



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.

Question 1.7

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

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

Question 1.8

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

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

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

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

C was the correct answer.

Question 1.9

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

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

Question 1.10

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

Assume that:

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

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

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

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks] 2

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

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

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

Statement 1:

The concept – the COMI and forum shopping (Article 3 and Recital 29 of the EIR Recast)

The “COMI” or the Centre of Main Interests in an Insolvency Proceeding determines the jurisdiction of the person/company that is most closely associated with for the purpose of cross-border insolvency.¹ The COMI 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 Article 3(1) EIR Recast). This is so that the application of the principle of COMI can be uniform in all Member States. The criterion for determining the COMI are not considered here.

However, as far as COMI is concerned, there is always the risk of ‘abusive forum shopping’. This is where a debtor moves his assets or changes his registered place of business for a more benefits favourable; whether it be tax, legal formalities, insolvency laws etc. at the detriment of the debtor’s general body of creditors. However, the word ‘abusive’ before forum shopping implies that it would only be unlawful where it is ‘abusive’ or detrimental to the creditors and that forum shopping per se is not prohibited.

For instance, in the case of Polbud – Wykonawstwo, the transfer of the registered office of the business of the debtor without changing the actual location of the business is protected by the debtors ability to exercise his ‘freedom of establishment’. This is advantageous for the debtor as it gives the debtor more freedom. Further, the EIR Recast does not appear to directly prohibit all forms of ‘forum shopping’ but only its harmful or abusive forms, causing damage or disadvantage to the debtor’s creditors (Recital 29). Therefore, the creditors interests seem to be the deciding factor here.

Statement 2:

The concept – ‘Synthetic’ secondary proceedings and Undertakings to avoid secondary proceedings (Article 36 EIR Recast)

This is where a unilateral undertaking is given by the insolvency practitioner in the main proceedings to the creditors, in a member state where secondary insolvency proceedings can be opened in relation to the assets of the debtor in said member state. The undertaking must comply with the relevant criteria under Article 36.

¹ Sarah Worthington, Sealy & Worthington's Text, Cases, and Materials in Company Law (11th edn), pg 16

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 EIR Recast – Insolvency practitioners of secondary proceedings concerning the same debtor, shall cooperate with each other. This can take the form of even agreements and protocols.
2. Article 42 EIR Recast – This Article refers to the cooperation between courts where a request to open insolvency proceedings is pending, or which has opened such proceedings. The courts can appoint an independent person or body for this purpose.
3. Article 43 EIR Recast – this Article covers communication between courts and insolvency practitioners. The Article contains three situations in which such a duty of communication would arise.

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 that the EIR Recast extends to proceedings aiming at rescuing economically viable but financially distressed businesses, including those providing for a stay of individual creditors' actions for the sake of protecting the general body of creditors and is no longer restricted to "traditional" liquidation-oriented procedures
2. The EIR Recast abolished the requirement that secondary proceedings must be winding-up proceedings, therefore the scope of the proceedings is enhanced
3. Provisions on cooperation and communication between insolvency practitioners and the courts and between themselves in secondary proceedings (Articles 41 – 43) and in group insolvencies (Articles 50 – 56)
4. Synthetic or virtual secondary hearings – Article 36 – where an undertaking would be giving by the insolvency practitioner in the main insolvency proceedings to treat claims of foreign creditors in the same way as they would be treated in the local jurisdiction
5. Introducing provisions which deal with insolvency of multinational enterprise groups – Chapter V of the EIR Recast

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. The 'synthetic' or 'virtual' secondary proceedings (Article 36 EIR Recast)
 - a. This is where the insolvency practitioner of the main proceedings gives an undertaking in accordance with Article 36 to the local creditors of the member states in which the debtors assets are present that the said creditors will be

- entitled to distribution and priority rights as if secondary proceedings had been opened.
- b. The objective of this instrument is to avoid and partially substitute the opening of secondary proceeding.
2. Stay of the opening of secondary insolvency proceedings (Article 38(3) EIR Recast)
 - a. Upon a request from the main insolvency practitioner or the debtor in possession, the court will be empowered to stay the opening of secondary proceedings for a period not exceeding three months.
 - b. However, there are certain conditions that need to be met for this instrument to apply:
 - i. If temporary stay of individual enforcement proceedings has been granted to allow negotiations between the debtor and his creditors, and
 - ii. if suitable measures (including certain protective measures) are adopted to protect the interests of local creditors.

