish adult-gaming market followed by actions undertaken by PAJ to support this intention (through negotiations with local distributors and execution of memoranda of understanding (albeit non-binding) provides sufficient basis for third parties to assume that PAJ is undergoing non-transitory economic activity in Spain.

Having said that, the fact remains that the definition of establishment must be assessed at the moment of filing for the opening of secondary insolvency proceeding (Article 2(10) EIR Recast). As number of years have passed between PAJ’s intentions of entering the Spanish adult-gaming market and the filing of secondary insolvency proceedings, the time requirement within the definition of establishment (for there to be an establishment in the three-month period prior to the filing of proceedings) is not met. Therefore, on the basis that it cannot be concluded that PAJ has an establishment in Spain, secondary insolvency proceedings cannot be opened in Spain under the EIR Recast.

Very good.

Marks awarded: 15 out of 15.

**\* End of Assessment \***

Marks awarded: 44.5 out of 50.