

A Future EU Instrument on Rights in rem?

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Summary

- The law applicable to rights *in rem*?
 - A Gap in the EU PIL Framework
 - Need of an Instrument?

- Article 2 (9) EIR Recast as starting point

The law applicable to rights *in rem*

- A Gap in the EU PIL Framework: Yes
- The need of an instrument
 - Institutional declarations

European Parliament (2012): *"A number of gaps can be identified that concern generally accepted problems of private international law which are currently not regulated by community instruments [...] these gaps are: property law [...]"* The Study added that those gaps *"[...] would need to be addressed before further codification is contemplated at all"*

"Stockholm Programme": the EU Council requested the Commission to continue the process of harmonising conflict-of-law rules at Union level, including *"[...] the area of [...] security interests"*

- Legal Scholars
- Practise: Spanish experience

Rules on location of assets: Art 2 (9) EIR Recast

- Why?

- (1) Recital 39

“This Regulation should provide for rules to determine the location of the debtor’s assets, which should apply when determining which assets belong to the main or secondary insolvency proceedings, or to situations involving third parties’ rights in rem”

Article 8 Third parties' rights in rem

1. **The opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets - both specific assets and collections of indefinite assets as a whole which change from time to time - belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.**

2. The rights referred to in paragraph 1 shall in particular mean:

...

3. The right, recorded in a public register and enforceable against third parties, under which a right in rem within the meaning of paragraph 1 may be obtained, shall be considered a right in rem.

Article 10 reservation of title

Paradox: A EU PIL rule on the effects of insolvency proceedings upon rights in rem, but not a EU PIL rule on the preliminary issue, ie which law determines whether a right in rem has been validly created.

Old vs New Art 2 (9) EIR Recast



What's new?

- **Tangible property**, in the Member State where the property is situated;
 - Property and **rights entered in a public registry**, in the Member State under authority of which the register is kept;
 - **Claims**, in the Member State where the person required to meet the claims has his centre of main interests.
- **Book-entry financial instruments**, in the Member State where the registry or account in which the entries are made is maintained;
 - **Registered shares** are situated in the Member State where the company having issued the shares has its registered office;
 - Cash held in **bank accounts**, in the Member State indicated in the account's IBAN;
 - **European patents**, in the Member State for which the patent is granted;
 - **Copyright and related rights**, in the Member State within the territory of which the owner of such rights has his habitual residence or registered office;

+ European Patents with unitary effects and European Trade Marks (Art 15)

Shares and financial instruments

Shares and financial instruments

Intermediated Securities (IS)

