INSOL INTERNATIONAL
FOUNDATION
CERTIFICATE
in INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2B

THE EUROPEAN INSOLVENCY REGULATION

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

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.

2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way**. **DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.

3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).

4. You must save this document using the following format: **[student number.assessment2B]**. An example would be something along the following lines: 202021IFU-314.assessment2B. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the word "studentnumber" with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked**.

5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words**.

6.1 If you selected Module 2B as one of your **compulsory modules** (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is **23:00 (11 pm) GMT on 1 March 2021**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2021. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.

6.2 If you selected Module 2B as one of your **elective modules** (see the e-mail that was sent to you when your place on the course was confirmed), you have a **choice** as to when you may submit this assessment. You may either submit the assessment by **23:00 (11 pm) GMT on 1 March 2021** or by **23:00 (11 pm) BST on 31 July 2021**. If you elect to submit by 1 March 2021, you **may not** submit the assessment again by 31 July 2021 (for example, in order to achieve a higher mark).

7. Prior to being populated with your answers, this assessment consists of **9 pages**.

ANSWER ALL THE QUESTIONS

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

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

Question 1.1

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

(a) True, before the EIR 2000, the EU has not sought to harmonise the insolvency laws of EU Member States.

(b) False, there was another EU Regulation regulating insolvency law at EU level before the EIR 2000.

(c) False, an EU Directive regulating insolvency law at EU level existed before the EIR 2000.

(d) False, the EU sought to draft Conventions with a view to harmonising the insolvency laws of EU Member States as early as the 1960s, but these initiatives failed.

D was the correct answer.

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).

C was the correct answer.

Question 1.9

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

(a) Where the decision to open the insolvency proceedings was taken in flagrant breach of the right to be heard, which a person concerned by such proceedings enjoys.

(b) The judgment, subject to recognition, was passed with incorrect application of the applicable substantive law.

(c) The court, which has opened insolvency proceedings (originating court), most certainly did not have international insolvency jurisdiction to do so under the EIR Recast.

(d) The rule applied by the court, which has opened insolvency proceedings (originating court), is unknown or does not have an analogue in the law of the jurisdiction, in which recognition is sought.

Question 1.10

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

Assume that:

- Under French law, creditors (except employees) must file proof of their claim within two (2) months from the publication in the French legal gazette of a notice of the judgment opening the insolvency proceedings.

- Under Irish law, the period within which creditors must file their claims is 15 days, as set in the order opening secondary insolvency proceedings against LPZ Corp.

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

(a) Within two (2) months following the publication date, as guaranteed by the French law (law applicable to the creditor).

(b) Within 15 days, as stipulated in the applicable *lex concursus secundarii* (law of the insolvency proceeding at issue).

(c) Within 30 days following the publication of the opening of insolvency proceedings in the insolvency register of Ireland.

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

C was the correct answer.

Marks awarded: 7 out of 10.

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks] 1

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

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

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

Statement 1: The Concept of COMI and International Jurisdiction under Article (3)(1), noting that the Centre of Main Interests is presumed to be the place of the location of the registered office. However, in the event of a Company moving their registered office within 3 months prior to the request for the opening of proceedings, the law of the prior jurisdiction

Statement 2: The concept of secondary proceedings under Article 34. This statement was relating 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.

Article 41 – Cooperation and communication between insolvency practitioners
Article 42 – Cooperation and communication between courts
Article 43 – Cooperation and communication between insolvency practitioners and courts

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.

Article 1 – scope which allows for the purpose of rescue, adjustment of debt, reorganisation or liquidation.
Article 41 which allows for insolvency practitioners in both main and secondary proceedings to cooperate and explore the possibility to restructure the debtor.
Article 47 which allows for an insolvency practitioner to propose restructuring plans in secondary proceedings only, and for the insolvency practitioner in the main proceedings to propose that measure.

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.

Article 38(3), which provides that where the insolvency practitioner in the main proceedings has given an undertaking in accordance with article 36, the court that receives a request for the opening of secondary proceedings shall at the request of the insolvency practitioner not open those proceedings, as long as the court is satisfied that local creditors are adequately protected.

Article 47, which allows closure of proceedings by restructuring plan or similar. Effectively, if the law of the Member State where the secondary proceedings are opened allows for insolvency proceedings to be closed by restructuring procedures, then the insolvency practitioner in the main proceedings can propose such a measure in accordance with the law of the second state.

