



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).

C was the correct answer.

Question 1.9

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

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

Question 1.10

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

Assume that:

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

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

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

Marks awarded: 9 out of 10.

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks] 2

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

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

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

Statement 1: This statement refers to the concept [?] of pre-insolvency forum shopping. To combat the ill-effects of pre-insolvency forum shopping in addition to the suspect period concept, the COMI of a company must be ascertainable by third parties. However, companies are allowed to transfer registered office to acquire benefit of more favorable legislations without the change of the real head office is considered to come under the ambit of freedom of enterprise and did not amount to forum shopping.

Statement 2: The provision for opening of secondary proceedings in any member state where the company has an establishment leads to the creation of separate insolvency estates and application of the lex concursus of the state where such secondary proceedings have been initiated, which results in protection of local rights and consideration available to the creditors under the local law. Secondary proceedings can only follow the opening the main proceedings thereby protecting the procedural integrity of the process.

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.

EIR Recast has laid down a comprehensive framework for communication and co-operation between insolvency practitioners involved in the proceedings at various jurisdictions against the same debtor. Article 31(2) mandated cooperation and co-ordination between the insolvency practitioners so long as such coordination does not conflict with the practices under the respective domestic law.

Article 41 further supplements this provision by laying down that co-operation and co-ordination could be by way of agreements and protocols which addresses specifically progress made in lodging and verifying claims and all measures taken for restructuring or terminating the proceedings. Further, insolvency practitioners in secondary proceedings must provide the main practitioner an early opportunity to submit proposals on the realisation or use of assets in secondary insolvency proceedings.

Article 42 further mandates courts where request for opening of insolvency proceedings are pending to coordinate with other courts faced with a similar issue thereby increasing the ambit of coordination to the even the pre-opening of insolvency proceedings.

Further under Article 43, it is laid down the following: (i) insolvency practitioner must co-operate and communicate between insolvency practitioner in the main proceeding with courts before which a request to open a secondary proceeding is pending; (ii) In flip situation, where

secondary proceedings have been opened the insolvency practitioner must coordinate with the court where a request to open main proceeding is pending; (iii) Lastly, insolvency practitioner in one secondary proceeding must coordinate with courts that have received a request to open another secondary proceeding against the debtor company.

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 of the EIR Recast extends not only to liquidation-based procedures but also the rescue and restructuring of economically viable distressed businesses. It extends to proceedings in respect of debtors who only have a likelihood of insolvency but would be rescued with timely intervention and in proceedings where the debtor is fully or partially in control. Further in the stage of communication and co-ordination, Article 41 lays down that these obligations arise in respect of such proceedings as well and the court and insolvency practitioners must coordinate for effective implementation of a rescue and/or restructuring plan as well.

Further, Article 45 of the EIR Recast provides for a stay on opening of secondary proceedings where a temporary stay of individual proceeding has been granted in the main proceedings. It provides a breathing space for the debtor to negotiate a restructuring deal with the creditors. Finally, the group insolvency related provisions in Article 53 mandates all members of the corporate group to be brought under the same jurisdiction which is a step taken to enhance the chance of the successful rescue and restructuring of the entire group.

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.

Examples of instruments restricting opening of secondary proceedings are as follows:

Synthetic secondary proceedings: Where the insolvency practitioner has issued an undertaking to protect the general rights of local creditors in accordance with Article 36, the court asked to open secondary proceedings must not allow for the same if satisfied with the undertaking of the insolvency practitioner in the main proceeding. This seeks to ensure centralisation of proceeding and also safeguards the creditors' legitimate expectations and preferential rights.

Stay of secondary proceedings: In accordance with Article 45, the court having the jurisdiction over the main proceedings may grant temporary stay over opening of secondary proceedings where a stay on individual proceedings is already in effect and provide the much needed respite to debtors to negotiate a restructuring deal with the creditors. A request to this effect is specifically required to be filed by the insolvency practitioner or the debtor in possession. The stay is only temporary in nature and cannot exceed a period of 3 months.