Non-Intermediated Securities

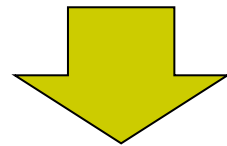
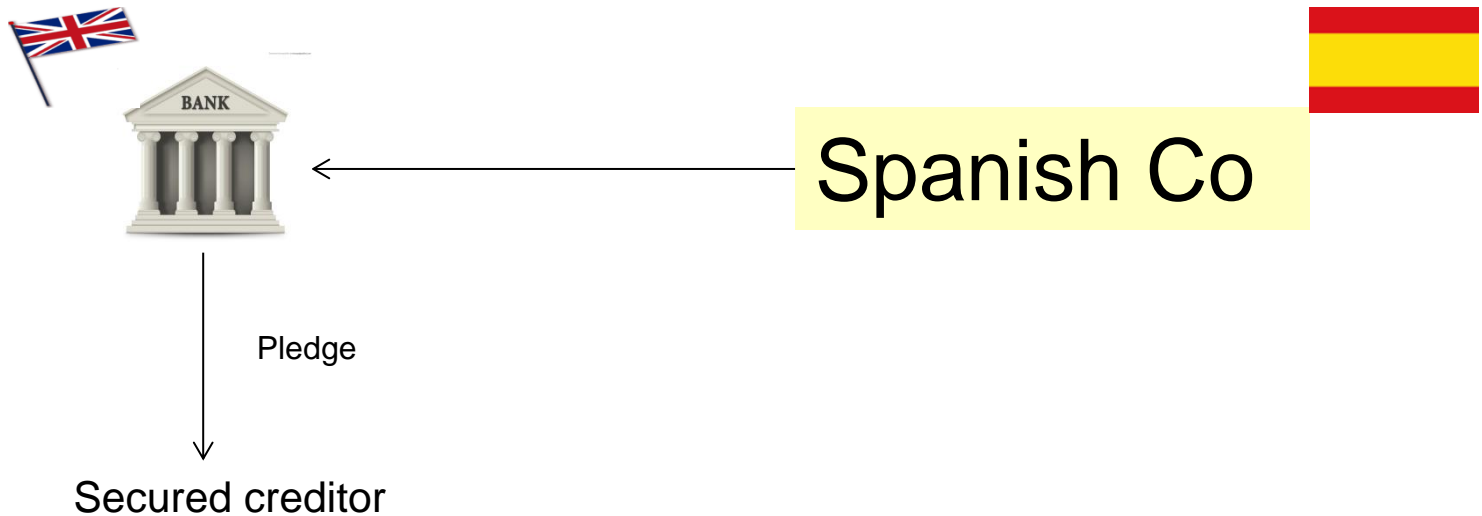


Article 2 (9) (ii) intermediated or book-entry securities are situated **“in the Member State in which the register of account where the entries are made is maintained”**



PRIMA-rule (*Conto sitae*)

