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**.

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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).

C was the correct answer.

Marks awarded: 8 out of 10.

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 2 marks] 0

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

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

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

[Type your answer here]
You did not provide any answer.

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 of EIR Recast mandates cooperation and communication between insolvency practitioners.

2 Article 42 of EIR Recast provides for cooperation and communication between courts.

3 Article 43 of EIR Recast mandates 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.

1 Article 1 – it provides that the EIR Recast applies not only to traditional liquidation orientated procedures but also to proceedings designed to rescue economically viable but financially distressed businesses.

2 The other example is the provision of the EIR Recast which abolished the requirement that secondary proceedings must be winding up proceedings as previously stipulated in article 3(3) of the EIR 2000.

3 Article 41(2)(a) EIR Recast – it provides that the communication between insolvency practitioners which should occur as soon as possible should deal with any progress made in lodging and verifying claims and all measures aimed at rescuing or restructuring the debtor, or terminating the proceedings.

Question 2.4 [maximum 2 marks] 1.5

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 first* is the right to give an undertaking - synthetic secondary proceedings. According to article 38(2) of the EIR Recast, if 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 such proceedings if it is satisfied that the undertaking concerned sufficiently protects the general interest of local creditors. Article 36 of the EIR Recast provides that in order to avoid the opening of secondary insolvency proceedings, the insolvency practitioner in the main insolvency proceeding may give a unilateral undertaking in relation to the assets situated at the member state in which the secondary insolvency proceedings could be opened, that when distributing those assets or the proceeds received as a result of the realisation, he will comply with the distribution and priority rights under the relevant foreign insolvency law which the creditors would have been entitled to if secondary insolvency proceedings were to be opened in that member estate.

2 *The second* is when an insolvency practitioner in respect of the main proceedings, for example, requests the court to temporarily stay the opening of secondary insolvency proceedings. This is to prevent a possible frustration or undermining of negotiations which the debtor may be involved in to rescue the company, following the stay which results from the opening of main proceedings. Which article are you referring to here?

Marks awarded: 7.5 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.

1 At the outset, it bears mentioning that the European Commission was obliged to prepare a report on the application of the EIR 2000 with a proposal for its adaptation, if necessary, by no later than 1 June 2012. Why was this the case? Reference to the adequate article of the EIR 2000 missing.

2 Although it was generally accepted that the EIR 2000 was a success, after it had been in place for 15 years, it became evident that some of its provisions had to be amended, whilst other developments made it necessary for the introduction of completely new rules. That is why a new insolvency regulation was needed and

recommended by the European Commission in 2012. This resulted in the new EIR Recast which was adopted in 2015. Notwithstanding its adoption date, it came into force on 26 June 2017 and replaced the previous EIR 2000.

3 The EIR 2000 did not respond sufficiently to the needs of the developing insolvency and restructuring regime. More specifically, in contrast to its predecessor (i.e. the EIR 2000), the EIR Recast addresses the needs of insolvency practice (broadening scope of restructuring proceeding, stronger rules for cooperation between insolvency practitioners and courts, possibility of proceedings with regard to members of the same group of companies), improvement of creditor information (interconnectivity of insolvency registers) as well as modernisation of legal rules.

4 It is thus clear, in light of the aforegoing, that although the EIR 2000 had become outdated somewhat and thus not responsive to the current and modern needs of insolvency practice, tt was no longer feasible for the European regulation to remain insolvency orientated. It had to adapt and become business rescue orientated too.

A reference to the European Parliament's policy document listing areas for reform would have made your answer stronger.

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.

Introduction

To answer this question I will focus (i) notification of creditors on the opening of insolvency proceedings in other EU Member States, (ii) the establishment and maintenance of insolvency registers and (iii) the insolvency of corporate groups under the EIR Recast.

Notification of creditors and insolvency registers

1 Any meaningful and proper vindication of a creditor's rights to file and prove claims depends on the creditors' knowledge about the opening of insolvency proceedings. To achieve this, the EIR Recast prescribes mandatory rules regarding the notification of creditors and establishment of insolvency registers. It bears mentioning that these rules are regarded as a major improvement when contrasted against the provisions of the EIR 2000 and should stimulate a more efficient administration of insolvency proceedings spanning across several EU Member states.

