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.

**Question 1.2**

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

(a) Through its case law, the CJEU had altered the literal meaning of several provisions of the EIR 2000. Newly formulated rules, in line with the CJEU interpretation, were therefore needed.

(b) The EIR 2000 was generally regarded as a successful instrument in the area of European insolvency law by the EU institutions, practitioners and academics. However, a number of its shortcomings were identified by an evaluation study and a public consultation.

(c) The fundamental choices and underlying policies of the EIR 2000 lacked support from the major stakeholders (businesses, public authorities, insolvency practitioners, etc.). A new Regulation was therefore needed to meet their expectations.

(d) The EIR 2000 proved to be inefficient and incapable of promoting co-ordination of cross-border insolvency proceedings in the EU.

**Question 1.3**

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

(a) Article 18 EIR Recast ("Effects of insolvency proceedings on pending lawsuits or arbitral proceedings").

(b) Article 31 EIR Recast ("Honouring of an obligation to a debtor").

(c) Article 40 EIR Recast ("Advance payment of costs and expenses").

(d) Article 7 EIR Recast ("Applicable law").

B was the correct answer.

**Question 1.4**

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

(a) The EIR Recast is more rescue-oriented because it harmonises substantive aspects of domestic proceedings.

(b) The EIR Recast is more rescue-oriented because all domestic rescue procedures fall within its scope.

(c) The EIR Recast is more rescue-oriented because its scope was extended to cover pre-insolvency proceedings and secondary proceedings can be rescue proceedings.

(d) It is incorrect to say that the EIR Recast is more rescue-oriented than the EIR 2000, as the latter was already heavily focused on rescue.

**Question 1.5**

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

(a) Where an insolvency practitioner in the main insolvency proceedings has given an undertaking in accordance with Article 36, the court asked to open secondary proceedings should not, at the request of the insolvency practitioner, open them if they are satisfied that the undertaking adequately protects the general interests of local creditors.

(b) Where secondary proceedings are opened, synthetic proceedings mean that these secondary proceedings are automatically rescue proceedings, as opposed to liquidation proceedings.

(c) Synthetic proceedings mean that insolvency practitioners in all secondary proceedings should treat the proceedings they are dealing with as main proceedings for the purpose of protecting the interests of local creditors.

(d) Synthetic proceedings mean that for the case at hand, several main insolvency proceedings can be opened, in addition to several secondary proceedings.

**Question 1.6**

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

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

(b) Although the COMI of a debtor is still presumed to be "at the place of the registered office", it is now possible to rebut this presumption, albeit only by the courts.

(c) The rule that a company's COMI conforms to its registered office is now an irrefutable presumption.

(d) Although the COMI of a debtor is still presumed to be "at the place of the registered office", it should now be possible to rebut this presumption based on Article 3 EIR Recast and Recital 31.

D was the correct answer.

**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: 6 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 relates to the concept known as forum shopping. Recitals 29 and 31 of the EIR Recast speak to forum shopping.
This is incorrect. It relates to Article 3.

Statement 2 relates to the concept known as a synthetic secondary proceeding. Article 36 of the EIR Recast deals with the concept of synthetic proceedings.

**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.

Three provisions of the EIR Recast that mandate co-operation and communication in the context of main and secondary insolvency proceedings are:

(i) Article 41 (insolvency practitioner to insolvency practitioner co-operation and communication);
(ii) Article 42 (court to court co-operation and communication); and
(iii) Article 43 (insolvency practitioner to court co-operation and communication).

**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.

Three provisions of the EIR Recast which show that it is more rescue-oriented that the EIR 2000 are:

(i) Article 1 of the EIR Recast – Per this provision, the EIR recast is applicable to include insolvency proceedings commenced for the purpose of rescue. As such, insolvency proceedings commenced with the aim of rescue fall within the scope of

the EIR Recast. Article 1 of EIR Recast also applies to pre-insolvency proceedings. Article 1 of the EIR 2000 does not include a reference to rescue proceedings, therefore such insolvency proceedings did not fall within the scope of the EIR 2000 and as such rescue proceedings could not derive benefit from EIR 2000.