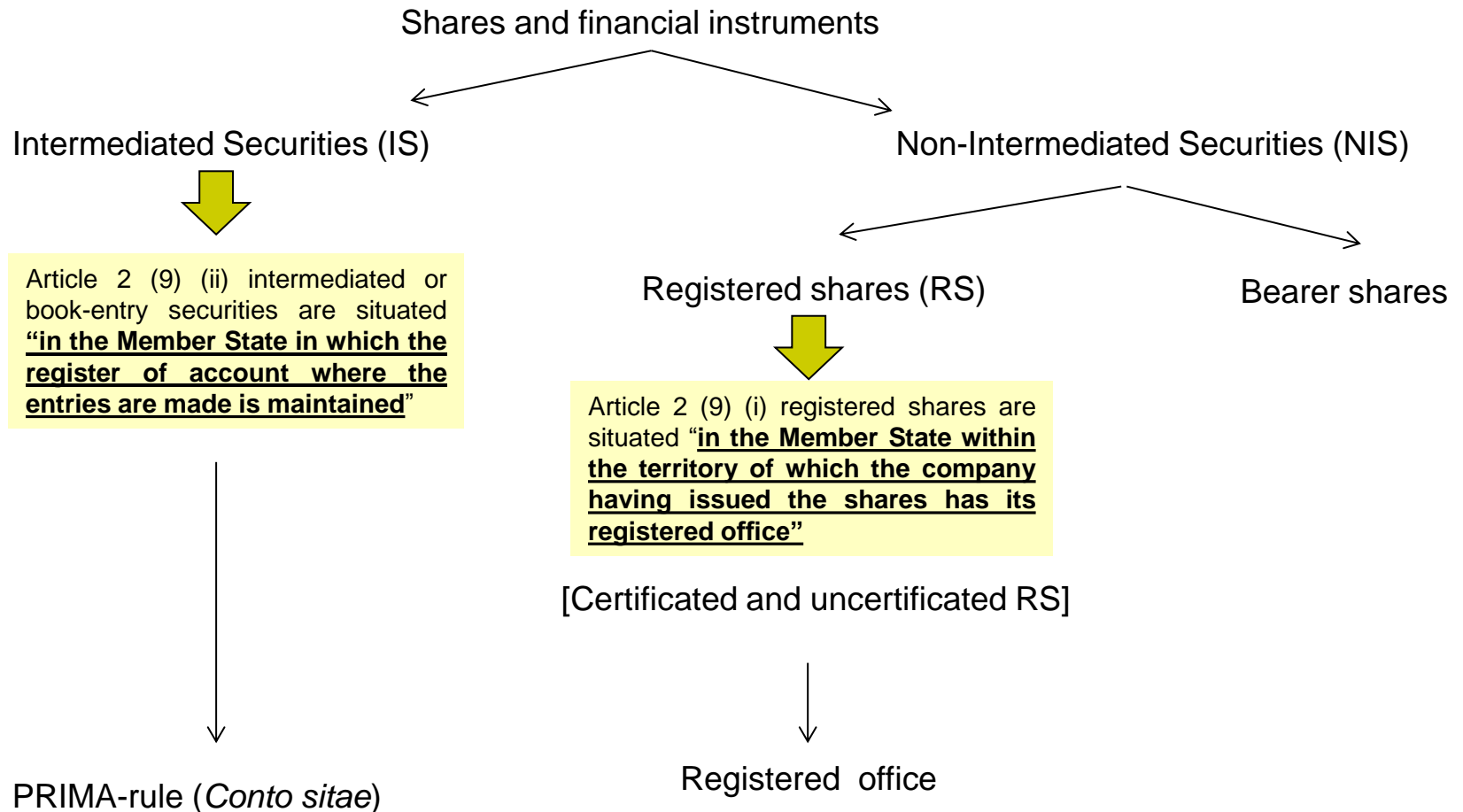
Example 1



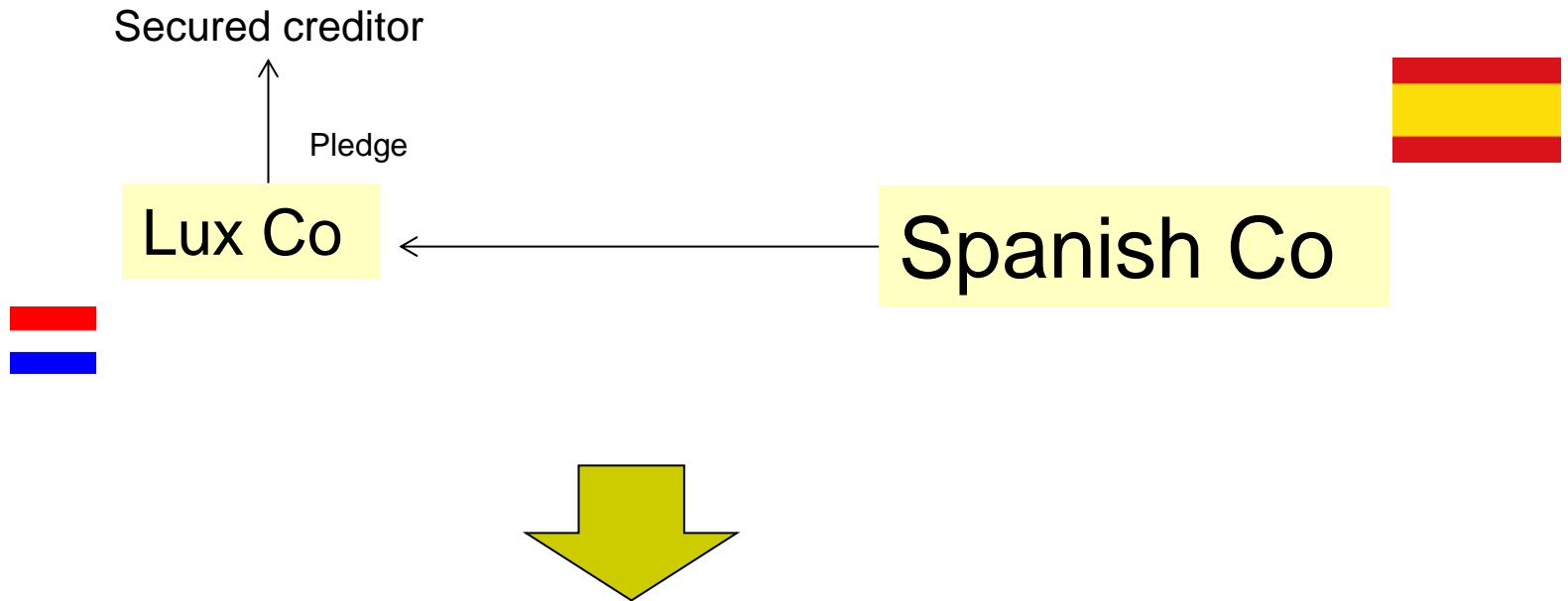
Effectiveness of the pledge: Art 9 (2) FCD

