

The Scope of Protection of the Principle of Sovereign Immunity against Insolvency Challenges in the European Single Market considering Article 6 (1) EU Insolvency Regulation

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Abstract

Tax law and insolvency law rarely intersect with Public International Law and European Law. Yet, a case currently before the Court of Justice of the European Union (CJEU) directly addresses this intersection. It thereby offers a valuable opportunity to explore the interplay between these areas of law. The legal debate mainly revolves around the interpretation of Article 6 (1) of the EU Insolvency Regulation (EIR), which has not often been dealt with yet.

Keywords: Tax liabilities; Cross-border insolvency; Art. 6 EIR; Sovereign immunity; Public International Law.

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Outline:

- I. The case before the German Federal Court of Justice*
- II. Question referred to the CJEU for Preliminary Ruling*
- III. Public international law foundations*
- IV. The influence of insolvency law on the legal categorization of payments on tax liabilities*
- V. Resolution of the conflict of laws with reference to rules and principles of European Law*
- VI. Outlook for a harmonized European approach to tax liabilities*

I. The case before the German Federal Court of Justice

The facts of the case before the German Federal Court of Justice shall quickly be recounted. The insolvency administrator of a GmbH based in Germany contested two payments totaling around 5.7 million zlotys (1.36 million euros) that the insolvency debtor had made to the Polish estate just a month after filing for insolvency in Germany. These payments were related to tax liabilities, which arose from the import of non-European goods into the debtor's logistics center operated in Poland. Both the Regional Court and the Higher Regional Court dismissed the claim.

In terms of procedural law, sec. 20 (2) German Court Constitution Act³ in conjunction with Article 25 German Constitution⁴ formed the starting point of the legal analysis. According to sec. 20 (2) German Court Constitution Act, German courts shall not decide a case, in which the defendant is subject to and protected by sovereign immunity. In accordance with the case law that the Federal Constitutional Court has established, this question must be answered *ex officio*⁵ before the respective international jurisdiction is determined.⁶

On this basis, the Regional Court dismissed the claim brought by the insolvency administrator on the grounds that, although the claim was principally a civil law matter, the claim had to be distinguished from the sovereign act of tax collection,

3 Gerichtsverfassungsgesetz, German Court Constitution Act; available at https://www.gesetze-im-internet.de/englisch_gvg/index.html (last visited 2 June 2025).

4 Grundgesetz, German Constitution, available at https://www.gesetze-im-internet.de/englisch_gg/index.html (last visited 2 June 2025).

5 BVerfG, 13.12.1977 - 2 BvM 1/76, BVerfGE 46, 342, 359.

6 BGH, 19.12.2017 - XI ZR 796/16, BGHZ 217, 153 para. 15; BGH, 8.3.2016 - VI ZR 516/14, BGHZ 209, 191 para. 11

which it could not rule upon.⁷ The insolvency administrator appealed against the decision and pursued its repayment claim before the Higher Regional Court, which, however, also dismissed the claim, invoking the principle of sovereign immunity.⁸ Following the insolvency administrator's second appeal, the German Federal Court decided to stay the proceedings and refer the matter to the CJEU pursuant to Article 267 (1) (b), (3) TFEU.⁹

II. Question referred to the CJEU for Preliminary Ruling

Pursuant to Article 6 (1) of Regulation (EU) 2015/848 on insolvency proceedings (EIR), the courts of the Member State in whose territory the insolvency proceedings have been opened have jurisdiction for all actions arising directly out of the insolvency proceedings and which are closely connected with the insolvency proceedings.

The German Federal Court of Justice has now referred the question to the CJEU as to whether Article 6 (1) EIR should be interpreted in such way that the provision contains an implied waiver by the European Member States of their respective sovereign immunity regarding actions brought by an insolvency administrator concerning the insolvency debtor's legal acts, including tax payments.