(Recital 45 EIR Recast)

 - c. This stay can also be lifted in certain circumstances

Marks awarded: 10 out of 10.

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

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

Question 3.1 [maximum 5 marks] 5

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

1. There were five main areas that were identified as requiring revision. They were: the scope of the EIR, jurisdiction, secondary proceedings, Publicity of proceedings and lodging of claims and Groups of companies,² which are examined individually below.
2. Scope of the EIR:
 - a. Scope of the EIR 2000 was too narrow and that it was said that the EIR 2000 “no longer cover[ed] a wide range of national proceedings aiming at resolving the indebtedness of companies and individual”.
 - b. It was recommended that the EIR Recast include “quasi-collective proceedings under the supervision of a court or an administrative authority which give a debtor in financial difficulties the opportunity to restructure at a pre-insolvency stage and to avoid the commencement of insolvency proceedings in the traditional sense”, and “proceedings in which the debtor retains some control over its assets and affairs albeit subject to the control or supervision by a court or an insolvency practitioner”
 - c. Further recommendations were made based with the objective to ‘encourage Member States to put in place a framework that enables the efficient restructuring of viable enterprises in financial difficulty and give honest entrepreneurs a second chance’. Therefore, the recommendations appear to

² A proposal for amending Council Regulation (EC) No 1346/2000 on insolvency proceedings <[https://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com\(2012\)0744_/com_com\(2012\)0744_en.pdf](https://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com(2012)0744_/com_com(2012)0744_en.pdf)>

be focused on expanding the scope of the EIR Recast to include more 'rescue oriented' proceedings that '*shift the focus from merely winding a company up towards giving businesses a second chance.*' This would benefit the SMEs.

3. Jurisdiction

- a. Under the EIR 2000 there were difficulties in ascertaining the Member State in whose jurisdiction the insolvency proceeding should be opened.
- b. Although it was widely accepted that the insolvency proceedings would be opened in the debtor's COMI. However, there remained in applying this concept in practice. This led to the abuse of 'forum shopping'
- c. The EIR Recast codified COMI and incorporated the effect of the case law into the Regulation. COMI is now defined in Article 3(1) as "the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties". This clarified the jurisdiction and the rules to determine jurisdiction significantly.

4. Secondary proceedings

- a. The EIR 2000 attracted the criticism that the opening of secondary proceedings can hamper the efficient administration of the debtor's estate.
- b. Therefore, one of the recommendations in relation to secondary proceedings was for a more efficient administration of insolvency proceedings by enabling the court to refuse the opening of secondary proceedings if this is not necessary to protect the interests of local creditors.
- c. This was introduced in the form of an undertaking in Article 36

5. Publicity of proceedings and lodging of claims

- a. Under the EIR 2000 there was no mandatory publication or registration of the decisions in the Member States where a proceeding is opened, nor in Member States where there is an establishment. There is also no European Insolvency Register which would permit searches in several national registers. This significantly hampers the good functioning of cross-border insolvency as it weakens the communication between courts and practitioners.
- b. The recommendation required Member States to publish the relevant court decisions in cross-border insolvency cases in a publicly accessible electronic register and provides for the interconnection of national insolvency registers.

6. Groups of companies

- a. The EIR 2000 did not contain specific rules dealing with the insolvency of a multi-national enterprise group although a large number of cross-border insolvencies involve groups of companies. The lack of specific provisions for group insolvency often diminishes the prospects of successful restructuring of the group as a whole and may lead to a break-up of the group in its constituting parts.