2 In relation to the duty to inform creditors:-

2.1 despite the fact that creditors' "*knowledge is power*" and thus critical to the efficient and expeditious administration of cross border insolvencies, article 21 of EIR 2000 afforded a liquidator the discretion (as opposed to imposing an obligation) to publish information regarding the opening of insolvency proceedings in other member states. This means that the liquidator could in certain circumstances exercise his discretion and permissibly not publish information regarding the opening of insolvency proceedings in other member states and thereby prejudicially deprive creditors of the critical information

without which they would not know when, how and where to lodge and prove claims in the estate of the foreign debtor concerned;

2.2 on the other hand, the EIR Recast is (or at least appears to be) mindful of the need for information pertaining to the opening of cross border insolvencies to be publicised. That is why article 28(1) of the EIR Recast requires (thus imposes a legal duty on) an insolvency practitioner or debtors in possession to request the publication of the notice on the opening of insolvency proceedings, whether main or secondary, at the place of the debtor's establishment in accordance with the publication procedures provided for in that member state. This obligation stems from the presumption that the debtor's establishment coincides with the location of a number of its creditors. The publication must specify where necessary the name of the insolvency practitioner appointed and whether the opened proceeding is main or secondary;

2.3 Article 28(2) EIR Recast provides that the insolvency practitioner or the debtor in possession may also request the publication in any other member state, if they deem it necessary or beneficial for the proper administration of the insolvency estate, for instance where the debtor has a significant number of assets or creditors in that member state;

2.4 Article 54 EIR Recast forces the court opening the insolvency proceedings or the insolvency practitioner appointed by such court to immediately inform the known foreign creditors as soon as insolvency proceedings are opened. The requirement to separately inform foreign creditors arises from challenges and impediments typically faced by foreign creditors – i.e. language, procedure and lack of information in relation to the foreign insolvencies. As stated above, without this critical information the foreign creditors would not know when, how and where to lodge and prove claims in the estate of the foreign debtor concerned;

2.5 importantly, the information in the creditors notices must include time limits for the lodging of claims, the penalties set out in relation to those time bars, the body or authority empowered to accept the lodgement of claims and any other measures. Such notice is also required to set out the ranking of creditors' claims and include a copy of the standard form for the lodging of claims referred to in article 55 EIR Recast or information whether that form is available; and

2.6 in relation to the procedure for informing creditors, article 54(2) EIR Recast refers to the use of individual notices, whilst article 54(3) EIR Recast stipulates the information must be furnished in terms of the standard notice form that must be published in the European e-Justice portal. Others are of the view that before the European e-Justice portal becomes fully operational, the procedures for publishing the relevant information is left to the applicable national law and will result in individual letters and/or emails sent to creditors. I agree with this.

3 In relation to insolvency registers:-

3.1 it cannot be disputed that the efficient functioning of cross border insolvency proceedings depends on meaningful and proper communication between insolvency practitioners, courts and creditors. Specifically, a court opening insolvency proceedings needs to know whether the debtor is already subject

to insolvency proceedings in another member state. Under the EIR 2000, every member state had its own insolvency registration system, which did not always work adequately and the interconnectedness of these registers was not ensured;

3.2 on the other hand, the EIR Recast made some significant improvements on this score. Article 24 EIR Recast stipulates that member states must establish and maintain in their territory one or several registers in which information concerning insolvency proceedings is published. That information is required to be published as soon as possible after the opening of such proceedings. The EIR Recast sets out the minimum information which is required to be published in the insolvency registers. For example, it includes the date of the opening of insolvency proceedings, the court that opened the insolvency proceedings, the type of insolvency proceeding (main or secondary), the debtor's name, registration number, registered office, the name, postal address or email of the insolvency practitioner and the like;

3.3 it is critical that creditors become or are made aware of information pertaining to the opening of foreign insolvency proceedings as they have (or may have) a vested interest in those proceedings. For example, they need to know how, where and when to lodge claims. They also need to know the consequences of failing to timeously lodge their claims. Without notice and information to creditors, they can never be an efficient and effective administration of cross border insolvency proceedings which treats all creditors equally. For example, foreign creditors who are deprived of the relevant information they need for purposes of proving claims may be prejudiced, whilst local creditors may be in an advantageous position as they are most likely to have all the information they need to prove claims.

