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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: **[studentID.assessment2B]**. An example would be something along the following lines: 2021122-336.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 “studentID” 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 2024**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2024. 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 2024 or by 23:00 (11 pm) BST (GMT +1) on 31 July 2024**. If you elect to submit by 1 March 2024, you **may not** submit the assessment again by 31 July 2024 (for example, in order to achieve a higher mark).

7. Prior to being populated with your answers, this assessment consists of **10 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.

Select the correct answer from the options below:

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**

Article 1(1) of the EIR 2015 relates to the scope of the Regulation. Choose the correct statement from the options below:

1. Proceedings will fall under the scope of the EIR 2015 if they are based on laws relating to insolvency for the purpose of rescue, adjustment of debt, reorganisation, or liquidation; are public; and are collective.
2. Proceedings will fall under the scope of the EIR 2015 if they are based on laws relating to insolvency for the purpose of rescue, adjustment of debt, reorganisation, or liquidation; are public; and are collective.
3. Proceedings will fall under the scope of the EIR 2015 if they are based on laws relating to insolvency for the purpose of rescue, adjustment of debt, reorganisation, or liquidation; and are public.
4. Proceedings will fall under the scope of the EIR 2015 if they are based on laws relating to insolvency for the purpose of rescue, adjustment of debt, reorganisation, or liquidation; and are collective.

**Question 1.3**

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 gone against the literal meaning of several provisions of the EIR 2000. A new Regulation was needed to codify the new rules created by the CJEU.
2. The EIR 2000 was generally regarded as an unsuccessful instrument in the area of European insolvency law by the EU institutions, practitioners and academics.
3. The fundamental choices and underlying policies of the EIR 2000 lacked support from the major stakeholders (businesses, public authorities, insolvency practitioners, etcetera). A new Regulation was therefore needed to meet their expectations.
4. The EIR 2000 was generally considered a successful instrument, but areas of improvement had been identified over the years by practitioners and academics.

**Question 1.4**

Why can it be said that the EIR Recast did not overhaul the *status quo*?

1. The EIR Recast is a copy of the EIR 2000. Its structure and the wording of all articles are similar.
2. Although the EIR Recast includes relevant and useful innovations, it has stuck with the framework of the EIR 2000 and mostly codified the jurisprudence of the CJEU.
3. The EIR Recast has not added any new concept to the text of the EIR 2000.
4. It is incorrect to say that the EIR Recast has not overhauled the *status quo* at all. On the contrary, the EIR Recast has departed from the text of its predecessor and is a completely new instrument which has rejected all existing concepts and rules.

**Question 1.5**

Article 3 of the EIR 2015 deals with jurisdictional matters. Which statement below is accurate in relation to Article 3?

1. Article 3 states that the courts of the Member State within the territory of which the debtor has an establishment shall have jurisdiction to open main insolvency proceedings.
2. Article 3 states that the courts of the Member State within the territory of which the debtor has its centre of main interest (COMI) shall have jurisdiction to open main insolvency proceedings.
3. Article 3 states that the courts of the Member State within the territory of which the debtor has its centre of main interest shall have jurisdiction to open secondary insolvency proceedings.
4. Article 3 states that the courts of the Member State within the territory of which the debtor has an establishment shall have jurisdiction to open territorial insolvency proceedings.

**Question 1.6**

The EIR 2015 does not provide a definition of “insolvency” or “likelihood of insolvency”. What are the consequences hereof?

1. The ECJ has provided a definition of “insolvency” in recent case law.
2. The European Commission has provided a definition of “insolvency” in its Recommendation on a “New Approach to Business Failure” published in 2014.
3. Each Member State will define “insolvency” in national legislation.
4. Deciding whether a debtor is “insolvent” or not is a matter for the ECJ to determine.

**Question 1.7**

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

**Question 1.8**

What are some of the main criticisms which have been voiced against the concept of the “centre of main interest”?

1. The concept makes it impossible for companies to move jurisdiction, which ultimately, may jeopardise their chances of rescue.
2. The concept does not have any equivalent in international instruments, which makes it difficult for international creditors to understand.
3. The concept is too similar to that of an “establishment” which makes it difficult for a court to know whether to open main or secondary proceedings.
4. The concept is too vague; it may result in higher capital costs; it may lead to manipulation; and it is difficult to assess by creditors.