(Source: *A proposal for amending Council Regulation (EC) No 1346/2000 on insolvency proceedings* <

[https://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com\(2012\)0744/_com_com\(2012\)0744_en.pdf](https://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com(2012)0744/_com_com(2012)0744_en.pdf)>)

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. Secondary proceedings, 'synthetic secondary proceedings' and Undertakings
 - a. Secondary insolvency proceedings are no longer required to be limited to winding up proceedings (as were listed in Annex B of the EIR). Therefore, this now includes rescue and restructuring procedures.
 - b. Further, the EIR Recast introduced the 'undertaking', where a unilateral undertaking is given by the insolvency practitioner in the main proceedings to the creditors, in a member state where secondary insolvency proceedings can be opened in relation to the assets of the debtor in said member state. The undertaking must comply with the relevant criteria under Article 36.
 - c. 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.
2. Groups of companies
 - a. The recast EIR introduces a new voluntary regime for groups of companies called 'group coordination proceedings'.
 - b. The EIR 2000 and the Model Law do not touch upon the issues pertinent to the insolvency of different group members
 - c. The EIR Recast contains a whole chapter (Chapter V) dedicated to group insolvencies, including
 - i. cooperation and communication duties for courts and insolvency practitioners involved in insolvency proceedings opened against members of an enterprise group (Articles 56-60 EIR Recast);
 - ii. distinct mechanism of the group co-ordination proceeding, including the figure of a group co-ordinator, who will be required to propose a group coordination plan amongst others (Articles 61-77 EIR Recast)
3. Jurisdiction & COMI
 - a. The EIR Recast codified COMI and incorporated the effect of the case law into the Regulation.
 - b. Now COMI has been defined in Article 3(1) as "the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties".
 - c. The EIR 2000 did not have a definition for COMI although it provided for some guidance in its Recital 13, which was not in itself enforceable

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. Forum shopping
 - a. While the EIR Recast is a significant step forward in relation to the definition of COMI and jurisdiction of the insolvency proceedings, it appears that the EIR Recast only addresses harmful or abusive forms of 'forum shopping'.
 - b. The fact that forum shopping is not 'per se' prohibited may reduce the certainty and predictability of creditors in relation to the jurisdiction and the law that would be govern insolvency proceedings.
 - c. Prohibiting forum shopping entirely does not seem to be a desirable result. Therefore, perhaps the solution would be in providing more guidelines and

discretion as to forum shopping and the principles upon which a court ought to determine the appropriate forum.

2. Undertakings

- a. While the ability of the main insolvency practitioner to give an undertaking to any creditors in a member state in which a secondary proceeding can be initiated (under Article 36) is a positive change, it should be noted that this undertaking is unilateral, that is, it can only be given by the main insolvency practitioner to the local creditors.
- b. However, this may be restrictive particularly for insolvencies of groups of companies, which may require concentration of insolvency proceedings at the location of both the COMIs and establishments of group members.
- c. Therefore, providing for “reversed synthetic proceedings”, as it were, where the local creditors can give an undertaking may be beneficial.

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.

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.

1. To ascertain whether the Strasbourg Court has international jurisdiction to open the requested proceeding, one would have to first ascertain the legal requirements to be fulfilled before opening proceedings in a Member State of the EU. Such requirements include ascertaining:
 - a. Whether the type of proceeding sought to be initiated is covered by the ‘Material Scope’ of the EIR 2000 (Article 1(1))
 - b. Whether the entity/person against whom the proceeding sought to be initiated is covered by the ‘Personal Scope’ of the EIR 2000 (Article 1(2))
 - c. Whether the location in which the proceeding sought to be initiated is covered by the ‘Material Scope’ of the EIR 2000 (Article 3)
2. As for the Material Scope of the EIR 2000, Article 1(1) states that “*This Regulation shall apply to collective **insolvency proceedings** which entail the partial or total*

divestment of a debtor and the appointment of a liquidator.” (emphasis added) This means that only insolvency proceedings are covered by the EIR 2000 and not restructuring/rescue proceedings.