The insolvency of corporate groups under the EIR Recast

4 In relation to the insolvency of corporate groups under the EIR Recast:-

4.1 it bears flagging that the deficiency of provisions dealing with insolvency of multinational enterprise groups in the EIR 2000 was regarded as a significant weakness. It is a weakness because a large number of cross border insolvencies in the EU involves groups of related companies. The entity by entity approach which prevailed under the EIR 2000 dispensation is generally regarded as inhibiting any prospects of restructuring a group of companies as a whole and often leads to breakups into different parts. Fortunately, the EIR Recast is alive to this problem. To address it, the EIR Recast introduced the whole chapter V specifically dedicated to group insolvencies and has more than 20 articles thereunder. It also added a new important recital 53 addressing the possibility of jurisdictional consolidation. Although the COMIs of members of a corporate group still have to be determined separately for each group member, the EIR Recast reserves the possibility for a court to open insolvency proceedings for several companies belonging to the same group in a single jurisdiction if that court finds that COMIs of those companies are located in a single member state (Recital 53 EIR Recast). Importantly, in such a case, the court should be able to appoint, if appropriate, the same insolvency practitioner in all the proceedings concerned, provided this is not incompatible with the rules applicable to them. Bringing members of a corporate group into a single jurisdiction, even with the applicable restrictions (i.e. entity by entity COMI determination), can significantly reduce transaction costs arising from multiple insolvency proceedings and enhance the chances

of a successful rescue of a group as a whole. It is argued that the solution offered in recital 53 is both practical and flexible and has been used in the past. I cannot disagree with this proposition.

4.2 Recital 51 provides that the EIR Recast aims at achieving the efficient administration of insolvency proceedings relating to different companies forming part of a group of companies.

Question 3.3 [maximum 5 marks]

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 To answer this question I will focus on group coordination proceedings:-

1.1 one first needs to explain what group coordination proceedings entail before the problems arising in relation thereto can be properly canvassed. In order to improve the coordination of insolvency proceedings of members of a group of companies and to allow for a coordinated restructuring of the group, the EIR Recast interestingly introduces procedural rules on the coordination of the insolvency proceedings of members of an enterprise group. Those rules aim to ensure efficiency of the coordination whilst at the same time respecting each group member's separate legal personality (recital 54 EIR Recast);

1.2 EIR Recast thus provides for "*group coordination proceedings*", which are voluntary in nature, for the member of the group to be included in the group coordination proceedings. Moreover, these proceedings lead to non-binding actions (i.e recommendations) of a group coordinator. It is for these reasons that the new rules on group insolvency have evoked a mixed reception in legal literature, with the majority of authors expressing doubts as to their effectiveness and practical value, as well as to the high costs the group coordination proceedings may bring to them and their complex character. Further problems may arise if the corporate group has members located in non-member states, meaning that the EIR Recast will not bind courts and insolvency practitioners in such non-member state proceedings in that the latter cannot form part of the group coordination proceedings;

1.3 the other the significant shortcoming or deficiency in the EIR Recast group coordination dispensation is the right of every insolvency practitioner concerned to object against the inclusion within group coordination proceedings of insolvency proceedings in respect of which he/she has been appointed (article 64(1) EIR Recast). That article does not expressly require insolvency practitioners to give reasons for their objection. The problem with this is that it gives room for practitioners to object arbitrarily, inappropriately to the prejudice of the group member concerned and by extension its creditors and other stakeholders. This flaw can be remedied by subjecting the right of every insolvency practitioner concerned to object against the inclusion within group coordination proceedings of insolvency proceedings in respect of which he/she has been appointed to a condition that such right maybe exercised on good cause shown, which must include a demonstration by the IP in question that the objection is not exercised arbitrarily and to the prejudice of one or more of the stakeholders who have in interest insolvency proceedings sought to be included within group coordination proceedings.

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.

1 The EIR 2000 designates the member state the courts of which may open insolvency proceedings.

2 The Strasbourg court does have jurisdiction to open the insolvency proceeding concerned because PAJ was registered in France and opened its first store in Strasbourg. Whether such proceeding shall be main or secondary depends on whether there was a COMI in Strasbourg at the time of opening of the proceedings in question. Although the EIR 2000 does not contain a definition of COMI, Recital 13 provides some guidance. Just like the EIR Recast, it stipulates that the COMI shall be the place where the debtor conducts the administration of its interest on a regular basis.

3 The Recital 13 providing guidance as to the meaning of the COMI concept is supported by settled case law of the CJEU. One them is the *Eurofood IFSC LTD Case C-341/04, ECLI:EUC:2006:281 (May 2, 2006)* where the court emphasised that the COMI concept is peculiar to the regulation. It has an autonomous meaning and must be interpreted in a uniform way, independently of what a similar term may mean in national legislation.

4 When dealing with the autonomous nature of the meaning of the COMI concept ECJ (as it then was) emphasised that it must be determined with reference to criteria which are objective and identifiable by third parties. The autonomous meaning of the COMI concept ensures legal certainty and predictability because its application must be uniform across all EU member states. The activity of the debtor concerned must be regular and lasting in order to give rise to a COMI so that it can be readily identifiable by third parties.