**Question 1.9**

The EIR Recast introduced the concept of “synthetic proceedings”. What are they?

1. “Synthetic proceedings” means that when 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. “Synthetic proceedings” means that for the case at hand, several main proceedings can be opened, in addition to several secondary proceedings.
3. “Synthetic proceedings” means that when secondary proceedings are opened, these are automatically rescue proceedings, as opposed to liquidation proceedings.
4. “Synthetic proceedings” means 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.

**Question 1.10**

Carala SARL is a French-registered company selling jam jars made out of glass. The company had opened its first store in Strasbourg, France in 2018. It has since opened another 10 stores in France. Its main warehouse is located in Cork, Ireland. 95% of its employees are located in France and 5% are located in Ireland. Most of its customers are located in France, yet some online purchases are coming mainly from the Netherlands.

In 2020, Bella SARL entered into a loan agreement with a Spanish bank because it was hoping to expand its reach onto the Spanish jam market. It opened a bank account with the bank while also negotiating prices with local suppliers. It signed some (non-binding) memoranda of understanding with three Madrid-based suppliers.

Unfortunately for Bella SARL, the timing of this initiative coincided with the Covid-19 pandemic. By the end of 2021, the company was in financial difficulty, yet managed to keep afloat for another few years. On 10 January 2022, it wants to file for insolvency. In which country is Carala’s centre of main interest presumed to be located?

1. Its centre of main interest is located in Spain because the loan agreement will lead to a presumption of COMI.
2. Its centre of main interest is located in Ireland because the warehouse will lead to a presumption of COMI.
3. Its centre of main interest is located in France because its registration, stores, customer-base and majority of employees lead to a presumption of COMI.
4. Its centre of main interest is located in the Netherlands because online customers lead to a presumption of COMI.

**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. Proceedings covered by the scope of the EIR 2015 should include proceedings promoting the rescue of economically viable debtors, especially at a stage where there is a mere likelihood of insolvency.

Statement 2. Pending lawsuits are not covered by the effects of the *lex concursus* in insolvency proceedings.

Statement 1: This statement is found in Recital 10 of the Preamble of the EIR 2015 and it is also alluded as well in the General Provisions in Chapter 1, Article 1 (Scope).

Statement 2: This statement is found in Article 7 (2)(f): (Applicable law) and is related to Article 18: (Effects of insolvency proceedings on pending lawsuits and arbitral proceedings).

**Question 2.2 [maximum 3 marks]**

The EIR Recast’s objective remains, as much as possible, the universality of proceedings. However, several exceptions to this universal vision exist throughout the Regulation. Provide **three (3) examples** of provisions from the EIR Recast which depart from a universal approach to cross-border insolvency.

Three examples of provisions from the EIR Recast which depart from a universal approach to cross-border insolvency are:

1. Secondary insolvency proceedings are a main exception to universalist approach of the EIR Recast. Pursuant to Article 3(2) secondary insolvency proceedings are territorial and restricted to the State where the Debtor has an establishment and to the assets of the Debtor within the territorial boundary of the Member State where such secondary proceeding is opened. Also, according to Article 8, the in rem Rights of creditors to assets of the Debtor are governed by the laws of the State not the lex concursus.
2. Article 13: Effects of the proceedings on employment contracts and labor relations are governed by the laws of the State not the lex concursus.
3. Article 18: Effect of insolvency on pending lawsuits or arbitral proceedings related to assets or rights of the debtor are governed by the law of the State, not the lex concursus.

**Question 2.3 [maximum 3 marks]**

The EIR Recast regulates the material scope of the Regulation in relation to national insolvency proceedings in Member States. List **three (3) elements** of the EIR Recast that deal with this matter and explain how they relate to this.

Three elements of the EIR Recast that deal with the material scope of the Regulation to national insolvency proceedings in Member States are the following:

1. Pursuant to Article 1 of the EIR Recast, the same extends to liquidation and rescue public collective proceedings (as the same are defined in Article 2) in the Member States, as the same are detailed in Annex A. Therefore, the scope of the Regulation has a broadening coverage and extends not only to the traditional liquidation proceedings, but also to reorganizations or restructuring proceedings.
2. Recital 9 of the EIR Recast provides that the same shall apply to Member States in those insolvency proceedings listed in Annex A without the need of any further examination by the courts of another Member State. Therefore, application of the Regulation to those proceedings listed in Annex A is automatic, mandatory and not subject to court interpretation.
3. Annex A provides clarity, efficiency and respect to the sovereignty of the Member States of the EU. There is no guessing as to what procedures are covered or not by the EIR Recast. Therefore, those insolvency proceedings not included in Annex A are outside of the scope of the EIR Recast and governed by the local law of the Member State.