(ii) Per Article 34 of the EIR Recast, secondary proceedings that were permitted to be opened are no longer limited to those proceedings of a winding up nature. As such, secondary proceeding in the nature of rescue proceedings may be opened which would benefit main proceeding that are in the nature of rescue proceedings. Previously, under 27 of the EIR 2000, only secondary proceedings in the nature of winding up proceedings were permitted to be opened.

(iii) Article 41 of the EIR Recast- Per this provision, insolvency practitioners are required to (i) co-operate and communicate with each other to verify all measures aimed at rescuing or restructuring the debtor; and (ii) explore the possibility of restructuring the debtor. Such a provision encourages rescuing of viable business. In the EIR 2000, no such provision existed.

**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.

Two examples of such instruments as described in question 2.4 are (i) synthetic secondary proceedings and (ii) stays of the opening of secondary proceedings.

**Synthetic proceedings**

- Pursuant to Article 36 EIR Recast, synthetic secondary proceedings involve an insolvency practitioner, in an effort to avoid the opening of secondary proceedings, giving a written undertaking to creditor(s) in a given jurisdiction that their claims will be dealt with in accordance with the relevant law of the jurisdiction as they relate to the priority of claims and distribution of assets. As a result, such creditors would receive the benefit of such secondary proceedings as if they formally existed.

**Stays of opening of secondary proceedings**

- Stays of the opening of secondary proceedings may be requested by insolvency practitioners under Article 38 (3) EIR recast. Such stays supplement stays of individual enforcement in main proceedings by temporarily preventing the opening of secondary proceedings.

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.

In the Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (COM(2012)0744–C7-0413/2012–2012/0360(COD)), the Commission identified 5 shortcomings of the EIR 2000[1], namely –

- The EIR 2000 was not sufficient for the current environment which sees many EU member states focusing on promoting mechanisms for the rescue and restructuring of viable business as oppose to liquidation. The EIR fell short in that it did not cover some of the national procedures of member state which provide for the restructuring of a company at a pre-insolvency stage or proceedings which leave the existing management in place.

- The EIR 2000 created difficulties in determining the COMI for the purposes of determining which member state was competent to open main insolvency proceedings. The EIR 2000 did not contain a definition of COMI. Also, the EIR did not contain any safeguards aimed at preventing fraudulent or abusive forum shopping.

- The EIR 2000 lacked mechanism or tools which minimized the opening of secondary proceedings which can hinder the effective administration of the estate and lead to diminution of the estate's assets by way of increased costs. Further, the EIR 2000 limited the opening of secondary proceedings to those proceeding in the nature of winding up proceedings. As such secondary proceedings in the nature of rescue proceedings were not prohibited under the EIR 2000.

- Under the EIR 2000 liquidators had the discretion to publish the opening of insolvency proceedings. Furthermore, as there was no European Insolvency Register in EIR 2000, there was no ability for persons to search efficiently for relevant insolvency proceedings. The absence of a requirement to publish the opening of insolvency proceedings and a European Insolvency Register created difficulties for creditors in lodging claims as well as made it difficult for insolvency practitioners and judges to become aware of the opening of insolvency proceedings in other member states.

- The EIR 2000 did not contain any provisions that dealt with the insolvency of a multi-national enterprise. This shortcoming was insufficient for the current global environment which has seen a steady increase in the number of multi-national entities and ultimately the cross-border insolvencies of multi-national entities. Under the EIR 2000, separate proceedings had to be opened for each individual member of a multi-national enterprise group and that these proceedings were entirely independent of each other. The lack of specific provisions for the insolvency of multi-national entities hindered the successful restructuring of the group.