Article 8 EIR Recast applies

Shares and financial instruments



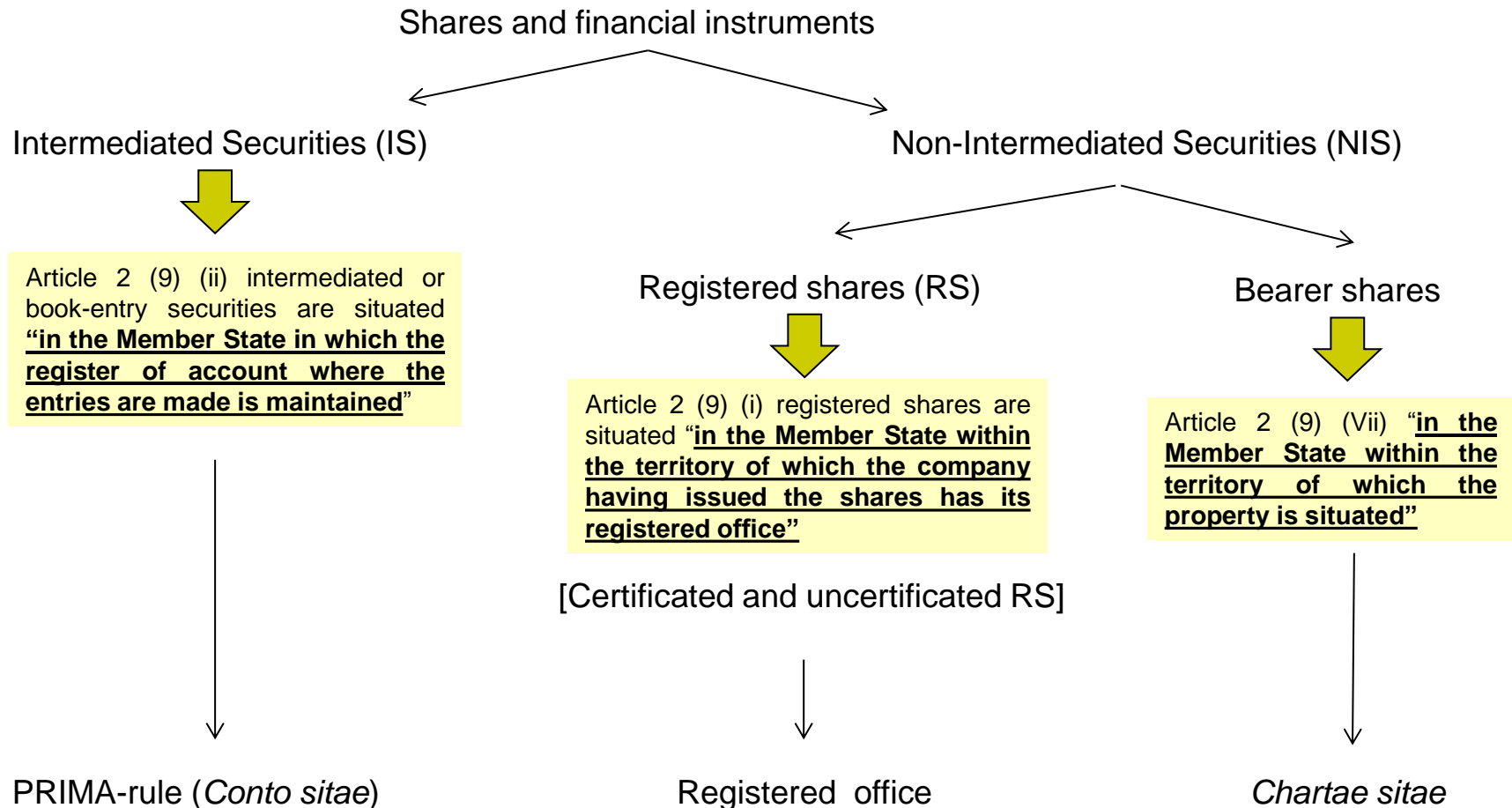
Example 2



Effectiveness of the pledge: ?

Article 8 EIR Recast applies

Shares and financial instruments



Claims and bank accounts

Claims and bank accounts

Claims

Bank accounts