**Question 2.4 [maximum 2 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 one to three sentences) explain how they operate.

Articles 36 and 38(2) of the EIR Recast provide a mechanism for preventing the opening of a secondary insolvency proceeding if the Insolvency Practioner (IP) in the main proceeding makes an undertaking and if the court is satisfied that the undertaking adequately protects the rights and interests of local creditors. In order to achieve this, the IP has the duty of realizing the assets of the Debtor in the Member State where the secondary proceeding should be opened and guarantee that the distribution to the local creditors of the Member State will be made in accordance with the laws of the Member State (regarding distribution rights and priority), as if the secondary proceeding had been opened. This petition is done in writing, in the language of the Member State where the secondary proceeding could be opened and must be made for a specific purpose. Creditors have to approve this undertaking and other requirements of form of the laws of the Member State must be followed. Approval needs to comply with the rules of qualified majority and voting of restructuring plans of the laws of the Member State.

A second instrument is the ability to request the temporary stay of the opening of a secondary insolvency proceeding under Article 38(3) of the EIR Recast. This allows the opportunity for negotiations with creditors of the Member State where the secondary insolvency proceeding was opened and minimizes the costs and expenses of such secondary proceeding. This temporary stay is not automatic. It has to be requested by the IP and also a temporary stay must be already in place in the main insolvency proceeding. The stay has a limit of three months and the rights and interests of the local creditors have to be protected. The court of the Member State where the secondary proceeding is sought to be stayed, has the authority to enter preventive measures to secure the protection of the local creditor’s rights and interests.

**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]**

During the reform process of the EIR 2000, what main elements were identified by the European Commission as needing revision within the framework of the Regulation (whether adopted or not)?

After over a decade of its implementation, the EIR 2000 needed to be updated in order to conform to the changes that cross-border insolvency matters faced during such period of time. This required not only that certain of its provisions be revised and updated, but also that new regulations be included to cover those new situations that arose. The following elements were considered by the European Commission when reviewing the EIR 2000:

1. The increase of restructuring or rescue proceedings and not only liquidation proceedings in order to provide for the continuity of the business/company. With the lapse of time and the changes in the world economy, companies that faced financial distress started to proactively seek insolvency proceedings to restructure or rescue the business instead of reaching the point of liquidation. This was a phenomenon that arose in cross-border situations and the EIR needed to address it.
2. The tendency to shift from pure universalism to modified universalism was another element considered and its implication in the interaction between the main insolvency proceeding (where the Debtor had its COMI) and any secondary insolvency proceedings that could be occurring in tandem. Changes to the regulation needed to be made to conform to the needs of the various constituencies and stakeholders in the secondary insolvency proceedings that could be filed simultaneously, as well as establishing as authority the definition of the COMI (including the COMI presumption) and not merely including it as a recital as guidance. This was necessary in order to resolve any jurisdictional issue that could arise in a cross-border insolvency case. See for example the case law of the CJEU which interpreted this term like the case of *Eurofood IFSC Ltd.*, Case C-341/04, ECLI:EU:C:2006:281 (May 2, 2006) and *Interdil Srl v Falliamento Interdil Srl.*, Case C-396/09, ECLI:EU:C:2011:671 (Op-lct. 20, 2011).
3. The regulation also needed to address the possibility of forum shopping in order to hide assets from creditors and the associated abuse of process. Even though the EIR Recast does not directly address forum shopping, Recital 29 provides that the same provides that the EIR Recast should contain “safeguards aimed at preventing fraudulent or abusive forum shopping.” Also, Article 3(1) includes the COMI presumption which is another tool incorporated in the EIR Recast to prevent forum shopping.
4. The need to modernize the flow of information in the cross border insolvency process and to implement technology tools were other elements considered by the commission. With the course of time and globalization, there was a need to improve the information made available to creditors and for a general modernization of data protection. The EIR Recast now has mandatory provisions related to publication in the insolvency registers, their interconnectivity as well as procedures for data protection. (i.e. Recitals 75 to 80 and Articles 24-30)
5. The need to include a definition of the term “centre of main interest” in the Articles of the EIR Recast, not just in the Preamble. This is necessary in order to make such definition binding on all Member States and not mere persuasive or instructive as it was solely in the Preamble of the EIR 2000.