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

[1] Bob Wessels, 'The European Union Regulation on Insolvency Proceedings (Recast): The First Commentaries', (2016), 13, European Company Law, Issue 4, pp. 129-135, https://kluwerlawonline.com/journalarticle/European+Company+Law/13.4/EUCL2016019https://bobwessels.nl/wp-content/uploads/2016/09/eucl_wessels_13-4.pdf

Travers Smith, "The recast European Insolvency Regulation: impact on distressed debt investors" https://www.traverssmith.com/media/3789/the_recast_european_insolvency_regulation__impact_on_di__.pdf

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.

The EIR Recast represented an improvement to the insolvency regulations in many aspects. Three major improvements are as follows –

**Communication and co-operation**
The EIR Recast contains a comprehensive framework which mandates co-operation and communication between insolvency practitioners, between courts and between insolvency practitioners and courts. Previously, there was only one provision in the EIR 2000 which required insolvency practitioners in main and secondary proceedings to exchange information amongst each other. The communication and co-operation framework under the EIR Recast represents a major improvement in that it leads to a more efficient of information in circumstances where there are several proceedings involving one debtor. If all relevant parties are provided with all relevant information and are able to co-ordinate the affairs to the estate this leads to a more efficient administration of an estate and realisation of its assets.

**Mandatory publication of insolvency proceedings and insolvency register**
Per Article 24 of the EIR Recast, member states must establish and maintain in their territory one or several registers in which information concerning insolvency proceedings is published. Moreover, the information shall be published as soon as possible after the opening of such proceedings. Article 25 EIR Recast provides for the establishment of a decentralized system for the interconnection of insolvency registers. This system will act as a search engine to make available the mandatory information and any other documents or information included in the insolvency registers. The requirement for publication of insolvency proceedings and the creation of the interconnection of insolvency registers are key tools that will be used in cross-order insolvencies to ensure that insolvency practitioner and judges have access to relevant information regarding insolvencies in other members for the purposes of ensuring the effective administration of estates with cross-border elements.
**Group Insolvency**
The group insolvency framework in the EIR Recast is a key improvement. The group insolvency framework imposes duties of co-operation and communication on insolvency practitioners and courts in the context of insolvency proceedings opened against members of an enterprise group. Such a framework is critically important due to the multi-national presence of companies and should promote the fair and efficient administration of cross-border insolvencies of multi-national entities.

**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.

Per recital 10 of the EIR Recast, a key objective of the EIR Recast is the promotion of the rescuing of economically viable distressed businesses. There are two provisions which I believe, although having good intentions, do not go far enough in the effort to promote the rescue culture.

**Group coordination proceedings**
Firstly, the group co-ordination proceedings provisions lack teeth. Due to their voluntary and non-binding nature, it is very likely that these provisions will not achieve their objective. If

insolvency practitioners and courts of member states refuse to cooperate and participate in the group proceedings, the purpose of these provisions are defeated. Parallel proceedings in different jurisdictions involving companies that belong to a multi-national group of companies would be inefficient in most cases and would not be beneficial to the coordination of rescue efforts.[2]

Perhaps, the EIR Recast should be amended to provide for limited circumstance in which insolvency practitioners and courts may choose not to participate in group coordination proceedings.

**Stay of opening of secondary proceedings**
The second provision which I believe falls short is Article 38 (3) of the EIR Recast. Per Article 38 (3) EIR Recast states,

"Where a temporary stay of individual enforcement proceedings has been granted in order to allow for negotiations between the debtor and its creditors, the court, at the request of the insolvency practitioner or the debtor in possession, may stay the opening of secondary insolvency proceedings for a period not exceeding 3 months, provided that suitable measures are in place to protect the interests of local creditors."

Based on Article 38 (3) EIR Recast, the law of the member state in which a request for a stay of opening of secondary proceedings governs whether or not such a stay is granted. This fact hinder legal certainty as requirements for stay would likely vary greatly from member state to member state.[3] Perhaps, to address this issue, the EIR Recast should be amened to include standard requirement for the granting of a stay of opening of secondary proceedings.

