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**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**.

6.1If 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.

1. True, before the EIR 2000, the EU has not sought to harmonise the insolvency laws of EU Member States.
2. False, there was another EU Regulation regulating insolvency law at EU level before the EIR 2000.
3. False, an EU Directive regulating insolvency law at EU level existed before the EIR 2000.
4. 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?

1. 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.
2. 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.
3. 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.
4. 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?

1. Article 18 EIR Recast (“Effects of insolvency proceedings on pending lawsuits or arbitral proceedings”).
2. Article 31 EIR Recast (“Honouring of an obligation to a debtor”).
3. Article 40 EIR Recast (“Advance payment of costs and expenses”).
4. Article 7 EIR Recast (“Applicable law”).

**Question 1.4**

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

1. The EIR Recast is more rescue-oriented because it harmonises substantive aspects of domestic proceedings.
2. The EIR Recast is more rescue-oriented because all domestic rescue procedures fall within its scope.
3. The EIR Recast is more rescue-oriented because its scope was extended to cover pre-insolvency proceedings and secondary proceedings can be rescue proceedings.
4. 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”?

1. 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.
2. Where secondary proceedings are opened, synthetic proceedings mean that these secondary proceedings are automatically rescue proceedings, as opposed to liquidation proceedings.
3. 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.
4. 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?

1. 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.
2. 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.
3. The rule that a company’s COMI conforms to its registered office is now an irrefutable presumption.
4. 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?

1. Claim to hold a director of the insolvent company liable for causing its insolvency.
2. Claim of the insolvent company against its contracting party, arising from non-performance of the (pre-insolvent) contractual obligations by the latter.
3. *Actio pauliana* claim filed by the insolvency practitioner.
4. 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**?

1. 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).
2. 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*.
3. 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.
4. 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?

1. 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.
2. The judgment, subject to recognition, was passed with incorrect application of the applicable substantive law.
3. The court, which has opened insolvency proceedings (originating court), most certainly did not have international insolvency jurisdiction to do so under the EIR Recast.
4. 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?

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

**QUESTION 2 (direct questions) [10 marks]**

**Question 2.1 [maximum 2 marks**]

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 Forum Shopping. The EIR Recast deals only with the harmful and abusive form as per Recital 29.

Statement 2: The concept is called Synthetic Proceedings covered under Article 36 and 38(2).

**Question 2.2 [maximum 3 marks]**

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 coordination of parallel proceedings received a lot of legislative attention. The EIR Recast now provides three separate provisions for the coordination:

1. Coordination between administrators (Article 41 EIR),
2. Coordination between courts (Article 42 EIR), and,
3. Coordination between administrators and courts (Article 43 EIR-P).

**Question 2.3 [maximum 3 marks]**

The EIR Recast is more rescue-oriented than its predecessor the EIR 2000. Name **three (3) provisions** (articles) of the EIR Recast which explain why this statement is true.

1. Article 1- Applicability of the EIR Recast Regulations
2. Article 41 (2)(b) which encourages the administrators to actively explore the possibility of restructuring the debtor and coordinate the elaboration and implementation of a restructuring plan
3. Article 47 EIR provides that the main administrator may propose to close the secondary proceeding without liquidation by a rescue plan, a composition or a comparable measure” assuming such a measure is provided for by the domestic insolvency regime of the secondary proceeding.

**Question 2.4 [maximum 3 marks]**

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.

the court temporarily stays the opening of secondary proceedings (Article 38 EIR Recast).

the insolvency practitioner in main proceedings can give an undertaking to local creditors in which they are promised that they will be treated as if secondary proceedings had been opened (Article 36 EIR Recast- Synthetic Proceeding).

A the time of closure of the secondary proceeding the liquidator has to propose a resolution plan as per Article 47 and if in the member state where the secondary proceedings are to be closed does not have such a provision then the liquidator has to propose a composition or a comparable measure.

Article 41 (2)(b) which encourages the administrators to actively explore the possibility of restructuring the debtor and coordinate the elaboration and implementation of a restructuring plan.