If the answer to this question is negative, the German Federal Court of Justice correctly assumes that payments made by an (insolvency) debtor to a foreign state or its bodies would henceforth be *de facto* excluded from transactions avoidance. Yet, the court suggested that Article 6 (1) EIR might contain an implied waiver of sovereign immunity, alleging that the principle of sovereign immunity has undergone a change from an "absolute to a relative right [...] not at least due to the increasingly commercial cross-border activities of state authorities."¹⁰

The CJEU's decision on the understanding of Article 6 (1) EIR is of great legal and economic interest: If the CJEU were to consider the principle of sovereign immunity applicable, the claim before German courts would fail. At the same time, an action brought before Polish courts would be inadmissible since German courts have jurisdiction under Article 6 (1) EIR. Although this deficit in legal protection could theoretically be compensated for via secondary insolvency proceedings in Poland in

7 LG Offenburg, 31.7.2023 - 2 O 343/22, BeckRS 2023, 46706 para. 13.

8 OLG Karlsruhe, 15.4.2024 - 3 U 43/23, BeckRS 2024, 7339 para. 24 f.

9 BGH, 16.1.2025 - IX ZR 60/24, BeckRS 2025, 572.

10 BGH, 16.1.2025 - IX ZR 60/24, BeckRS 2025, 572 para. 7.

accordance with Article 34 et seq. EIR, such proceedings would not be practically viable considering the necessity of procedural efficiency, especially in insolvency related matters. In addition, pursuant to Article 35 EIR, the legislation of the Member State in whose territory the secondary insolvency proceedings have been opened applies to the secondary insolvency proceedings. The avoidance claim could not be enforced if that law does not provide for an avoidance option. Ultimately, this would result in the dilemma for the insolvency administrator with the action failing both in Germany and in Poland. Hence, a ban on the avoidance of tax payments would have substantial ramifications for the financial stability within the European Single Market.

As a result, the interlocking of tax law and avoidance law with European and Public International Law, which has rarely been dealt with so prominently in supreme court case law,¹¹ must be analyzed in depth.

III. Public international law foundations

Under international law, the legal principle of *sovereign equality of states*, as enshrined in Article 2 No. 1 UN Charter, frames the legal dispute. The principle of sovereign equality entails the principle of non-interference in the exercise of sovereign powers of foreign states. It means that states do not sit in judgment over one another (*par in parem non habet imperium*).¹² This “principle of state immunity” has been established as a worldwide practice since the end of the Thirty Years’ War in 1648 and is still largely regarded as unwritten customary international law today. Yet, the extent to which the principle of non-interference is binding on Poland and Germany is unclear and must therefore be clarified.

Notwithstanding the fact that the Convention on the Immunity of States and their Property from Jurisdiction adopted by the UN Assembly in 2004¹³ is yet to come into effect,¹⁴ Germany has neither signed nor ratified this Convention. At the same time,

11 Most recently concerning a different constellation CJEU, 14.3.2019 - C-695/17 - *Mettrato*, ECLI:EU:C:2019:209 = BeckRS 2019, 3330.

12 On this principle in general, *Dinstein*, Israel Law Review 1966, 407-420; specifically for civil and commercial matters, *Bsaisou*, in: Geimer/Schütze, Internationaler Rechtsverkehr in Zivil- und Handelssachen, 67th ed., June 2024, before Art. 1 para. 3-13.

13 United Nations Convention on Jurisdictional Immunities of States and Their Property, dated December 2, 2004.

14 It is not yet in force since the required ratification by at least thirty states has not been reached yet.

the 1972 European Convention on State Immunity,¹⁵ which Germany has signed, has not been ratified by Poland. Albeit not being bound by virtue of a joint convention, the Federal Republic of Germany must still respect the principle of state immunity as a part of the customary international law.¹⁶ More specifically, Article 25 (1) German Constitution entails the constitutional command to regard customary international law as part of the federal law, which, according to the “doctrine of intermediate priority”, stands between the constitution and other federal laws.¹⁷

However, for the principle of state immunity to apply, the state invoking this very principle must have exercised sovereign powers (*acta iure imperii*) as opposed to non-sovereign (i.e. private¹⁸) acts (*acta iure gestionis*).¹⁹ Due to the lack of an international definition of sovereign acts *vis-à-vis* private acts, this differentiation is generally made according to the applicable national law,²⁰ which was German law in the matter brought before the CJEU. Within the applicable German legal system, the decisive criterion to differentiate between sovereign acts and private acts is the “public law nature” of the act or the legal relationship resulting therefrom.²¹ Recognized sovereign acts include the exercise of military or police power as well as acts relating to legislation or the administration of justice.²² Yet, it is to be determined how the act of raising and collecting taxes has to be classified.