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.

The EIR Recast expands and improves upon the EIR 2000 with respect to insolvency proceedings across the European Union. However, the EIR 2000 itself contained a provision that demonstrated a recognition that the business and legal landscape may change over time, resulting in the EIR 2000 potentially requiring amendments to be made to the EIR 2000 to ensure its relevance and application to the European Union.

Firstly, Article 46 of the EIR 2000 required the European Commission to present a report that examined the application of the EIR 2000 no later than 1 June 2012, and subsequently every 5 years thereafter, as well as any proposal for the adaptation of the EIR 2000 if required. A number of notable legal scholars, in 2014 prepared the "Heidelberg – Luxembourg – Vienna Report"[1] (**Report**) which formed part of the basis for the European Commission Report to be prepared in accordance with Article 46. As succinctly stated in the Report, the EIR 2000 was focussed on the implementation of the universality of national insolvency proceedings across the European Union, yet with the passage of time, the focus of insolvency law had significantly changed. Recent developments (at the time) had shown that modern insolvency law was now based around the key focus of business restructuring, and to provide protection and the ability

[1] B Hess, P Oberhammer & T Pfeiffer, European Insolvency Law, The Heidelberg – Luxembourg – Vienna Report, CH Beck, Hart and Nomos 2014.

to be discharged from unbearable debts for private debtors, whilst avoiding the established formal insolvency processes.[2]

10 years after the formal adoption of the EIR 2000, the Commission had reviewed the operation of the EIR 2000 and determined that the EIR 2000 needed amendment, as set out in the Commission's Report and Proposal (**Proposal**).[3] The Commission, in the Proposal determined that there were ultimately 5 main shortcomings of the EIR 2000 in respect of the modern-day applicability of the EIR 2000.

Firstly, the EIR 2000 failed to cover any procedures relating to the restructuring of a company at the pre-insolvency stage, or proceedings which continue to allow the management to remain in charge of the company. These new provisions were being introduced throughout the EU and were becoming a regularly used tool for businesses, and it was important to note that the EIR 2000 did not incorporate some personal insolvency proceedings in its scope.[4]

The EIR 2000 also did not adequately set out the framework for determining the correct Member State that holds the competency for opening insolvency proceedings, resulting in companies moving their centre of main interests regularly to take advantage of certain laws, and meaning that it is ultimately difficult to determine the correct jurisdiction.[5]

The EIR 2000 also was not satisfactory in how it dealt with the opening of secondary proceedings, including the issue that the opening of secondary proceedings ultimately hampered the efficiency of overall estate of the debtor.[6] Under the EIR 2000, the opening of secondary proceedings removed the control of a liquidator for any available assets in other jurisdictions, resulting in a significant and ultimately untenable inefficiency in the long run.

Despite the nature of the EIR 2000 in dealing with universality, there were no provisions that obligated the publication of the opening of any insolvency proceedings or the lodgement of claims in those proceedings, meaning that there would be creditors who were ultimately missing out on proceedings. Further, there was no ability for some creditors to easily lodge claims in the various proceedings, meaning that there was no easy nor consistent approach way to lodge claims in insolvency proceedings.[7]

Finally, the EIR did not contain any provisions relating to the insolvency of groups of companies, or multi-national enterprises. The Proposal highlighted those insolvencies of multi-national enterprises was common, but by failing to adequately provide for these proceedings ultimately also prevented successful restructuring or rescue of the group of companies.[8] The EIR 2000 required separate proceedings that were independent of each other.

Evidently, the proposal highlighted the ongoing limitations of the EIR 2000, which would have created further inefficiencies as time passed but would have led to greater confusion and a failure to keep up with the modern laws within the European Union.

Question 3.2 [maximum 5 marks] 5

[2] Ibid page 10, 2.2.1 'Main Issues'.
[3] Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 On Insolvency Proceedings, 12.12.2012, page 2.
[4] Ibid 2.
[5] Ibid, 3.
[6] Ibid.
[7] Ibid.
[8] Ibid.

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.

As highlighted above, the EIR 2000 had a number of shortcomings. The EIR Recast has in adapting to the issues highlighted in Report and Proposal, has resulted in a number of improvements as discussed in the following.

