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.

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).

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] 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."

[In choosing a court, the certainty or visibility of third parties (mainly creditors) is closely related to the time factor. In other words, the debtor's activities in a given Member State should be regular and sustained in order to establish the main centres of interest. This standard is essential to combat abuse of court choice when a debtor seeks a more favourable legal position in bankruptcy by transferring its assets, personnel or registered offices to different Member States, to the detriment of the debtor's general creditors. It is important to note that EIR Recast does not address the issue of choice of the bankruptcy court itself, but only in a harmful or abusive form that harms or disadvantages the debtor's creditors (Recital29). Changing the location of bankruptcy for the purpose of successful restructuring or simplification and beneficial sales of the business is not itself prohibited. Yes but you were expected to make reference to Article 3.

Secondary Insolvency Proceedings, EIR Recast is permitted to commence one or more Secondary insolvency proceedings against a debtor in any Member state in which it has a business office (EIR Recast paragraph 3 (2)). The rule that secondary proceedings are ancillary to the main bankruptcy proceedings is a new provision in EIR Recast to ensure the protection of local creditors in the event of a transfer of the institution or cessation of the institution's business prior to bankruptcy.] This was referring to articles 36 and 38 and 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.

[The EIR reorganization introduces a comprehensive framework for cooperation and communication between insolvency practitioners (EIR Recast article 41), between courts (EIR Recast Article 42) and between insolvency practitioners and courts (EIR Recast Article 43).

Under section 41 (1) of the Bankruptcy Ordinance, an administrator in a main insolvency proceeding and an administrator in a secondary proceeding involving the same debtor shall cooperate with each other, provided that this is consistent with the rules applicable to their

respective proceedings. Article 31 (2) EIR2000 has similar wording. However, article 41 of the Investment in Europe Report reaffirms that such cooperation may take any form, including the conclusion of agreements or protocols.

EIR Recast article 42, Cooperation between courts may take various forms and may be implemented by any means the Court deems appropriate. The Court has the power to coordinate the management and supervision of the debtor's assets and affairs, to conduct simultaneous hearings and approval agreements where necessary, and may consider holding joint hearings in accordance with the COMMON CRITERIA for EU Judges.

Article 43 of EIR Recast, which describes three situations in which such obligations arise :(1) the insolvency practitioner in the main insolvency proceedings must cooperate and communicate with any court before which a request to initiate secondary insolvency proceedings is pending or such proceedings have been initiated; (2) An administrator in a territorial or sub-insolvency proceeding must cooperate with and communicate with the court in which a request for the commencement of the main insolvency proceeding is pending, or with a court in which such proceedings have been commenced; (3) An administrator in a dependency or secondary insolvency proceeding must cooperate and communicate with a court which is awaiting a request for the commencement of another dependency or secondary insolvency proceeding, or which has commenced such proceedings.]

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.

[It is clear from the wording of Article 1 that EIR restructuring applies not only to "traditional" liquidation procedures, but also to procedures aimed at rescuing economically viable but financially distressed enterprises, including those that provide for the suspension of individual creditor actions in order to protect creditors as a whole. In particular, it should include procedures that provide for the restructuring of the debtor at the stage where only bankruptcy is possible, and procedures that give the debtor full or partial control over his assets and affairs (section X). This emphasis on structural adjustment is a clear innovation of EIR Recast, as EIR2000 only refers to the procedure leading to partial or total cancellation of the debtor and the appointment of a liquidator (see Article 1 EIR2000). The expansion of the coverage of the new regulations is in line with the general Trend in Europe to promote effective restructuring instruments to maximize the value of creditors and increase investment and employment opportunities in the single market.

EIR Recast applies to insolvency proceedings where the conditions set by it are met, whether the debtor is a natural or legal person, a trader or a consumer (Recital9).

Article 19 contains a general principle according to which, in all other Member States, any judgment of the court of a Member State having jurisdiction under Article 3 to initiate insolvency proceedings (i.e., primary and secondary proceedings) shall be recognized from the date on which it enters into force at the time of the initiation of the proceedings. EIR Recast's recognition approach, which is based on the principles of mutual trust and facilitation of recognition (promotion of recognition), is in sharp contrast to the approach adopted in the UNCITRAL Model Law on Cross-border Insolvency (1997)(THE Model Law). Recognition of a foreign procedure under the latter instrument is based on an application for recognition (art. 15 of the Model Law). It doesn't automatically admit.