5 An Italian case of *Interidil Srl v Fallimento Inerdil Srl Case C-396/09, ECLI:EUC:2011:671 (Oct.20,2011)* dealt with an issue of COMI presumption. It is

particularly relevant because the facts are similar, to an extent, to the facts this question I am answering. Interidil was originally registred in Italy but subsequently relocated to London and entered into the UK register as a foreign company. Notwithstanding this, a petition to open Italian bankruptcy proceeding was filed with an Italian court. Interidil Srl, then liquidated, challenged the Italian court's jurisdiction on the basis that its registered office had already been transferred to the UK at the time of opening of the Italian proceedings. Despite this, the Italian court accepted its jurisdiction, holding that the registered office presumption was rebutted by several factors, namely – the presence of immovable property in Italy owned by the Interidel, the existence of a lease I respect of 2 hotel complexes, a contract concluded with a bank and the fact that the Italian register of companies had not been informed of the transferred of Interidil's registered office to the UK.

5 In that case, the CJEU ruled that when 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 taken at the same place then the registered office presumption is irrefutable. The presumption can only be rebutted when, from a third parties perspective, the place in which the company's central administration (actual centre of management and supervision and of the management of its interests) is located does not coincide with jurisdiction of its registered office. Thus this requires consideration of the relevant facts. What is discernible form the courts argument is that the mere presence of some assets (i.e bank accounts, movable or immovable assets) will not be adequate to rebut the registered office presumption.

5 I now turn to apply the above principles to the facts.

6 As stated above, the Strasbourg court does have jurisdiction to open the insolvency proceeding concerned because PAJ was registered in France and it opened its first store in Strasbourg. Just like the court effectively ruled in *Interidil* (with similar facts), the registered office presumption applies and remains undisturbed by the mere existence of some assets and factors in Spain (i.e warehouses it rents out to other companies, Spanish bank account and non-binding memoranda it concluded with local distributors). Moreover, although the facts of our question are silent on this score, it can be reasonably be assumed that the central administration of PAJ is in France where it was registered and opened its first store. There is nothing in our facts suggesting that the central administration is in Spain or else where – in which event the registered office presumption would have been disturbed and rebutted.

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 The determination of the EIR Recast's scope requires the answering of the following questions – when does it apply in time (temporal scope), to whom does it apply (personal scope), which proceedings are covered by it (material scope) and what are its geographical limitations (geographical scope).

2 A step by step model which applicable can be summarised as follows:-

2.1 The has a COMI in a member state of the EU, except Denmark? Yes, in France, based on *inter alia* the registered office presumption contained in article 3 of the EIR Recast;

2.2 The debtor is not a bank, insurance company or another "excluded undertaking" ? Yes

2.3 The proceeding opened against the debtor is listed in Annex A to the EIR Recast? Yes

2.4 The proceeding is opened after 26 June 2017? Yes, it was opened on 29 June 2017?

2.5 Because all the answers to the above steps are in the affirmative, I conclude and submit that the EIR Recast applies to the proceedings concerned.

Question 4.3 [maximum 5 marks] 2.5

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.

1 Secondary proceedings can be opened in Spain if PAJ has an establishment there, according to Article 3(2) EIR Recast.

2 Such proceedings' effect shall be limited to PAJ's assets situate in Spain, which, thus, would enable a Spanish bank to secure a Spanish distribution ranking. That is because the opening of secondary proceedings creates a separate insolvency estate and the application of a separate *lex concursus – lex concursus secundari*.

3 According to Article 2 (10) EIR Recast, "establishment" means any place of operations where a debtor carries out or has carried out in the 3 month period before the request to open main proceedings a non-transitory economic activity with human means and assets.

4 The EIR Recast adheres to the autonomous interpretation of the concept of an "establishment". In *Interdil* the CJEU examined the concept and concluded that the fact that the definition connects the pursuit of an economic activity to the presence of human resources, shows that a minimum level of organisation and a degree of stability are required. It follows then that the existence alone of goods in isolation or bank account does not, in principle, satisfy the requirements to be classified as an "establishment". It be reasonably be argued that PAJ has an establishment in Spain because :-

4.1 it has a warehouses in Spain;
4.2 it has concluded a line of credit agreement with a Spanish bank with which it has a bank account;
4.3 it has concluded some memoranda with local distributors for purposes of expanding to the Spanish adult gaming market.

[While your reasoning is sound, your answer is incorrect.

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.

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: 12.5 out of 15.

*** End of Assessment ***

Marks awarded: 41 out of 50.