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] 3

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

The erstwhile EIR was based on a convention signed in 1995 and overtime the provisions therein were outdated to the extent that it did not complement the provisions and law in various member states. The erstwhile EIR was more liquidation centric and provided mostly for distribution of the debtor's assets, there was no concept of restructuring where the intervention could be made at a pre-insolvency period. Therefore, the new EIR recast expanded the scope of the regulations to include quasi-collective proceedings under the aegis of the court to effectively rescue and restructure corporate debtors before they reached an insolvency stage. Further, the special situations and interpretations that were made by the CJEU over the years of implementation of erstwhile EIR were codified in the EIR Recast whereby a clearer definition of the what would constitute an insolvency event was laid down with a list of events in Annex A of the EIR Recast. It also laid to rest whether the list in Annex A is directive or mandatory in nature and reinforced that it has binding effect. Therefore, this move brought in much needed legal certainty and third-party predicability to the proceedings under the EIR Recast. In furtherance of the same the definition of COMI has also been specifically moved from the recital to the Art. 3(1) thereby reaffirming that all factors such as where the debtor conducts the administration of interests on a regular basis and more so the perception of the creditors as to where a company's COMI is located is also crucial.

Therefore, the EIR Recast brought in much needed clarity into the whole implementation process by codifying the standard practices that had been adopted by the CJEU over the years. As predictability and clarity are the corner stones in cross-border insolvency proceedings the EIR Recast was a much needed welcome change.

It would have made your answer stronger had you referred to policy documents drafted before the EIR Recast, such as the Heidelberg report, which highlighted five aspects in need of reform.

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.

There have been several ground-breaking changes brought out to the insolvency regulation through the EIR 2000. For instance the shift of focus from just the distribution of the debtor's assets spread across member states to provisions providing an option of intervention at a pre-insolvency stage with the aim of rescuing the business and restructuring it in a way that would aid its survival. The scope of what would be considered as insolvency proceedings was expanded under the EIR Recast and it specifically eliminates mentioning insolvency or likelihood of insolvency for proceedings to be begun. It simply requires for proceedings to be based on law pertaining to insolvency in the member state.

Second important improvement would be the revised definition of COMI, which has been specifically moved from the recital to the Art. 3(1) thereby reaffirming that all factors such as where the debtor conducts the administration of interests on a regular basis and more so the perception of the creditors as to where a company's COMI is located is also crucial. Article 3 lays down that the place of the registered office and habitual residence shall be considered as the centre of main interests. It also introduces suspect period of 3 months prior to the start of

the proceeding with respect to any change of the debtor's COMI during the suspect period shall not be considered for the determination of COMI. This step is taken to ensure predictability of the COMI to the creditors of the debtor company.

Lastly, inter alia other changes introduced in the EIR recast, an important change was introduction of a framework for group insolvencies. Wherein insolvency proceedings relating to different members of a corporate group are opened in more than one member state. The relevant insolvency professionals are under an obligation to communicate with each other and cooperate with the on-going proceedings in other member states. Further, an independent insolvency practitioner may be appointed as a group coordinator who proposes a group coordination plan and mediate disputes and take all steps for necessary for the successful implementation of the resolution plan.

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.

One major flaw of the EIR Recast is also incidentally the a [?] major advantage of the recast. The non-inclusion of a type of national procedure which in sum and substance is in the nature of an insolvency procedure but is not included in the list laid down in Annex A. Even if the national judges are of the opinion that it would be included under the meaning of insolvency proceedings in Article 1 non-inclusion of the same in Annex A would mean that the procedure would not be recognised by other member states. A related problem could also be if a procedure included in Annex A no longer meets the criteria in Article 1 due to a change in the procedure or law applicable. These issues would only be solved if the courts could go into the merits of the other proceedings and that would hinder the almost automated process set out in the EIR Recast and therefore affect the efficiency of the EIR Recast.