Insolvency practitioners must communicate to each other as soon as possible any information that may be relevant to other proceedings. In particular, it should deal with any progress made

in the filing and verification of claims, as well as all measures aimed at rescuing or reorganizing the debtor or terminating the proceedings (article 41 (2) (a) of the International Covenant on Economic, Social and Cultural Rights reassembled). Article 23 EIR Recast (" Return and liability "), which guarantees the balance of rights of creditors in several bankruptcy proceedings, will not work if communication is not frequent. The predecessor of Article 41, EIR Recast, Article 31, EIR2000, makes no mention of the need to provide information on measures relating to the rescue and restructuring of the debtor. The measures mentioned in EIR Recast represent a broadening of scope and policy preferences to rescue economically viable but struggling companies. In order to explore the possibility of a commercial rescue, insolvency practitioners must coordinate the development and implementation of a restructuring plan. A third situation is where communication and coordination between implementing partners is essential and involves the management or realisation or use of the debtor's assets and transactions. In this regard, Article 41 (2) (c) of EIR Recast authorise insolvency practitioners in secondary proceedings to provide the primary insolvency practitioner with the opportunity to advise on the realisation or use of assets in secondary insolvency proceedings as early as possible.]

Question 2.4 [maximum 2 marks] 2

It is widely accepted that the opening of secondary proceedings can hamper the efficient administration of the debtor's estate. For this reason, the EIR Recast has introduced a number of legal instruments to avoid or otherwise control the opening, conduct and closure of secondary proceedings. Provide **two (2) examples** of such instruments and briefly (in 1 to 3 sentences) explain how they operate.

[1. The undertakings provided for in Article 36 of EIR Recast, according to which, in order to avoid the initiation of secondary insolvency proceedings, the insolvency practitioner in the main insolvency proceedings may enter into a unilateral undertaking (" undertaking ") in respect of the assets located in the Member State in which secondary insolvency proceedings may be initiated, namely, that in the distribution of these assets or the proceeds received on their realization, He will comply with the distributional rights and priorities of creditors under national law in the event of the initiation of secondary insolvency proceedings in that Member State. A number of substantive and procedural requirements for commitments cover the content, language and form of commitments. First, the commitment must specify the factual assumptions on which it is based. In particular, these assumptions should relate to the value of the assets of the Member States concerned and the options available to realise those assets (Article 36(1) of the INVESTMENT in Europe Report). A mere promise to treat local assets as subprograms is not enough. Secondly, in accordance with article 36 (3), the commitment must be made in the official language (one of the official languages) of the Member State in which the secondary procedure could be initiated. Thirdly, it must be in writing and comply with any other preconditions regarding the form and approval requirements of the distribution provided for in the law of the place of court in the main insolvency proceeding (recompilation of article 36 (4) of the European Insolvency Regulation). In addition, Article 36 (5) of the EIR stipulates that a commitment must be approved by "known local creditors". Such approval is subject to the qualified majority and voting rules applicable to the adoption of the reorganization plan in the Member States of the bypassing (consolidated) secondary procedure.

2. Suspension of secondary insolvency proceedings. The Recompilation of the European Insolvency Regulations provides that the court may temporarily suspend the commencement of secondary insolvency proceedings when a temporary stay of individual execution proceedings is granted in the main insolvency proceedings. The suspension of secondary bankruptcy proceedings is not automatic. It requires a claim from an insolvency practitioner or a debtor in possession (EIR Recast s. 38 (3)). The period of suspension shall not exceed three months, provided that appropriate measures are taken to protect the interests of local

creditors. The suspension can be lifted under three circumstances. The aborted operation is simpler than the promised one and does not require approval from local creditors.]

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] 0

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

[The EU Convention is a compromise between the "unity" and "universality" of the early EC convention and the pluralistic model of the Istanbul Convention. Like the Istanbul Convention, the EU Convention Do you mean the European Insolvency **Regulation**?? A regulation and a convention are two very distinct legislative instruments! allows several insolvency proceedings to be initiated against the same debtor. Insolvency proceedings at the location of the debtor's main centre of interest are referred to as "primary insolvency proceedings" and all competitive proceedings initiated at the debtor's "place of business" are characterized as "secondary proceedings". Major insolvency proceedings are universal and cover all assets of the debtor in the entire geographical area of the European Union. In contrast, the geographical scope of secondary litigation is limited. The effectiveness of such proceedings is limited to assets within the territory of the country initiating these secondary insolvency proceedings. Compared with the Istanbul Convention, the arrangements for primary and secondary procedures provided for in the EU Convention are more structured, predictable and efficient.