The amendments to the scope, and the broader scope of the EIR Recast now includes a broader definition of the insolvency proceedings to include both hybrid proceedings and pre-insolvency proceedings has now brought the EIR into a common position with the laws of countries within the European Union, but also into line with the modern practice of insolvency. This amended scope, as set out in Article 1(1) and numerous recitals in the EIR Recast ensures continuity throughout the European Union, and an understanding that the laws that govern insolvency proceedings in multiple states now reflect the legal position and process in those states. Further, it is important that restructuring and rescue proceedings are now adequately reflected in the EIR Recast, given the way in which these proceedings are becoming more prevalent.

The EIR Recast now also deals with the insolvency of groups of companies.[9] As highlighted above, the EIR 2000 provisions for the insolvency of groups of companies was severely limited and required individual proceedings for each company. However, the EIR Recast has now established a number of obligations for both insolvency professionals and companies to cooperate and communicate with each other to ensure efficiency consistency across the insolvency procedures pertaining to groups of companies. Further the EIR Recast also includes a number of procedural tools that allow for the staying of other proceedings where appropriate, or the power for the insolvency professional to propose a reconstruction and rescue plans for the group of companies.

Finally, and what is arguably the main improvement of the EIR Recast in my view, is the requirements for insolvency practitioners to publish the existence of proceedings, as well as relevant court decisions pertaining to cross-border insolvencies in a register that is publicly accessible.[10] Further, the interconnection of insolvency registers across all of the member states of the European Union means allows for ease of access to information and notifications pertaining to insolvencies for affected parties. Further, it is also important that the EIR Recast now allows for standard forms for the lodgement of the claims in insolvency proceedings, benefitting both creditors and insolvency professionals.

Question 3.3 [maximum 5 marks] 3.5

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.

Despite the positive improvements to the EIR Recast, one of its flaws is that there are limited powers granted to insolvency practitioners in terms of the avoidance of transactions and their other powers as granted within specific jurisdictions. This is difficult to implement where there are different legislations at stake, and could be seen to be a political issue as well. How can this be corrected?

[9] EIR Recast, Article 2(13), Articles 56 -77.
[10] EIR Recast Articles 24 – 29.

The EIR Recast, despite moving forward with dealing with the restructuring process, still does not have sufficient restructuring procedures like a number of jurisdictions globally, including provisions such as cram down (where there is a potential restructuring plan in place but a number of dissenting creditors) and dealing with debtor in possession procedures. These seem to have been overlooked despite the EIR Recast accepting the need for the restructuring and other procedures being in place. This may be harmonised by including particular wording regarding these options in the EIR, however given the current operational framework of the EIR Recast, it remains hampered by differing laws in some jurisdictions.

Marks awarded: 13.5 out of 15.

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

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

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

Question 4.1 [maximum 5 marks]

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.

The EIR 2000 set out the requirements for opening proceedings in Article 3(1), which stated that the Courts of the Member State where the centre of main interests is situated shall have the jurisdiction to open insolvency proceedings, and because the debtor is a company, the centre of main interests under the EIR 2000 was the location of its registered office. Given that the registered office is within France, then the Strasbourg court would have jurisdiction.

A decision of the European Court of Justice (as it then was) demonstrated that the notion of COMI was based on reference to a number of objective and identifiable criteria.[11] The objective criteria could only rebut the presumption of the registered office being the COMI if it could be proven that the administration of the debtors interest occurred in a different state to that of the registered office, for instance, in this scenario if the French debtor had their 'administration' in Germany.

Notwithstanding the location of the registered office in France, it appears as though there is arguably an establishment in Spain. This however, appears to only be a warehouse, and on this basis the COMI is still within France and the Strasbourg [court] has jurisdiction under the EIR 2000.

[11] *Eurofood IFSC Ltd* Case C-341/04, ECLI:EU:C:2006:281 (May 2, 2006), p33.

Question 4.2 [maximum 5 marks] 5

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

To determine if the EIR Recast is applicable, it is important to ensure that the scope of the EIR Recast is met by the potential proceedings. The scope of the EIR Recast is temporal (i.e. time), personal (to whom do the proceedings relate to), whether the proceedings are covered by the EIR Recast, and what if any, are the geographical limitations.

In this situation, we can confirm that the debtor has a COMI within a member state of the EU[12], being France and so the geographical scope has been satisfied. In assessing the COMI however, we need to ensure that the COMI of the debtor has not altered in any recent time.[13] Given that the registered office is still within France, and the Spanish establishment does not alter the COMI, France would have the jurisdiction.