Tax law is administrative law.²³ Albeit not always consciously, citizens are constantly confronted with tax law, be it when buying bread at the bakery, where the VAT is included in the purchase price, or be it in the form of wage tax deductions on their income.

15 European Agreement on State Immunity of May 16, 1972; Act on the European Agreement of May 16, 1972 on State Immunity of January 22, 1990, German Federal Law Gazette I, p. 34.

16 On customary international law, see also Article 38 para. 1 lit. b ICJ Statute: Customary international law as the “expression of a general practice recognized as law”, which in turn presupposes a certain state practice (*consuetudo*) and a corresponding legal conviction (*opinio iuris*); see also BVerfGE 111, 307 (318).

17 Heintschel von Heinegg/Frau, in: Epping/Hillgruber, BeckOK-GG, 59th ed. of 15.9.2024, Art. 25 para. 27.

18 However, if a foreign state acts *exclusively* under private law, a legal dispute in this regard is subject to ordinary jurisdiction as a whole, BGH, 24.3.2016 - VII ZR 150/15, ZfBR 2016, 571, 573 para. 21.

19 BGH, 16.1.2025 - IX ZR 60/24, BeckRS 2025, 572 para. 7; also Dany, Forderungsfeststellung im Europäischen Insolvenzrecht, 2024, p. 193.

20 BGH, 19.12.2017 - XI ZR 796/16, BGHZ 217, 153 para. 18.

21 BGH, 19.12.2017 - XI ZR 796/16, BGHZ 217, 153 para. 17; BVerfGE 16, 27, 61 f. = NJW 1963, 1732.

22 BVerfG, 30.4.1963 - 2 BvM 1/62, BVerfGE 16, 27, 63 = NJW 1963, 1732; BVerfG, 17.3.2014 - 2 BvR 736/13 = NJW 2014, 1723 para. 21; BGH, 8.3.2016 - VI ZR 516/14, NJW 2016, 1659.

23 Seer in: Tipke/Lang, Steuerrecht, 25th edition, Cologne, 2024, para. 1.7.

No attempt to summarize the entire history of taxes could ever be considered exhaustive, let alone in this article. The first harvest taxes were levied by the Egyptians five millennia ago. The Nile customs duty is probably the first recorded trade tax, and the ecclesiastical personal tithe and territorial poll taxes mark the beginning of modern tax law in Germany. For the purposes of this analysis, it is sufficient but vital to understand that taxes are the most important source of funding for the state.

As it is very unlikely to assume that citizens are generally willing to pay all their taxes voluntarily, tax law has been construed as public debt law, which means that paying taxes is a legal obligation establishing monetary claims of the state against each citizen pursuant to sec. 37 *et seq.* German Fiscal Code^{24, 25} Unlike in contract law, this liability is established by law (*obligatio ex lege*) and further determined by the state.

Just like other public charges, levying taxes is widely recognized as a sovereign act.²⁶ This applies regardless of the fact, whether the act of tax collection has been conducted lawfully.²⁷ Even if a court is not *explicitly* reviewing the *legality* of a foreign state's sovereign act, the court's judgement may be considered a violation of sovereign immunity.²⁸ For example, some voices have argued that the principle of state immunity also applies to actions concerning the determination of a distribution list in insolvency proceedings if the court herewith reverses the legal consequences of a foreign state's sovereign act.²⁹ Against this background, a blocking effect of state immunity *vis-à-vis* the German insolvency courts in the case discussed here would – *prima vista* – seem to be possible.

24 Abgabenordnung, The Fiscal Code of Germany; available at https://www.gesetze-im-internet.de/englisch_ao/index.html (last visited 2 June 2025).

25 Seer in: *Tipke/Lang* (Fn. 21), para. 1.29.

26 BVerfG, 6.5.2020 - 2 BvR 331/18, NJW 2020, 3647, 3648 para. 21; previously BVerfG, 17.3.2014 - 2 BvR 736/13, NJW 2014, 1723, 1724 para. 22 with further references.

27 Otherwise, another court would decide on the legality of the sovereign action of another state, which would probably be the clearest violation of the principle of state immunity.