The Eu Convention requires unanimity (article 49) and the failure of the United Kingdom to accede to it means that it cannot be adopted. The legal basis of European insolvency law has changed since the European Union has the power to make provisions in the area of judicial cooperation in civil matters with transboundary implications "as long as that is necessary for the proper functioning of the internal market". A few years after the failure of the EU Convention project, it is proposed, at the joint initiative of Germany and Finland, to adopt an EU regulation borrowing most of the provisions of the EU Convention. Changing the status from convention to regulation means that ratification by all Member States is no longer required. A regulation, as an EU measure, directly binds member states. It also has the effect of giving the EU's judicial authority, the European Court of Justice (ECJ), the power to interpret legislative provisions to ensure that it applies uniformity. Since 2009, the European Court of Justice has been known as the Court of the European Union.

On 29 May 2000, the Council of Europe adopted the Emergency Report 2000, which entered into force on 31 May 2002. The Council of Europe is not an EU institutions… It is fully binding and directly applies to all EU member states, with the exception of Denmark, which has decided to leave. It contains uniform rules on international jurisdiction, recognition of insolvency judgments, applicable law in insolvency matters and cooperation between insolvency practitioners). The adoption of the Investment Report for Europe 2000 marks the end of a long and somewhat irregular process of negotiating a binding EU instrument in the area of insolvency law.

No. 1215/2012 of 12 December 2012 (a Restatement in Brussels) concerning jurisdiction, recognition and enforcement of judgments in civil and commercial matters. In accordance with

Article 1 (2) B of the Brussels First Restatement, it does not apply to insolvency, liquidation proceedings, judicial arrangements, composition and similar proceedings of insolvent companies or other legal persons. These matters fall within the scope of the ENVIRONMENTAL Impact Report Compilation subject to its applicable conditions. The 2000 Emergency Report is therefore an exception to the broader and broader scope of the Brussels First Report. It occupies a specific position, dealing exclusively with bankruptcy (or bankruptcy related) legal matters.]

Unfortunately you do not answer the question adequately. You also seem to be confusing the European Union with the Council of Europe and the Convention with the Regulation… Here you would have been required to mention 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)) where the Commission identified 5 shortcomings of the EIR 2000, 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

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 first innovation: Article 1 of EIR Recast provides that EIR restructuring applies not only to "traditional" liquidation procedures, but also to procedures aimed at rescuing economically viable but financially troubled enterprises, including those that provide for the cessation of individual creditor actions in order to protect creditors as a whole. In particular, it should include procedures that provide for the restructuring of the debtor at the stage where only bankruptcy is possible, and procedures that give the debtor full or partial control over his assets and affairs. This emphasis on structural adjustment is a clear innovation of EIR Recast, since EIR2000 only mentions procedures leading to partial or total cancellation of the debtor and the appointment of a liquidator. The expansion of the coverage of the new regulations is in line with the general Trend in Europe to promote effective restructuring instruments to maximize the value of creditors and increase investment and employment opportunities in the single market.

The second innovation: the introduction of the period of doubt. In order to make the identification of the major centers of interest more predictable, EIR Recast article 3 does not propose a more stringent definition of the major centers of interest; Instead, it presented several assumptions that made its position clear. One of the main assumptions relating to the main centre of interest is the registered office presumption. In the case of a company or legal person, it should be assumed that the location of the registered office is the location of the principal centre of interest. However, this presumption applies only if the registration office has not been moved to another Member State during the three months (" doubtful ") period preceding the application for the commencement of insolvency proceedings. The introduction of the doubt period was an innovation in EIR Recast, creating a safeguard against fraudulent manipulation of the bankruptcy court (and "choice of court") shortly before the actual filing. Therefore, if the registered office is transferred during the period of doubt, the court should ignore the change of registration for the purpose of determining the centre of primary interest.