**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**]

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

The 2002 Insolvency Regulation was in force for more than a decade. As per Article 46 EIR, 2002, the European Commission had to present a report on the EU 2002 success not later than 1st of June 2012. It is generally regarded as a successful legal instrument on insolvency in the EU, but certain changes need to be incorporated as the fundamental premise adopted by 2002 Insolvency Regulation was that the insolvency law is the matter for each Member State. This proved to be a major weakness. Other reasons which needed reforms are described as below:

1. The 2000 Insolvency Regulation did not have significant effect on harmonization of national substantive laws in this field.
2. Liquidation of the debtor had to be broadened to include the scope for restructuring proceedings. What needed was encouraging viable business to restructure at the early stage to prevent insolvency.
3. COMI and secondary proceedings needed more clarity as many courts gave different rulings on COMI leading to uncertainty with increased costs and time. Conflicts in COMI such as registered office of the Debtor and the shifting of COMI by the debtor for the purpose of forum shopping was consuming consume a considerable amount of time, and result in different courts concluding and reaching differing decisions. Landmark judgements on COMI such as Interedil Srl (In Liquidation) v Fallimento Interedil Srl bought come clarity but a clear provision was needed.
4. Stronger rules for cooperation between insolvency practitioners and the courts
5. Coordination and cooperation between for Group insolvency of companies belonging to the same group were absent.
6. Cross-border coordination of national insolvency proceedings.  A new regulation was needed to reduce the risk to banks and financial institutions of enforcement against insolvent companies in EU Member States by enabling cross-border cooperation and increasing certainty in the law applicable on insolvency.
7. Improvement of creditor information. The need of information such as preferential creditors if any of the debtor security rights (security in rem, reservation of title) and any claimed set-off rights.
8. Data protection and the need of information symmetry of all insolvency proceedings conducted in all member states interconnected.
9. the economic crisis which affected European countries in period between 2009 and 2011 and which has led to increase in number of failing businesses, indicated that current insolvency regulation on EU level may not be adequate instrument for dealing with increased number of insolvency proceedings in enlarged EU.

The shortcoming of the EU regulations was addressed in the 2015 EU Recast Regulation and The European Commission expects highly from this legislative reform.

**Question 3.2 [maximum 5 marks]**

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.

*Answer of 3.2 on the next page.*

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| S.No | Changes | EU 2000 | EU Recast 2015 | How stimulate a more effective administration of insolvency proceedings |
| 1. | **Scope of the Regulation** | Regulation did not cover pre-insolvency proceedings or so-called hybrid proceedings, which aim to prevent insolvency and to rescue companies whose financial situation is distressed.  It mentioned only partial or total divestment of debtor and the appointment of the liquidator. | Article 1 sets out a much broader scope and includes rescue and restructuring proceedings.  Moreover, the Regulation makes an explicit reference to its Annex A, which lists the (pre-) insolvency proceedings in the different member states of the European Union that fall within the scope of the Regulation Recast. | Recital 9 of the Regulation Recast now also clearly states that Annex A is exhaustive and that no further examination by the courts is needed. This is facilitating in faster decision whether Recast will be triggered or not as Annex A has become a determinative factor for the applicability of Recast.  The broadening of the scope introduced in Recast will promote effective restructuring tools and will maximize the value for creditors and will aim to prevent insolvency and to rescue companies whose financial situation is distressed. |
| 2. | **COMI Presumption** | There is no time period mentioned for the presumption of registered office of the debtor as the COMI. | Presumption of registered office as COMI applies only if the registered office has not been moved to another member state within 3 months period prior to opening of the insolvency proceedings. | This innovation will safeguard against forum shopping. Preventing forum shopping will maintain the ascertain ability and predictability of the bankruptcy forum and the applicable bankruptcy law. Debtors might not be able to deliberately manipulate the facts that determine the bankruptcy forum and the applicable law. Eventually, the insolvency proceedings will not lose its efficiency and insolvency proceedings must be completed speedily. |
| 3. | **Secondary Proceedings** | secondary insolvency proceedings limited to liquidation proceedings.  There was no suspension of secondary proceedings.  Synthetic proceedings was not included. | The types of secondary proceedings were extended: these proceedings can now be any of the proceedings listed in Annex A.  The insolvency practitioner of the main proceedings can also seek suspension of the secondary proceedings for a maximum of 3 months if there is a temporary stay in the main proceedings, provided that suitable measures are in place to protect the interests of local creditors.  The concept of synthetic proceedings is also introduced. Synthetic proceedings allows insolvency practitioners in the main proceedings to act as if” there were secondary proceedings opened in other member states and to comply in such member states with local distribution and priority rights with regard to the proceeds of the local assets. | This will allow a restructuring procedure to be used in secondary proceedings.    This will allow the insolvency practitioner to conduct negotiations without having to look after the secondary proceedings that could be taking place all over the European Union.  enhanced cooperation duties between courts and practitioners. |