3. However, the proceedings that PAJ intends to initiate are safeguard proceedings (procédure de sauvegarde), which may not constitute ‘insolvency proceedings’ as envisaged by the EIR 2000.
4. However, in the case of Bank Handlowy w Warszawie SA v Christianapol, the main proceeding of ‘sauvegarde’ was recognised in France under the EIR 2000. It was stated that “*It is common ground that the sauvegarde proceedings opened in the main proceedings by the Tribunal de commerce de Meaux are among the proceedings included for France in Annex A to the Regulation.*”³ As recognised by Annex A, it fell within the purview of the EIR 2000.
5. In any event since the question specifies that “*the EIR 2000 applies*”, the international jurisdiction of the Strasbourg Court to open the requested insolvency proceeding will be considered.
6. As for the ‘Personal Scope’, Article 1(2) prevents the application of the EIR 2000 to “*... to insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings which provide services involving the holding of funds or securities for third parties, or to collective investment undertakings.*”
7. However, as PAJ is a toy company it does not seem to fall within a restricted entities identified in Article 1(2). Therefore, PAJ is not disqualified from initiating proceedings under the EIR 2000 on this ground.
8. Article 3 of the EIR 2000 contains provisions as to the International Jurisdiction and ‘Territorial Scope’ of the EIR 2000. Article 3 states that “*The courts of the Member State within the territory of which the centre of a debtor’s main interests is situated shall have jurisdiction to open insolvency proceedings*”. As for how a person’s or company’s centre of its main interests or more commonly known as “COMI” is to be identified, Article 3(1) further states that “*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.*”
9. Recital 13 further states that “*The ‘centre of main interests’ should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties*”. Since it was PAJ that concluded a line of credit agreement with a Spanish bank and had plans to expand the business, it appears that PAJ conducts the administration of its business in France.
10. The collective effect of Article 3 is that:
 - a. The courts with the jurisdiction to open insolvency proceedings are those situated in the territory where the debtor’s main interests is situated.
 - b. The debtors COMI is presumed to be the place of the registered office.
11. Therefore, as far as PAJ is concerned:
 - a. Its COMI would be considered to be France, as PAJ is a “**France-registered** toy shop company” (emphasis added).

³ Bank Handlowy w Warszawie SA v Christianapol, paragraph 34, <
<https://curia.europa.eu/juris/document/document.jsf?text=&docid=130249&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=5217655>>

- b. Therefore, the court of Strasbourg, France does have authority to open insolvency proceedings of PAJ.

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.

1. To identify whether the EIR Recast is applicable, it needs to be ascertained whether the proceeding opened in the Strasbourg Court falls within the purview of the EIR Recast in relation to its Territorial, Material, Personal and Temporal Scope.
2. To fall within the purview of the EIR Recast the proceeding opened in the Strasbourg Court:
 - a. The location in which such proceedings are opened need to be the debtor's 'COMI' as envisaged by the EIR Recast (Article 3(1) EIR Recast)
 - b. PAJ needs to fall within the Personal Scope of the EIR Recast (Article 1(2) EIR Recast)
 - c. The proceeding needs to fall within the 'Material scope' an insolvency proceeding has to be listed in Annex A of the EIR Recast. (Article 2, Point 4 EIR Recast)
 - d. The temporal scope must be checked.
3. As for the Territorial Scope, the debtor's 'COMI' has to be within the EU (excluding Denmark). This is confirmed by Article 1(1), which states that "The courts of the Member State within the territory of which the centre of the debtor's main interests is situated shall have jurisdiction to open insolvency proceedings ('main insolvency proceedings')."
4. As for what constitutes a COMI under the EIR Recast, Article 3(1) continues to state 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.*" And that "*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.*"
5. The collective effect of Article 3(1) of the EIR Recast is that:
 - a. The courts with the jurisdiction to open insolvency proceedings are those situated in the territory where the debtor's main interests is situated.
 - b. The debtors COMI is the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.
 - c. The debtors COMI is presumed to be the place of the registered office.
6. Therefore, as far as the territorial scope is concerned:
 - a. PAJ's COMI would be considered to be France, as PAJ is a "**France-registered** toy shop company" (emphasis added).
 - b. Since it was PAJ that concluded a line of credit agreement with a Spanish bank and had plans to expand the business, it appears that PAJ conducts the administration of its business in France.
 - c. Therefore, the court of Strasbourg, France falls within the territorial scope referred to in Article 3(1) of the EIR Recast. Therefore, the requirement of the geographical scope is satisfied.