**Question 3.2 [maximum 5 marks]**

The concept of the “centre of main interest” has been both praised and criticised by EU institutions, academics, and practitioners. List **two (2) praises and / or shortcomings** and explain why they are considered praises / shortcomings.

The EIR Recast provides a definition of COMI that is autonomous and objective. COMI is defined as the place where the debtor conducts the administration of its business on a regular basis which is ascertainable by third parties. The autonomous meaning of the term COMI allows that the same be identifiable by using an objective criteria and that it has to be ascertainable by stakeholders or third parties. This allows uniformity in the application of the term and is foreseeable for all stakeholders dealing with the Debtor and its insolvency case. See Article 3(1) of the EIR Recast and Eurofood IFSC Ltd., Case C-341/04 ECLI: EU: C: 2006:281 (May 2, 2006). As it has been stated by the EU Commission, the COMI concept ensures that an insolvency case is handled by the Court and the choice of law of the State where the Debtor and its creditors have a connection that is major and genuine. This is a policy consideration in favour of the creditors and their familiarity to the legal system where the insolvency proceeding is held.

A second praise of the COMI concept is the fact that since the same is ascertainable or “visible” to third parties, the probability of abusive forum shopping is reduced. The Debtor needs to have a regular and lasting activity in the State where it wishes to file its main insolvency proceeding and therefore determine if such State is its COMI. The presumptions of the EIR Recast assist in providing an objective test and criteria for determining if a State is indeed the Debtor’s COMI. For example, the registered office presumption and its suspect three (3) month period. This creates a safeguard against abusive forum shopping or COMI manipulation. See Sussanne Staubitz-Schrieber, Case C-1/04, ECLI:EU:C:2006:39 (January 17, 2006) and Interdil Srl v. Fallimento Interdil Srl, Case C-396/09, ECLI:EU:C:2011:671 (October 20, 2011) which provides that the registered office presumption is irrefutable when third parties can ascertain that management and supervision of the Debtor are at the same place where the Debtor is registered.

**Question 3.3 [maximum 5 marks]**

The European Insolvency Regulation is a choice-of-forum instrument, which although aiming at procedural harmonisation, did not harmonise the substantive insolvency laws of the Member States. Because of lingering disparities among the national insolvency regimes across the EU, the European institutions introduced the Directive on Preventive Restructuring Frameworks in 2019, which is meant to dovetail the European Insolvency Regulation. List **two (2)** ways in which the Regulation and the Directive differ.

The EIR Recast and the Directive on Preventive Restructuring Frameworks of 2019 differ in the following:

1. The Directive on Preventive Restructuring Frameworks deals with the limited scope of preventive restructuring of businesses using warning tools to identify the deteriorating businesses and allowing for them to engage in restructuring efforts at an early stage in order to avoid falling into insolvency. The EIR Recast in turn deals with already commenced insolvency proceedings which include liquidation scenarios as well as rehabilitation of the Debtor on a cross border aspect.
2. The Directive focuses on preventive restructuring within individual EU Member States with the goal to facilitate the continuity of the business. The EIR Recast focuses on the cross border jurisdiction, recognition, cooperation and harmonization of the main and secondary insolvency proceedings of a Debtor within the EU.

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

**Scenario**

Dinosaurus SARL is a company selling children stuffed animals. It is incorporated in France and has opened its first store in La Flèche in 2015 and another 10 stores across France since. 80% of its employees work in France. It also has an office in Cork, Ireland, as well as three stores around Ireland. 20% of its employees are located in Ireland. Its main warehouse is in Spain. Most of its customers come from France, and some online purchases are coming mainly from the United Kingdom.

In 2020, Dinosaurus SARL entered into a loan agreement with a Spanish bank because it was hoping to expand its reach onto the Spanish children toys market. It opened a bank account with the bank while also negotiating prices with local suppliers. It signed some (non-binding) memoranda of understanding with three Madrid-based suppliers.