**Question 3.3 [maximum 5 marks]**

Select **two (2)** major flaws and / or omissions of the EIR Recast. Explain why you consider them to be flaws and / or omissions and how they can be corrected or remedied.

EIR Recast 2015 is a robust legislation which has incorporated the shortcomings of the 2000 EU regulations and incorporated new innovative concepts. However, there are many flaws in the regulation. However, according to me the two major flaws are:

1. The recast EIR provides that secondary insolvency proceedings are no longer required to be limited to winding up proceedings (as were listed in Annex B of the EIR). According to me this frustrates attempts to rescue group companies or divisions located in multiple different member states.
2. Furthermore, synthetic secondary proceedings are expressly provided for in the recast EIR, whereby the relevant office holder may give a unilateral undertaking to the effect that local creditors, when it comes to distributions, will be treated as if secondary proceedings has been opened. The objective is to limit the cases in which secondary proceedings will be opened, in response to secondary proceedings broadly being seen as disruptive and an impediment to a rescue and/or an efficient realisation strategy. Known local creditors must approve the undertaking, such approval to be obtained in line with the local rules on the adoption of a restructuring plan. According to me it remains a point of potential contention that, as a result, local creditors may enjoy greater rights than creditors in the main proceedings.

The purpose of the EIR Recast is also to prevent insolvencies at the same time treat the ailing company either through rescue or through liquidation. Such flaws may be addressed by limiting the right to request secondary proceedings (to the main administrator and possibly certain, secured creditors), which would lead to in the words of one practitioner the consequence that practically no such proceedings would take place any longer, or by granting Member States’ courts the right to reject the opening in cases where secondary proceedings are considered detrimental towards the estate while simultaneously ensuring that the main administrator is given ample chance to convince said court that a secondary proceeding would be needless and wasteful.

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

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

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

**Question 4.1 [maximum 5 marks]**

Assume that the EIR 2000 applies.Does the Strasbourg Court have international jurisdiction to open the requested insolvency proceeding? (Explain why it does or does not have jurisdiction.) Your answer should contain references to the applicable law and the relevant CJEU jurisprudence.

From the perusal of the facts, No, the Strasbourg Court does not have the jurisdiction to open the safeguard proceedings (*procédure de sauvegarde*) in France.

According to Article 1(1) of the EU regulations,2000 applies to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator. In the instant case the safeguard proceedings are like pre insolvency proceedings which does not mean that the debtor has collectively divested the business and there is no need for a liquidator as the proceeding is rescue oriented. The motive of the safeguard proceeding is not for liquidation, liquidation might be the last resort. Here, the debtor has come for resolving the debt as there is a likelihood that the debtor in future might become insolvent if the debt fails to get restructured.

Even though by virtue of Article 3(1) of the EU Regulation 2000, the COMI lies in Strasbourg as COMI defined in the article is where the debtor has its registered office. Also, The debtor is not a bank, insurance company or any other excluded entity and therefore, Article 1(2) gets satisfied.