28 For example, in a civil action against the Republic of Greece in connection with a sovereignly ordered exchange of government bonds, which was based on contractual repayment and compensation claims that, viewed in isolation, were to be classified as civil law, but for which a decision would have had to be made on the authorization to carry out the sovereign measures, BGH, 9.12.2017 - IX ZR 796/16, BGHZ 217, 153-165 para. 20 *et seq.*

29 *Cranshaw*, DZWIR 2019, 459, 473; later generally *Kopp*, NZI 2021, 547, 662.

IV. The influence of insolvency law on the legal categorization of payments on tax liabilities

However, it is questionable whether these findings also apply to the restitution claim of an insolvency administrator under insolvency law. The insolvency restitution claim must be distinguished from the act of tax assessment. After all, restitution claims under sec. 143 (1) German Insolvency Code³⁰ are indisputably of private law nature. Consequently, insolvency courts, as opposed to administrative (tax) courts, decide on insolvency restitution matters in accordance with sec. 13 German Court Constitution Act. In addition, sec. 143 (1) German Insolvency Code, according to which a contestable outflow of assets from the insolvency estate is to be returned, serves the purpose of enforcing the regulatory content contained in sec. 129 *et seq.* German Insolvency Code. To enforce these provisions effectively, insolvency law shall supersede tax law to ensure the best possible distribution of the insolvency estate to all creditors (*par conditio creditorum*, which is the overarching principle of German insolvency law, cf. sec. 1 (1) German Insolvency Code). Accordingly, the restitution claim is dogmatically not derived from the legal relationship between the insolvency debtor and its creditor, neither does it follow from the insolvency-related restructuring of their legal relationship, but it rather represents an *independent* legal ground for the insolvency administrator to recover payments, contingent upon the initiation of insolvency proceedings.³¹ Accordingly, the German Federal Fiscal Court consistently distinguishes between the establishment of the tax liability and the contestation of a tax payment; the latter has to be pursued exclusively before civil courts.³²

Yet, it can hardly be denied that the repercussions of the insolvency avoidance extend to the authority of the Polish state to carry out its tax collection, albeit indirectly.³³ Factually, the Polish tax authorities' power would be completely devalued if the tax payment made had to be returned.³⁴

Therefore, in the case at issue, the courts of first instance ruled that Poland's sovereign immunity was affected. Opposing to this, *Thole*³⁵ considered these judgments

30 Insolvenzordnung, German Insolvency Code; available at https://www.gesetze-im-internet.de/englisch_inso/index.html (last visited 2 June 2025).

31 BFH, 5.9.2012 – VII B 95/12, NZI 2013, 102, 103 para. 11.

32 BFH, 5.9.2012 – VII B 95/12, NZI 2013, 102, 103 para. 13; BFH, 27.9.2012 – VII B 190/11, DStRE 2013, 235, 236.

33 OLG Karlsruhe, 15.4.2024 - 3 U 43/23, BeckRS 2024, 7339 para. 24.

34 The tax debt revived in the proceedings (sec. 144 (1) German Insolvency Code) would have to be entered in the insolvency schedule, with the prospect of a pro rata asset distribution in the amount of the insolvency quota.

35 *Thole*, ZRI 2024, 1006, 1006.

to be “misguided”. *Thole* argues that a contradiction arises from the fact that challenging payments to the domestic tax authorities would have to be classified as a non-sovereign act, while challenging payments to the foreign tax authorities would have to be classified as a sovereign act. *Thole* also criticized the reference made by the Higher Regional Court that the tax recovery by the foreign state would otherwise come close to zero. In this context, *Thole*³⁶ and – following this – *Skauradszun*³⁷ have pointed out that this idling of the claim has no legal cause and, in particular, does not stem from the qualification of the act as sovereign or non-sovereign; it is simply the factual consequence of the economic situation of the insolvent debtor.

Yet, the German Federal Court took a different view. The German Federal Court emphasized that the legal consequences of insolvency challenges interfere with foreign tax collection to a particular extent.³⁸ Even if the legality of the foreign state act is not reviewed incidentally, as in the landmark decision *Greece Ruling*,³⁹ the German courts would effectively still order the tax authorities of a foreign state to return the taxes levied and thereby influence the whereabouts of tax revenue in the foreign treasury.⁴⁰

However, the case showed some particularities: The debtor had apparently filed for insolvency, but no protective measures had been ordered with regard to the self-administration the debtor had applied for and that had initially been granted. If the court had at least ordered a reservation of consent or provisional self-administration, the payments made on December 17, 2021 and December 24, 2021 could no longer have been made. In this case, the Polish state would also have defaulted on its claims, but the claims would then have been “promoted” to so-called insolvency liabilities under sec. 55 (4) German Insolvency Code that are paid before all other insolvency claims are paid. Yet, the facts of the case do not reveal any further details.