Unfortunately for Dinosaurus SARL, the timing of this initiative coincided with the Covid-19 pandemic which hit the world in 2020. By 2021, the company was in financial difficulty, yet managed to keep afloat for another two years. On 20 June 2023, it filed a petition to open safeguard proceedings in the Commercial Court in Le Mans, France.

**Question 4.1 [maximum 5 marks]**

Assume that the timeline is slightly different and, therefore, assume that it is not the EIR 2015 that applies but the EIR 2000.

***Does the EIR 2000 apply to this case and to the opening of safeguard proceedings?***

You must justify your answer when explaining why it does or does not have jurisdiction. Your answer should contain references to the applicable law and the relevant CJEU jurisprudence.

The EIR 2000 does not apply to this case and to the opening of safeguard proceedings. According to Article 1 (1) the scope of the EIR 2000 was limited to divestment proceedings and the appointment of liquidators. Therefore, safeguard proceedings which are proceedings that allow solvent debtor to reorganize or restructure under the supervision of the Court, are excluded from the scope of the EIR 2000. Furthermore, Appendix A of the EIR 2000 does not include French safeguard proceedings. It is limited to Judicial Liquidations and receiverships in France.

**Question 4.2 [maximum 5 marks]**

Assume that the timeline is as explained in the original scenario above and that the French High Court opens safeguard proceedings on 23 June 2023.

***Will the EIR Recast be applicable to the proceedings?***

Your answer should address the EIR Recast’s scope and contain **all** steps taken to answer the question.

The scope of the EIR Recast of 2015 includes insolvency proceedings to allow the rescue, adjustment of debt, restructuring or reorganization of a Debtor in which its assets and affairs are subject to either the control or supervision of the Court or provide for a stay in order to allow the Debtor to negotiate with creditors. See EIR Recast Art. 1(b) and (c). See also Appendix A to the EIR Recast 2015 which includes safeguard proceedings in France.

In order to determine if under these specific facts the EIR Recast of 2015 apply we need to consider the following four tier test:

1. Does the Debtor have a COMI in an EU Member State?- Yes
2. The Debtor is not a bank, insurance company or any other excluded institution.- Yes, it is not.
3. The safeguard proceeding is included in Annex A of the EIR Recast 2015.- Yes, it is included.
4. The proceeding was opened after June 26, 2017.- Yes it was.

Therefore, in this specific case the proceeding complies with the four tier test to determine if the EIR Recast 2015 applies. The EIR Recast is thus, applicable.

**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 Italy under the EIR Recast?***

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

If the Spanish bank files a secondary insolvency proceeding in Spain in order to secure a Spanish distribution ranking, we would need to consider the following factors to determine if such proceeding can be opened under the EIR recast of 2015.

The first criteria that needs to be considered is if the Spanish proceeding is within those listed under Annex A of the EIR Recast. In this case, it is. All other of the four tier steps discussed before are met. Secondly, we must see if the Debtor has in Spain an “establishment” as such term is defined under the EIR Recast. Article 2(10) of the EIR Recast defines an establishment as any place where the Debtor carries out or has carried out within three (3) months prior to the opening of the main insolvency proceeding a “non-transitory” activity with human means and assets. Article 3(2) of the EIR Recast further provides that a secondary insolvency proceeding can be opened only if the Debtor possess an establishment within the territory and such proceeding will be restricted only to the assets of the Debtor situated within such territory (in this case Spain).

Following the rationale of the Interedil case, *supra*, an establishment requires not only the pursuit of an economic activity, but also the presence of human resources and a minimum level of organization and a degree of stability. For example, merely holding a bank account does not satisfy this requirement. There has to be a “non-transitory” business activity perceived by third parties.

Under the specific facts of this case the Court would have to determine if the Debtor’s activity in Spain is considered a “non-transitory” business activity that has sufficient organization, human resources and stability to be considered as an establishment under the EIR Recast. The facts presented do not reflect that the Debtor had invested human resources in Spain. Its employees are located in France (80%) and Ireland (20%). The Debtor only holds a bank account and a warehouse in Spain and merely entered into non-binding memorandums of understanding with three (3) suppliers in Spain. No true business organization nor stable business activity is evidenced in Spain. On the contrary, the Debtor’s business activity is more in France and Ireland, where its stores, employees and sales are located. Therefore, the EIR Recast does not allow the opening of the secondary insolvency proceeding in Spain.

**\*\*\* END OF ASSESSMENT \*\*\***