Marks awarded: 15 out of 15.

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

Prêt A Jouer (PAJ) is a France-registered toy shop company. The company opened its first store in 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

[2] Maria-Thomais Epeoglou, (2017) The Recast European Insolvency Regulation: A Missed Opportunity for Restructuring Business in Europe. UCL Journal of Law and Jurisprudence , 6 (1) , Article 2. 10.14324/111.2052-1871.078. at pg 50.
[3] See Note 2 at pg 55.

jurisdiction.) Your answer should contain references to the applicable law and the relevant CJEU jurisprudence.

**Do safeguard proceedings fall within the scope of EIR 2000?**

The first step in determining whether the Strasbourg Court has international jurisdiction for the purposes of EIR 2000, in this context, is determining whether the French safeguard proceedings fall within the scope of the EIR 2000. Per Article 1 of the EIR 2000, *"This Regulation shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator.*"

The French safeguard proceedings are pre-insolvency proceedings which allow a company in financial distress to reorganize its outstanding debts and continue to operate its business while a draft plan of safeguard or plan of reorganization is being established.[4] Based on the nature of the safeguard proceedings, it is my opinion that the same do not fall within the scope of EIR 2000 as it operates where companies are not yet insolvent and it does not involve the partial or total divestment of a debtor.

**Is PAJ's COMI France?**

In the event that it is determined that the safeguard proceedings fall within the scope of EIR 2000, the next step in determining whether the Strasbourg Court has international jurisdiction is to consider whether PAJ's COMI is France. The fact pattern states that PAJ is registered in France, although it is not confirmed that its registered office is in France. For the purpose of this answer, I will assume that PAJ's registered office is in France. Article 3 (1) EIR 2000 states,

"The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or a legal person, the place of its registered office shall be presumed to be the centre of its main interest in the absence of proof of the contrary."

Recital 13 of the EIR 2000 provides some guidance on the interpretation of the term COMI, where it states,

"The' centre of main interest' should correspond to the place where the debtor conducts the administration of his interest on a regular basis and is therefore ascertainable by third parties."

Regarding determining COMI, the CJEU held in Eurofood IFSC Case C-341/04 at paras 33-35,

"That definition shows that the centre of main interests must be identified by reference to criteria that are both objective and ascertainable by third parties. That objectivity and that possibility of ascertainment by third parties are necessary in order to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open main insolvency proceedings. That legal certainty and that foreseeability are all the more important in that, in accordance with Article 4(1) of the Regulation, determination of the court with jurisdiction entails determination of the law which is to apply.

It follows that, in determining the centre of the main interests of a debtor company, the simple presumption laid down by the Community legislature in favour of the registered office of that company can be rebutted only if factors which are both objective and ascertainable by third

[4] Baker McKenzie (2016), "Global Insolvency & Restructuring Guide" https://restructuring.bakermckenzie.com/wp-content/uploads/sites/23/2016/12/Global-Restructuring-Insolvency-Guide-New-Logo-France.pdf.)

parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect

That could be so in particular in the case of a 'letterbox' company not carrying out any business in the territory of the Member State in which its registered office is situated."

The fact pattern does not confirm whether PAJ conducts the administration of its interest in France. I would need further information on this point to determine whether the presumption that France is PAJ's COMI could be 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.

To determine whether proceedings opened by the Strasbourg Court on 29 June 2017 would fall within the scope of EIR Recast, the following steps will be taken –

(i) Assessing the temporal scope;
(ii) Assessing the personal scope;
(iii) Assessing the material scope; and
(iv) Assessing geographical scope.

**Temporal Scope**
The EIR Recast came into effect on 26 June 2017. Per Article 84(1) of the EIR Recast, the EIR Recast "shall apply only to insolvency proceedings opened after 26 June 2017." The Strasbourg proceedings will be opened on 29 June 2017, which is three days after the EIR Recast came into effect. Therefore, the temporal scope requirement is satisfied.