If one – like *Thole* and *Skauradszun* – assumed, that the repayment is a legal act under civil law that is to be distinguished from the act of tax assessment, the principle of state immunity would not apply because of the absence of a sovereign act, and Article 6 (1) EIR would establish the jurisdiction of the German courts.

36 *Thole*, ZRI 2024, 380, 385.

37 *Skauradszun*, in: *Skauradszun/Fridgen*, BeckOK StaRUG, 15th ed. as of January 1, 2025, Sec. 2 para. 44c.

38 BGH, 16.1.2025 - IX ZR 60/24, BeckRS 2025, 572 para. 12.

39 BGH, 9.12.2017 - IX ZR 796/16, BGHZ 217, 153.

40 BGH, 16.1.2025 - IX ZR 60/24, BeckRS 2025, 572 para. 12; cf. previously *Kopp*, NZI 2021, 657, 662; *Reimer*, IWRZ 2024, 247, 249.

However, if one – like the Higher Regional Court and the German Federal Court of Justice – assumed that the action for repayment with regard to contestable payments on tax liabilities also concerns a sovereign act,⁴¹ Article 6 (1) EIR becomes relevant.

In principle, the EU Insolvency Regulation takes precedence over federal law outside the scope of application of Article 1 (2) German Basic Law. It could therefore be assumed that this also applies to customary international law, which is classified as federal law. Furthermore, the EU Insolvency Regulation does not contain any provision that regulates the relationship to customary international law in general or to the principle of state immunity specifically. Article 85 EIR only states that individual international treaties take precedence. The German Federal Court takes the view that the primacy of European Law does not apply in relation to general rules of International Public Law.⁴²

However, the German Federal Court considers it possible that a waiver of immunity by the Member States can be inferred from Article 6 (1) EIR.⁴³ A waiver of immunity is generally possible and commonly recognized in International Public Law. In legal terms, the waiver can be made in the form of an international treaty, a private treaty or declared in court for specific proceedings (possibly even implicitly through an unrepentant plea).⁴⁴ A waiver via the EU Insolvency Regulation would therefore be possible. The fact that the EU Insolvency Regulation is secondary law is irrelevant here.⁴⁵

However, there is a dispute as to whether Article 6 (1) EIR is to be interpreted as containing an implied waiver of the principle of sovereign immunity with regard to the recognition of foreign insolvency proceedings,⁴⁶ which the German Federal Court – due to its nature and relevance under EU law – is not able to resolve, but correctly leaves this to the CJEU.

41 BGH, 16.1.2025 - IX ZR 60/24, BeckRS 2025, 572 para. 11.

42 BGH, 16.1.2025- IX ZR 60/24, BeckRS 2025, 572 para. 15.

43 OLG Karlsruhe, 15.4.2024 - 3 U 43/23, BeckRS 2024, 7339 para. 26.

44 BVerfG, 17.3.2014 - 2 BvR 736/13, NJW 2014, 1723 para. 24.

45 See also OLG Karlsruhe, 15.4.2024 - 3 U 43/23, BeckRS 2024, 7339 para. 26.

46 BGH, 16.1.2025 - IX ZR 60/24, BeckRS 2025, 572 para. 17 with further references.

V. Resolution of the conflict of laws with reference to rules and principles of European Law

In brief words, the German Federal Court rejects the views of *Skauradszun* and *Thole* (para. 11). The German Federal Court appears to be concerned that a violation of Public International Law could result from the fact that a German court could order the tax authorities of a foreign state to return taxes collected to the insolvency estate, thereby influencing the whereabouts of tax funds with the foreign treasury (para. 12).

This argument only convinces on the surface. It assumes that the whereabouts of tax funds are to be assessed differently from the whereabouts of other liquid funds. If, for example, the debtor had rented space from a state-owned company, the German Federal Court would hardly have allowed an insolvency challenge to fail because of an interference with a core area of the foreign state.