Marks awarded: 13 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.

Article 3(1) of EIR 2000 established that insolvency proceedings should be initiated at the place of the debtor's main interests. However EIR 2000 did not lay down a strict definition of COMI. However, the main proceedings had universal scope and encompassed all of the debtor's assets throughout the EU. In the present case the main operations of the Company are in France and it only had expansion plans in Spain which did not materialise. Therefore, going by the definition and interpretation of COMI it would be adjudged to be France. This is further reaffirmed by the Eurofood IFSC Ltd case, wherein Eurofood IFSC Ltd. had its registered office in Ireland and it was a wholly owned subsidiary of Parmalat SpA which was incorporated in Italy. Eurofood's primary operation was to provide financing facilities to the Parmalat group. Finally, in 2003 Parmalat was admitted to extraordinary administration proceedings in Italy and a compulsory winding up proceeding was initiated against Eurofood in Ireland. Italian Court took a view that Eurofoods COMI was Italy and therefore had international jurisdiction to decide. However, Irish court confirmed that Eurofood's COMI was the Irish Court.

The pillars of determining COMI are legal certainty and foreseeability for all stakeholders dealing with the debtor. EIR contains a registered office presumption which can only be rebutted by objective factors that indicate that the debtor's interest happens in a different state. In the present case PAJ does not have any ongoing operations in Spain other than the warehouse operated and rented out to other toy companies. Therefore, the main proceedings would have to be opened in France.

Question 4.2 [maximum 5 marks] 1.5

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.

The main insolvency proceedings are intrinsically connected to the centre of main interests of the debtor. Article 3(1) of the EIR Recast lays down that the COMI shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties. In the present case the main operations of the Company are in France and it only had expansion plans in Spain which did not materialise. Therefore, going by the definition and interpretation of COMI it would be adjudged to be France. To be adjudged as the COMI the following criteria must be fulfilled:

- (1) It must be legally ascertainable by third parties especially creditors;
- (2) The activity of the debtor should also be regular and lasting to create COMI;

Further, the EIR Recast has introduced certain presumptions for indicating COMI of the debtor. One of the main presumptions is the registered office presumption and in this case the registered office of PAJ is in France. The relevant information required in this case is whether majority of the operations are carried out in France and whether the management of the company is also stationed at France, following the precedent set in *Interedil Srl v. Interedil Fallimento Srl* the CJEU has ruled that when the bodies responsible for the management and supervision of the debtor exist in the same place as the registered office then the registered office presumption becomes irrefutable. Further, the guidance under the judgement and the wording of the EIR Recast reiterates that mere presence of some assets will not be sufficient to rebut the registered office presumption. Therefore, in this case presence of a warehouse and a bank account would not be enough to rebut the registered office presumption.

You fail to answer the question which was whether the EIR Recast is application. You were supposed to discuss all the different scopes of the Regulation (geographical, temporal, material, etc.).

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.

Article 3(2) of the EIR Recast allows opening of secondary insolvency proceedings against a debtor in a member state where such debtor has an establishment. In accordance 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 request open main insolvency proceedings a non-transitory economic activity with human means and assets. Following the principles laid down in the Interedil judgement, it is apparent that pursuit of economic activity and presence of human resources coupled with a minimum level of organisation and stability in operations is required to meet the conditions to qualify as an 'establishment'. It goes on to lay down that present of goods or a bank account alone is not enough to establish presence of an establishment. In the present case, it is stated that the main operations in Spain was the warehouse and a credit line was availed from a Spanish Bank, however whether actual operations in line with the expansion plan ever materialised beyond non-binding MOUs. Therefore, a preliminary view would be that establishment cannot be said to be present in Spain and therefore secondary proceedings could not be initiated.

Marks awarded: 11.5 out of 15.

*** End of Assessment ***

Marks awarded: 43.5 out of 15.