The third innovation: Article 36 of EIR Recast provides that, in order to avoid the initiation of secondary insolvency proceedings, the insolvency practitioner in the main insolvency proceedings may enter into a unilateral undertaking (" undertaking ") in respect of the assets located in the Member State in which the secondary insolvency proceedings may be initiated, that in the distribution of these assets or the proceeds received on their realization, He will comply with the distributional rights and priorities of creditors under national law in the event of the initiation of secondary insolvency proceedings in that Member State.]

Question 3.3 [maximum 5 marks] 3

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. Annex A is A decisive factor in the implementation of EIR Recast. The definition of insolvency proceedings in Article 1 loses its prominence and serves as A guide for national decision makers considering the introduction of new national insolvency proceedings in Annex A. This annex - based system is somewhat rigid. National insolvency proceedings not included in Annex A are not covered by the EIR reassessment. Clearly, if A procedure is mentioned in annex A, that procedure automatically (without further review) falls within the substantive scope of the compilation of the ENVIRONMENTAL Impact Report. The opposite is also true: if A program is not included in Annex A, it will not trigger the application of EIR Recast. With

the increasingly rapid development of social economy, Annex A inevitably lags behind and needs to be updated in real time to meet the needs of judicial practice.

2.In practice, without a developed regulatory framework, purely voluntary co-operation can be bogged down by high transaction costs and collective action issues. In order to improve the harmonization of bankruptcy proceedings for a group of company members and to enable the group to carry out coordinated restructuring, EIR Recast proposed procedural rules on the harmonization of bankruptcy proceedings for the members of an enterprise group. These rules strive to ensure the efficiency of coordination while respecting the individual legal personality of each group member (recited 54EIR recited). As we will point out below, the latter requirement led to rather modest results.

As noted above, the restatement of the Emergency report does not allow for substantive, procedural or even jurisdictural consolidation. Instead, it provides a coordination mechanism called the "group coordination procedure". So there's nothing structural about the group itself. It is important to note that the group coordination process is voluntary (group members should be included in the group coordination process). In addition, these procedures lead the panel coordinator to take non-binding actions (recommendations). For these reasons, the new set of rules on group insolvency has received varying degrees of acceptance in the legal literature, with most authors expressing doubts about its effectiveness and practical value, as well as about the high costs that group harmonization procedures may incur.

One of the weakest points in the EIR restructuring group harmonization system is that each insolvency practitioner concerned has the right to object to the inclusion in the group harmonization procedure of the insolvency proceedings for which he or she has been appointed. It is worth noting that Article 64 EIR Recast does not explicitly require insolvency practitioners to raise grounds for objection. We believe, however, that the objecting administrator would be well advised to present a fact-based statement of the grounds for its objection. Consider laws against bankruptcy practitioners should not only put forward calculation (complexity, cost, time loss), but also should consider to an external perspective, how the general creditors group or the market will react to refused to join the group program, thereby to strive for the maximum value yourself ruled out for the whole group coordination efforts.] If the insolvency practitioner objects to the inclusion of the affected proceeding in the Group harmonization procedure, the proceeding will not be part of the Group harmonization procedure (EIR Recast article 65 (1)) and the Coordinator will have no rights with respect to the member State that is "excluded". If no objection is filed within the prescribed period (30 days), the "silent" (non-objection) bankruptcy proceedings automatically fall under the group coordination procedure. So the plan proposed by EIR Recast is basically an "opt-out" plan.]

While you mention good points, you fail to answer half the question which stated **'and how they can be corrected or remedied'**

Marks awarded: 8 out of 10.

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] 2.5

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.

[The Strasbourg Court does not have international jurisdiction to open the requested bankruptcy proceedings.

One of the main assumptions relating to the main centre of interest is the registered office presumption. In the case of a company or legal person, it should be assumed that the location of the registered office is the location of the principal centre of interest. (PAJ) is a Toy store company registered in France, with only one store in Strasbourg. In one of the most important cases concerning the interpretation of the European Investment Report 2000, the European Integrated Framework for Food Limited, the court stressed that the concept of a centre of major (main) interest was unique to the Regulation. It has an autonomous meaning and must therefore be interpreted in a uniform manner, independent of the meaning of similar terms in national legislation (para. 31). The case concerns the registered office of Eurofood IFSC Ltd(Eurofood) in Ireland. It is A wholly owned subsidiary of Parmalat Sp A, which is registered in Italy. Eurofood's main goal is to facilitate financing for the Parmalat group of companies. In December 2003, Parmalat Sp A was admitted to the Italian Special Administrative procedure. In January 2004, an application was made to the High Court of Ireland for a compulsory liquidation of Eurofood and a provisional liquidator was appointed. Nevertheless, in February 2004, the Parma (Italy) Regional Court held that Eurofood's main centre of interest was in Italy and that it had international jurisdiction to decide on the insolvency of Eurofood. In March 2004, the Irish High Court confirmed that Eurofood's main centre of interest was in Ireland and refused to recognise the Italian court's decision.