In addition, states may generally collect their taxes through their own enforcement proceedings; however, there are some alternative systems. For example, the *Frankfurter Allgemeine Zeitung* reported on August 9, 2012 that, in Italy, Equitalia AG, whose capital is held entirely by the public sector, has been collecting taxes since 2006 after the tax office assigned them to collect the debts in case of a non-payment.⁴⁷ In accordance with Legislative Decree 193 of October 22, 2016, which has since been amended several times, the Agenzia Entrate Riscossione is now responsible for collecting tax revenue as a public corporation under the management and supervision of the Italian Ministry of Economy and Finance. Would the German Federal Court view a payment to the Agenzia Entrate Riscossione differently because the tax authority itself is no longer the holder of the claim? Can the success of an insolvency challenge depend on the fact that the claim for which payment was made was previously assigned by the tax authorities to another entity? In the authors' opinion, an assigned tax claim remains a tax claim.⁴⁸ However, this would have the consequence that the bar on transactions avoidance claims would have to be extended even further to private companies.

A look at the EU Insolvency Regulation can also be helpful. Recital 63 (1) EIR states that any creditor who has his or her habitual residence, domicile or registered office in the Union should have the right to lodge his or her claims in any insolvency proceedings pending in the Union relating to the debtor's assets. According to Recital 63 (2)

47 Cf. *Bremer*, Italy - Tax collection company: Monti's men for the rough stuff, FAZ of August 9, 2012.

48 See BFH, 17.3.2022 - IX ZR 216/20, NZI 2022, 472 et seq. with note by *Schmittmann*.

EIR, this expressly applies to tax authorities and social security institutions. This suggests that the EU Insolvency Regulation does not intend to privilege tax authorities and social security institutions in insolvency proceedings, but to place them on an equal footing with other creditors.⁴⁹ Insolvency avoidance law serves essential procedural objectives, namely the joint and equal satisfaction of creditors (*par conditio creditorum*).

Furthermore, Article 2 (12) EIR states that the term “foreign creditor” means a creditor who has his or her habitual residence, domicile or registered office in a Member State other than the Member State of the opening of proceedings. Tax authorities and social security institutions of the Member States are expressly included. This suggests that no distinction is drawn between creditors acting under public law and creditors acting under private law. Hence, a creditor cannot invoke its sovereign activity if this would prevent the best possible distribution of the insolvency estate to the creditors.

Pursuant to Article 7 (2) (1) EIR, the law of the state in which proceedings are opened governs the conditions under which insolvency proceedings are opened and how they are to be conducted and terminated. According to Article 7 (1) EIR, the insolvency proceedings and their effects are governed by the insolvency law of the Member State in whose territory the proceedings are opened. The EU Insolvency Regulation assumes that it is incumbent on the liquidators to examine whether there are any possibilities for restructuring and, if such a possibility exists, to agree on the proposal of a coordinated restructuring plan (Article 56 (2) lit. c EIR). In addition, Article 60 (1) lit. b EIR provides for the possibility for the liquidator to apply for a stay of any measure relating to the realization of assets in any proceedings concerning the assets of another member of the same group of companies, provided that a restructuring plan has been proposed for all or some members of the group of companies over whose assets insolvency proceedings have been opened and has a reasonable prospect of success. Although these provisions are set out in Chapter V (“Insolvency proceedings concerning the assets of members of a group of companies”), they are likely to be general principles. Tax liabilities can also be included in these restructuring plans. Hence, the tax revenue of a foreign state would also be affected by such a plan. Pursuant to Article 32 (1) EIR, a confirmed restructuring plan would also have to be recognized by all other states, even if their own tax claim has been reduced in it.

49 Cf. ECJ, 9.11.2016 - Case C-212/15, NZI 2016, 959 et seq. with comment by *Mankowski* = NJW 2017, 144 et seq. with comment by *Strickler*.

It is one of the general principles of European Law (cf. Article 4 (3) TEU) that the European legal texts are to be interpreted in such way as to give them their greatest possible effect (*effet utile*).⁵⁰ The possibility of an insolvency challenge is expressly assigned to the law of the state of the opening of proceedings in Article 7 (2) (2) lit. m EIR. It is therefore clear that the possibility of an insolvency challenge is intended by the legislator of the EU Insolvency Regulation. It is not clear from the EU Insolvency Regulation that the legislator intended to give the Member States the option of avoiding a claim by an insolvency administrator by invoking sovereign immunity. Otherwise payments to sovereigns of other Member States would be completely excluded from insolvency avoidance.