Secondly, we can confirm that the entity of which the proceedings concerns is not an excluded undertaking as set out in the EIR Recast, as the entity is not a bank nor any other entity as set out in article 1(2). Thirdly, the insolvency procedure has to be listed in Annex A of the EIR Recast. The proceedings are *procedure de sauvegarde*, which is listed as the first available proceedings in France. Finally, the temporal scope must be satisfied, meaning that the proceeding must have been opened after the date on which the EIR Recast entered into force, being 26 June 2017. These proceedings were opened after the entry of the EIR Recast.

On the above basis, these proceedings would fall within the operation of the EIR Recast.

Effectively, the EIR Recast applies as follows:

1. The debtor has COMI in Member State of the EU (excluding Denmark) – Yes.
2. The debtor is not a bank, insurance company or another excluded undertaking – Yes
3. The proceeding opened against the debtor is listed in Annex A to the EIR Recast – yes
4. The proceeding has been opened after 26 June 2017 – Yes.

Question 4.3 [maximum 5 marks] 3.5

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

The EIR Recast allows for secondary insolvency proceedings to be opened in jurisdictions where the debtor possesses an establishment.[14]

Any form of establishment is crucial to the opening of these secondary proceedings. As set out in Article 2(10) of the EIR Recast, an establishment means any place of operations where a debtor carries out or has carried out in the 3 months prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets. Effectively this requires humans to carry out the 'economic activity', that is the business of the debtor.

[12] EIR Recast article 1(1).
[13] EIR Recast article 3(1).
[14] EIR Recast Article 3(2).

Here, the only links to Spain for the debtor are the warehouse that is leased to other toy companies; a bank account and line of credit extended by the Spanish bank and to have signed some non-binding memoranda regarding local distributors. These factors are prima facie unlikely to satisfy the criteria for a non-transitory economic activity by human means.

Further, and in terms of jurisprudence, the CJEU has examined this issue and found that the existence of bank accounts does not satisfy the definition for an establishment.[15]

On this basis, the Spanish elements of the business does not satisfy the criteria for an establishment, and as such does not provide for proceedings to be opened in Spain under the EIR Recast.

Your answer is correct but you have made reference to case law.
Based on the facts, it would seem that the finding of an establishment would not be made out in Spain, as these facts do not qualify as "non-transitory economic activity with human means and assets" (Article 2(10) of the EIR Recast). The EIR Recast does not have requirements as to form i.e. that there has to specifically be a corporate branch or representative office, in order for there to be an establishment. The EIR Recast places more importance on the substance, looking at both human resources and assets. Nevertheless, the facts of the case suggest that the threshold for there to be considered an establishment in Spain has not been reached, as there is only a bank account and intentions to expand into the adult gaming market in Spain, and the signing of some non-binding memoranda of understanding.
In the CJEU decision in *Interedil Srl v Fallimento Interedil Srl,* the Court stated at paragraph 64 that the term "establishment" under the EIR Recast requires the presence of a structure consisting of a "*minimum level of organisation and a degree of stability necessary for the purpose of pursuing an economic activity. The presence alone of goods in isolation or bank accounts does not, in principle, meet that definition*." Although there is no explicit time limit on how long the activity has gone on for, an occasional place of operations would not be considered as an establishment. This assessment is an objective one, rather than viewed through the subjective lens of the debtor (see paragraph 71 of the Virgós-Schmit Report).
Applied to this case, this is significant because it cannot be said that because there was the intention to enter the Spanish market (by signing non-binding MOUs), that this demonstrated sufficient connection for there to be an establishment in Spain.
The same *Interedil* decision also held that if the bodies responsible for the management and supervision of the debtor are in the same place as its registered office, and the management decisions of the company are in fact taking place there, the registered office presumption (i.e. the COMI is presumed to be the same place as the registered office) cannot be refuted. In this case, the facts do not expressly say that the management takes place in France, although given that the first store was opened there, this is possible.
In this case, in consideration of the facts and the relevant case law, it appears that the minimum level of organization and stability has not been demonstrated for Spain. Therefore, it would not be possible to open secondary insolvency proceedings in Spain.

Marks awarded: 13.5 out of 15.

*** End of Assessment ***

Marks awarded: 43 out of 50

[15] *Interedil Srl v Fallimento Interedil Srl*, Case C-396/09, ECLI:EU:C:2011:671 (Oct 20 2011), [62].