In resolving this judicial dilemma, the Union of European Courts (then still referred to as the European Court of Justice or EcJ) first stressed the autonomous meaning of the term "centre of major (main!) interests" and then stressed that the term must be determined by reference to criteria that were both objective and could be determined by third parties (para. 2). 33). The autonomous meaning of the main centre of interest contributes to legal certainty across the EU because, in principle, its application must be uniform across all member states. Legal certainty and predictability for all stakeholders dealing with the debtor in the event of bankruptcy is further encouraged by the objectivity and certainty of the location of the main centre of interest. In order to make the centre of primary interest more predictable, EIR Recast contains a presumption of a registered office where the centre of primary interest of an insolvent company is presumed to be the jurisdiction of the company that has been registered. This presumption can only be overturned if objective factors show that the debtor's interest management occurred in a different country from the registered office (for example, in the case of the "mailbox" company).

The certainty or visibility of third parties (mainly creditors) is closely related to the time factor. In other words, the debtor's activities in a given Member State should be regular and sustained in order to establish the main centres of interest. This standard is essential to combat abuse of court choice when a debtor seeks a more favourable legal position in bankruptcy by

transferring its assets, personnel or registered offices to different Member States, to the detriment of the debtor's general creditors. It is important to note that EIR Recast does not address the issue of choice of the bankruptcy court itself, but only in a harmful or abusive form that harms or disadvantages the debtor's creditors (Recital29). Changing the location of bankruptcy for the purpose of successful restructuring or simplification and beneficial sales of the business is not itself prohibited.]

You fail to explain how this applies to the Strasbourg court and therefore your answer is not well defended.

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.

[EIR Recast shall adapt, and EIR Recast shall apply from 26 June 2017 (EIR Recast Art. 92). EIR Recast applies to public collective proceedings, including AD hoc proceedings, which are based on the laws relating to bankruptcy, where, for the purpose of rescue, adjustment of debt, restructuring or liquidation :(a) the debtor is stripped of its assets in whole or in part and an insolvency practitioner is appointed; (b) the assets and affairs of the debtor are under the control or supervision of the court; Or (c) a temporary suspension of individual enforcement proceedings may be granted by a court or legal exercise to facilitate negotiations between the debtor and his creditors. The procedures referred to in Article 1 are listed in Annex A to the EIR Assembly. Annex A (" Insolvency proceedings within the meaning of article 2 (4) ") lists the names of insolvency proceedings in all 27 countries covered by the Compilation of Insolvency Regulations and Rules. No fewer than 112 procedures are listed in Annex A. With regard to the national procedures contained in annex A, under article 9 compilation, the report explains that compilation should be applied without further examination by the courts of another Member State of compliance with the conditions laid down in the Regulation. Therefore, national insolvency proceedings not included in Annex A are not covered by the EIR reassessment. Clearly, if A procedure is mentioned in annex A, that procedure automatically (without further review) falls within the substantive scope of the compilation of the ENVIRONMENTAL Impact Report. The opposite is also true: if A program is not included in Annex A, it will not trigger the application of EIR Recast.

EIR Recast allows the initiation of one or more secondary insolvency proceedings against a debtor in any member State in which it has a business office (EIR Reorganization Article 3 (2)). In contrast to the main insolvency proceedings, which have a general scope (para. 23), the effectiveness of the secondary proceedings is limited to the debtor's assets in the territory of the Member State in which the secondary proceedings were initiated. The initiation of secondary insolvency proceedings results in the establishment of a separate insolvency property and the application of a separate court law, that is, the law of the Member State where the Court is located (/ EX court law). The concept of a "business office" is essential for the opening of a secondary procedure, which can only be opened in a Member state where the debtor has a business office. In accordance with section 2 (10) of the Bankruptcy Ordinance, "reorganization, establishment" means any place of business in which non-temporary economic activities with manpower and assets are carried out or have been carried out by the debtor during the three months preceding the request for the commencement of the main bankruptcy proceedings. At Interedil, CJEU examined the concept and concluded that the fact that the definition linked the pursuit of economic activity to the existence of human resources indicated the need for a minimum level of organization and a degree of stability. Thus, on the contrary, the separate existence of separate goods or bank accounts does not in principle satisfy the requirement to classify goods as "premises" (para. 62).