With Article 16 EIR, the legislator has expressly set limits to insolvency avoidance. However, it has limited these to the defendant proving that this act is governed by the law of a Member State other than the State of the opening of proceedings (Article 16 lit. a EIR) and that this act cannot be challenged in any way under the law of that Member State in the present case (Article 16 lit. b EIR). Further restrictions on transactions avoidance in insolvency proceedings are not provided for in the EU Insolvency Regulation, so that it can be assumed that the legislator did not want any further restrictions (*argumentum e contrario*). Otherwise, it would have been easy for the legislator to implement a rule that protects the sovereign interests of the Member States.

Lastly, the CJEU has interpreted the provision of Article 3 (1) EIR 2000⁵¹ as meaning that the jurisdiction of the courts of the Member State in whose territory the insolvency proceedings have been opened establishes exclusive jurisdiction for an action to contest insolvency proceedings against a defendant who has his or her registered office or domicile in another Member State. The German Federal Court also applies this to Article 6 (1) EIR. It would be incomprehensible if, on the one hand, the Member States of the opening of proceedings had jurisdiction to hear an action for avoidance against a defendant domiciled in another Member State, but at the same time could not rule on the action for avoidance because of the payee's immunity.

If the CJEU and the German Federal Court should nevertheless deem the avoidance claim a sovereign matter, barring the German courts from a decision, *Baumert*

50 Cf. instead of many CJEU, 21.9.1983 - Case C-205-215/82 *Deutsche Michkontor*, ECLI:EU:C:1983:233 = NJW 1984, 2024; CJEU, 4.7.2006 - Case C-212/04 *Adeneler*, ECLI:EU:C:2006:443 = ZIP 2006, 2141; for more details *Schill/Krenn*, in: Grabitz/Hilf/Nettesheim, Das Recht der EU, Art. 4 EUV (82th ed., July 2024) para. 93 ff.

51 Council Regulation (EC) No. 1346/2000 of 29.5.2000 on insolvency proceedings.

argues that the insolvency administrator shall at least not only have the option of initiating secondary insolvency proceedings in the foreign Member State, but that Article 6 (1) EIR must also be interpreted in such meaning as to giving the insolvency administrator a right to choose the jurisdiction – as it is the case with cases involving third countries, e.g. Switzerland.⁵² *Baumert* argues that the purpose of Article 6 (1) EIR is not to limit the insolvency administrator to the exclusive jurisdiction of one member state.⁵³

VI. Outlook for a harmonized European approach to tax liabilities

The CJEU's decision is eagerly awaited, as it sets the course for all further disputes that will arise in the context of cross-border transactions avoidance matters with the foreign state as a creditor of tax liabilities.

The European Commission had already published a proposal for a Directive of the European Parliament and of the Council on the harmonization of certain aspects of insolvency law (COM (2002) 702 2002/0408 (COD)) in 2002 and stated that insolvency rules were fragmented at national level. The nuances between the national rules created legal uncertainty regarding the outcome of insolvency proceedings and led to higher costs for creditors with debtors in other Member States compared to those operating only domestically (e. g. costs for gathering data and information). The Directive proposed at the time contained provisions on avoidance actions in Title II. The Commission's proposal explicitly stated: "Title II on avoidance actions contains minimum harmonization rules aimed at protecting the insolvency estate against the unlawful seizure of assets prior to the opening of insolvency proceedings. This is intended to ensure that Member States' laws on insolvency proceedings provide for a minimum standard of protection in relation to the voidness, voidability or unenforceability of legal acts affecting all creditors."

Despite that, the European Commission has not indicated any plans to restrict insolvency avoidance vis-à-vis tax authorities. Yet, it is recommended that the Commission addresses this issue in order to harmonize and protect the European Single Market, particularly in consideration of the uncertainties surrounding non-European tax and tariff policies.

⁵² *Baumert*, NZI 2025, 301, 303.

⁵³ *Baumert*, NZI 2025, 301, 303; already in 2024: *Baumert*, NZI 2024, 106, 106.