**Personal Scope**
Per Article 1 (2) of the EIR Recast, the EIR Recast does not apply to (i) insurance undertakings, (ii) credit institutions, (iii) investment firms and other firms, institutions and undertakings to the extent that they are covered by Directive 2001/24/EC; or (iv) collective investment undertakings. PAJ is toy company and as such does not fall within the those prohibited entities just mentioned at (i) – (iv). Therefore, the personal scope requirement is satisfied.

**Material Scope**
The next step is determining whether the safeguard proceedings are proceedings which fall within the scope of EIR Recast. Article 1 (1) EIR Recast states,

This Regulation shall apply to public collective proceedings, including interim proceedings, which are based on laws relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation:
(a) a debtor is totally or partially divested of its assets and an insolvency practitioner is appointed;
(b) the assets and affairs of a debtor are subject to control or supervision by a court; or
(c) a temporary stay of individual enforcement proceedings is granted by a court or by operation of law, in order to allow for negotiations between the debtor and its creditors, provided that the proceedings in which the stay is granted provide for suitable measures to protect the general body of creditors, and, where no agreement is reached, are preliminary to one of the proceedings referred to in point (a) or (b).

Where the proceedings referred to in this paragraph may be commenced in situations where there is only a likelihood of insolvency, their purpose shall be to avoid the debtor's insolvency or the cessation of the debtor's business activities.

The proceedings referred to in this paragraph are listed in Annex A."

The French safeguard proceedings are listed in Annex A of the EIR Recast and such fall within the scope of the EIR Recast. The material scope requirement is satisfied.

**Geographical Scope**
It must be determined whether the COMI of PAJ is in an EU member state. Per recital 35 EIR Recast, the EIR Recast only applies to proceedings in respect of a debtor whose centre of main interests is located in the EU. There is a presumption that France is COMI of PAJ based on the fact that PAJ is registered in France. I do not have sufficient information to consider whether this presumption is likely to be rebutted. France is a member of the EU, therefore the geographical scope requirement is satisfied.

As all 4 requirements listed above would likely be satisfied, it is likely that the proceedings to be opened in Strasbourg would fall within the scope of EIR Recast.

**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.

To determine whether secondary proceedings can be opened in Spain as described in this question, I must consider Article 3 (2) and (3) of the EIR Recast which state respectively,

"Where the centre of the debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if it possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State. "

"Where insolvency proceedings have been opened in accordance with paragraph 1, any proceedings opened subsequently in accordance with paragraph 2 shall be secondary insolvency proceedings."

Accordingly, I must consider whether PAJ has an establishment in Spain. Per Article 2 (10) EIR Recast, the term establishment means "any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets";
To determine whether PAJ has an establishment in Spain, the following factors are important –

(i) PAJ owns and rents warehouses in Spain;
(ii) PAJ has a bank account in Spain and has a line of credit agreement with a Spanish bank;
(iii) PAJ was looking to expand into the Spanish adult game market and was in discussions with local distributors and signed memoranda of understanding in this connection.

The key consideration is whether these factors demonstrate that PAJ conducts non-transitory economic activity with human means and assets in Spain. On this point, in Interdil C-396/09, the CJEU held at paragraph 64,

“The answer to the second part of Question 3 is therefore that the term ‘establishment’ within the meaning of Article 3(2) of the Regulation must be interpreted as requiring 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.”

Based on the facts listed above, specifically that PAJ owns and rents warehouses in Spain, operations a bank account is Spain, has a credit line agreement with a Spanish company and was looking to expand in to the Spanish adult game market by signing memoranda of understanding with Spanish distributors, demonstrates that it is more likely than not that PAJ has an establishment in Spain for the purposes of Article 3 (2) EIR Recast.

Additionally, there is mention in the fact pattern that an undertaking has been given under Article 36 of EIR Recast to avoid the opening of secondary proceedings.

[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: 42.5 out of 50.