The non-transience of the debtor's activities indicates a certain degree of continuity and stability. Purely accidental locations of operations cannot be classified as agencies. The negative (" not temporary ") is designed to avoid minimum time requirements. The decisive factor is how the activity appears externally, in the view of the third party, rather than the intention of the debtor (VirgosSchmit report, paragraph 71). The existence of human resources and assets is another criterion for determining an organization. It states that the debtor should carry out its activities with the participation of human resources (personnel) and assets, which together indicate the organization's presence in the forum. EIR Recast does not require an organization to have any formal (corporate) form, such as a branch or representative office. In this context, organizational presence may imply any form of external business activity of the debtor, provided it can be determined by a third party and meets the definition of Section 2 (10). [in the member state of its registered office, the condition is that the debtor carries out economic activities in that country with human resources and assets. This directive is now reflected in recitation 24EIR recitation.]

According to the definition of establishment, an application for the initiation of secondary insolvency proceedings must be examined from the moment it is filed (article 2 (10) of the EAP). If the necessary criteria are not met at that time, the court must review the presence of institutions within three months before the filing of documents. If this is the case, the court has the right to bring a secondary action. This rule, a new provision of the EIR restructuring, is intended to guarantee protection for local creditors in the event of a transfer of the forum or cessation of institutional business prior to bankruptcy.]

Question 4.3 [maximum 5 marks] 4

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

[A Spanish bank has filed a petition to start secondary insolvency proceedings in Spain, where such proceedings cannot begin.

According to the facts of the case, Spain had only one bank account and some (non-binding) memorandums of understanding signed after PAJ negotiated with local dealers.

EIR Recast allows the initiation of one or more secondary insolvency proceedings against a debtor in any member State in which it has a business office (EIR Reorganization Article 3 (2)). In contrast to the main insolvency proceedings, which have a general scope (para. 23), the effectiveness of the secondary proceedings is limited to the debtor's assets in the territory of the Member State in which the secondary proceedings were initiated. The initiation of secondary insolvency proceedings results in the establishment of a separate insolvency property and the application of a separate court law, that is, the law of the Member State where the Court is located (/ EX court law). The concept of a "business office" is essential for the opening of a secondary procedure, which can only be opened in a Member state where the debtor has a business office. In accordance with section 2 (10) of the Bankruptcy Ordinance (??? Do you mean the Insolvency Regulation?), "reorganization, establishment" means any place of business in which non-temporary economic activities with manpower and assets are carried out or have been carried out by the debtor during the three months preceding the request for the commencement of the main bankruptcy proceedings. At Interedil, CJEU examined the concept and concluded that the fact that the definition linked the pursuit of economic activity to the existence of human resources indicated the need for a minimum level of organization and a degree of stability. Thus, on the contrary, the separate existence of

separate goods or bank accounts does not in principle satisfy the requirement to classify goods as "premises" (para. 62).

The non-transience of the debtor's activities indicates a certain degree of continuity and stability. Purely accidental locations of operations cannot be classified as agencies. The negative (" not temporary ") is designed to avoid minimum time requirements. The decisive factor is how the activity appears externally, in the view of the third party, rather than the intention of the debtor (VirgosSchmit report, paragraph 71). The existence of human resources and assets is another criterion for determining an organization. It states that the debtor should carry out its activities with the participation of human resources (personnel) and assets, which together indicate the organization's presence in the forum. EIR Recast does not require an organization to have any formal (corporate) form, such as a branch or representative office. In this context, organizational presence may imply any form of external business activity of the debtor, provided it can be determined by a third party and meets the definition of Section 2 (10).]

Marks awarded: 11.5 out of 15.

*** End of Assessment ***

Marks awarded: 36.5 out of 50.