7. As for the Personal Scope, Article 1(2) of the EIR Recast limits the application of the said EIR Recast to persons and entities other than “*insurance undertakings, credit institutions, investment firms and other firms, institutions and undertakings to the extent that they are covered by Directive 2001/24/EC; or, to collective investment undertakings*”.
8. However, as PAJ is a toy company it does not seem to fall within any of the restricted/excluded entities identified in Article 1(2). Therefore, PAJ is not disqualified from initiating proceedings under the EIR Recast on this ground.
9. As for the Material Scope of the proceeding, the proceeding opened by the Strasbourg Court must be listed in Annex A of the EIR Recast. (Article 2, Point 4 EIR Recast). The decisive role of Annex A was previously confirmed by the CJEU in Case C-116/11, *Bank Handlowy w Warszawie SA v Christianapol*, where the court noted that “... *once proceedings are listed in Annex A to the Regulation, they must be regarded as coming within the scope of the Regulation. Inclusion in the list has the direct, binding effect attaching to the provisions of a regulation.*” The proceeding of ‘Sauvegarde’ is listed in Annex A of the EIR Recast. Therefore, it appears that the proceeding opened by the Strasbourg Court has material scope.
10. As for the Temporal Scope, the EIR Recast came into force from 26 June 2017. Since the action was filed on 29 June 2017 which is after 26 June 2017, this brings the proceeding within the temporal scope of the EIR Recast.
11. The proceedings opened by the Strasbourg Court meets the requirements of the Territorial, Personal, Material and Temporal scope. Therefore, the EIR Recast will be applicable.

Question 4.3 [maximum 5 marks] 4

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.

1. The EIR Recast allows for the opening of one or more secondary insolvency proceedings against a debtor in any Member State where it possesses an establishment (Article 3(2) EIR Recast). This is confirmed by Recital 23 of the EIR Recast which states that the secondary insolvency proceedings are “to run in parallel with the main insolvency proceedings.”
2. Therefore, the ‘secondary’ nature of the proceedings depends on whether the main proceedings are opened in the debtor’s COMI. If main proceedings are not initiated against the debtor in its COMI, then any other proceeding in another member state would be a stand-alone procedure and is then referred to as ‘local’ or ‘territorial’ proceedings.
3. However, since the main procedure appears to fall under the EIR Recast, the secondary insolvency proceedings initiated by Spanish bank would in fact be ‘secondary’ in nature.

4. To identify whether the Spanish bank can open secondary insolvency proceedings under the EIR Recast, it needs to be ascertained whether the requirements to be fulfilled in opening secondary proceedings under EIR Recast have been fulfilled.
5. The requirements to be fulfilled in opening secondary proceedings under EIR Recast appear to be as follows:
 - a. The proceeding needs to be in another Member State, where the debtor has an establishment within the territory of that other Member State Article 3(2)
 - b. Generally opened after the main proceeding, unless it falls within Article 3(4)
6. 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.
7. This requires that the debtor that the 'establishment' have
 - a. A presence in the Member State for longer than a three-month period prior to the request to open main insolvency proceedings;
 - b. a degree of stability, indicated by the words 'non-transitory'; and
 - c. human means and assets
8. An 'establishment' could also be a branch or representative office; that is, it need not take any particular corporate form.
9. it appears that PAJ's warehouse could be considered an 'establishment' as:
 - a. it has been established in Spain since prior to 2013, which is a much longer period than 3 months prior to the filing of the proceeding
 - b. it appears to be non-transitory as it has not changed its location since it was established
 - c. the warehouse itself appears to be the asset. It is unclear as to whether PAJ stores its goods there, or whether it is merely for the purpose of being rented out.
10. In any event, PAJ's line of credit agreement with a Spanish bank where it maintains a bank account, seems to suggest steady activity in Spain. Therefore, it is unlikely that the warehouse would not be considered to be an 'establishment'.
11. The effects of secondary insolvency proceedings shall be restricted to the assets of the debtor situated within the territory of the Member State in which those proceedings have been opened. (Article 34 EIR Recast)
12. Therefore, it would appear that secondary insolvency proceedings be opened in Spain under the EIR Recast.

While your answer is very detailed and reasoned, it 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: 14 out of 15.

*** End of Assessment ***

Marks awarded: 47 out of 50