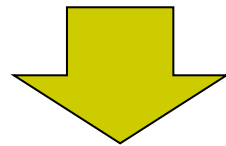
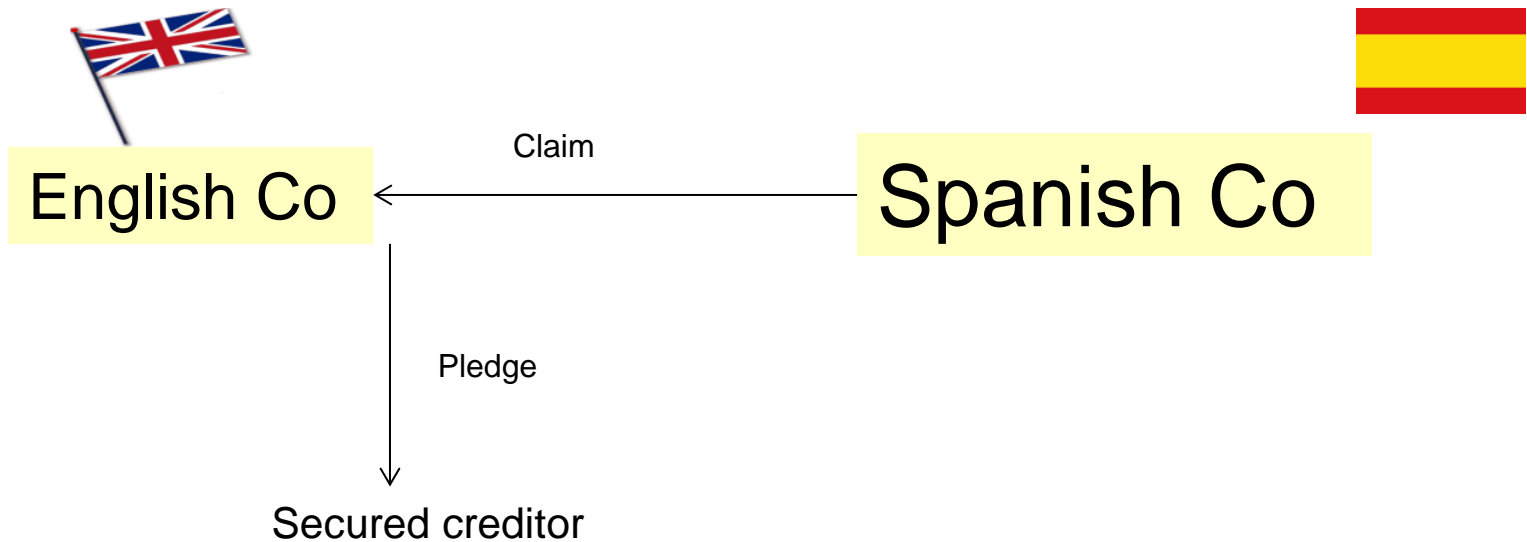


Article 2 (9) (viii) claims **“in the Member State within the territory of which the third party required to meet the claim has the COMI”**



Debitor debitoris' COMI

Example 3



Effectiveness of the pledge: ?