**Question 4.2 [maximum 5 marks]**

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.

There are broadly 4 steps involved in addressing the applicability of EIR Recast 2015. If all the 4 steps namely, Temporal scope; Material Scope; Personal scope; Territorial scope are satisfied then it proceedings qualify to be governed by EIR Recast.

1. Temporal Scope which identifies the commencement of proceedings. EU recast will be applicable from 26/6/2017. In our case the proceedings commenced on 19/6/2017. Therefore, the first step stands qualified.
2. Material Scope defines the proceedings covered under Annex A. In the present matter, the proceedings are opened for Procedure De Sauvegarde which is listed under the France’s list of permitted proceedings under Annex A. Therefore, the second step stands satisfied.
3. Personal Scope defines who all are allowed In the EIR. The debtor is not a bank, insurance company or any other excluded entity. Therefore, the third step also complies with the EIR’s applicability.
4. Territorial Scope defines the geographical limits. In the present case, the proceedings are opened in Strasbourg which forms part of the EU(Denmark not covered). Therefore, the last step also falls in the scope of applicability of EIR.

All the four above stated scope are satisfied and hence EIR must be made applicable to the insolvency commenced at Strabourg.

**Question 4.3 [maximum 5 marks]**

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.

Yes, the Spanish Bank may open the secondary proceedings in Spain. In the present case the Spanish Bank wants to secure its ranking in the distribution of proceeds. This concern is well explained in the Virgos-Schmit Report which states that:

*“the secondary proceedings make sense for creditors who cannot rely on the recognition of their rights (or their preference rank) in proceedings in another…state.”*

For opening a secondary proceeding,

* Firstly, the secondary proceedings can only open after the opening of the main proceeding. From the perusal of the facts of the case, the main proceedings have already been commenced. Article 3(4) EIR Recast.
* Secondly, as per Article 2(11), local creditor’ means a creditor whose claims against a debtor arose from or in connection with the operation of an establishment situated in a Member State other than the Member State in which the centre of the debtor's main interests is located. The Spanish bank is a local creditor as the operation of the debtor were conducted in Spain and France(Strabourg.) is the member state where the main proceedings are being carried out.
* Thirdly, as per Article 3(4)(b)(i), the opening of territorial insolvency proceedings is requested by “a creditor whose claim arises from or is in connection with the operation of an establishment situated within the territory of the Member State where the opening of territorial proceedings is requested”.   
    
  In our present case, the secondary proceedings is requested by the creditor of the debtor which the Spain Bank in the territory of Spain itself where the request has been made to open the secondary proceeding.
* Fourthly, Establishment of the Debtor must exist in Spain for the secondary proceeding to open as per Article 3(2) EIR Recast. The definition of establishment is as per Article 2(10) which reads as “‘*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”*

We must look at the following essentials to establish the establishment

1. Place of operations of the debtor or a place of business carried out *in the 3-month period prior to the request to open main insolvency proceedings*
2. *a non-transitory economic activity with human means and assets*

From the facts of the case, the debtor has a warehouse in Spain andthis warehouse the debtor has lent to other toy companies on lease/rent. In Spain the debtor runs a bank account which means that the creditor here i.e Spanish Bank identifies the business of the debtor at Spain. The debtor also started negotiations with local distributors and some (non-binding) memoranda of understanding have been signed for expanding its busines in Spain suggests that there was in fact a non-transitory economic activity with debtors asset the warehouse and human means deployed by the debtor to expand in the gaming industry in Spain.

In the case of Interdil the CJEU examined the concept of Establishment and held that the definition of establishment shows that there is some human activity and some degree of organisation and stability is required. Merely, a bank account presence of goods in isolation will not satisfy the definition of establishment.

But, in our case, there is a presence of the debtor business in Spain and the debtor was putting in efforts to enter into the gaming industry in Spain shows that the debtor’s establishment was not a letter box office.

Hence, the Spanish Court can open the secondary proceeding in Spain.

**\* End of Assessment \***