Article 8 EIR Recast applies

Claims and bank accounts

Claims and bank accounts

Claims



Article 2 (9) (viii) claims **“in the Member State within the territory of which the third party required to meet the claim has the COMI”**



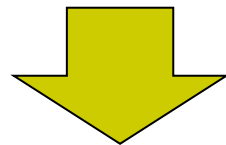
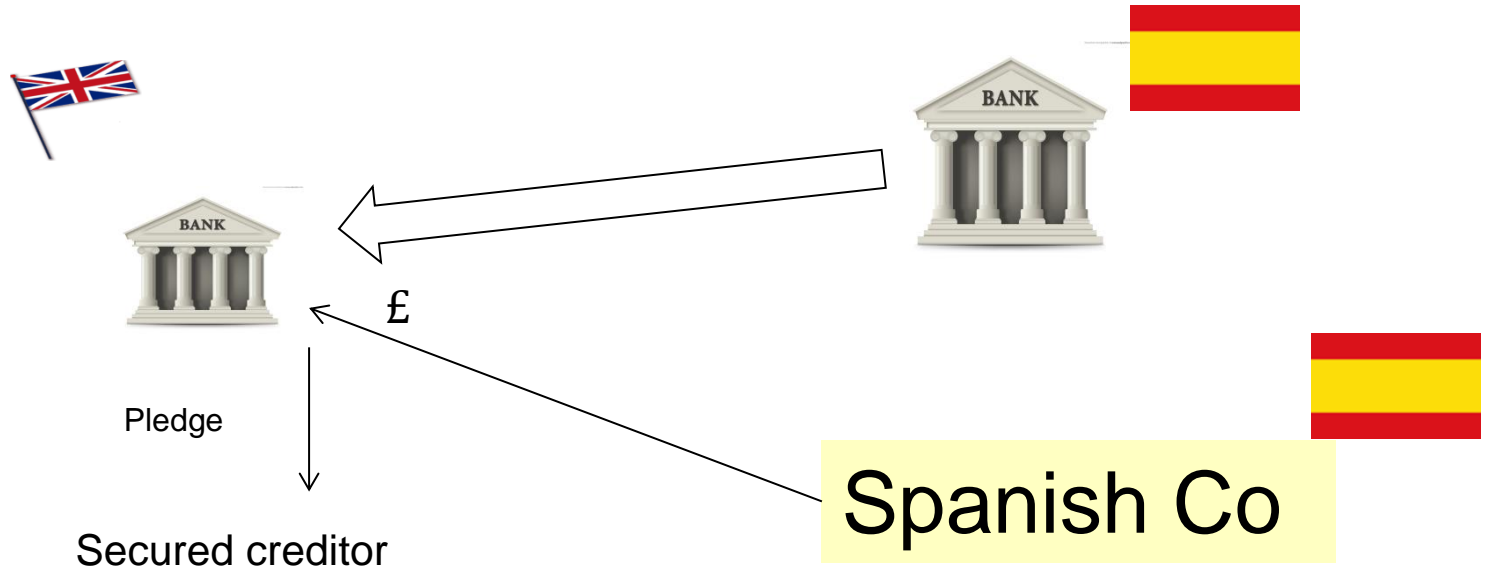
Debitor debitoris' COMI

Bank accounts



Article 2 (9) (iii) bank accounts are situated **“in the Member State indicated in the account's IBAN”**

Example 4



Effectiveness of the pledge: ?

Article 8 EIR Recast applies



The three main elements of a future instrument

- Connecting factor(s)
- *Conflit mobile* problems
- General provisions
- Commission's works

Thank You

