

# Strange goings-on in Luxembourg – critical reflections on the CJEU judgment of 19 March 2026 – C-43/25 *SML Maschinengesellschaft*

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## Abstract

In its judgment of 19 March 2026, the CJEU’s Seventh Chamber ruled that Article 13 EIR 2000 (= Article 16 EIR 2015)<sup>1</sup> is not applicable if the provision of the *lex fori concursus* underlying the challenge serves to ensure subordination.<sup>2</sup> This settles an issue that had already been declared a matter of vital importance for German shareholder loan law.<sup>3</sup> In the following analysis, the decision is examined critically and it is argued that, whilst its reasoning is untenable, its outcome is to be welcomed.

## I. Background

1. Put simply, the decision was based on the following case. SML and MAPLAN had the same parent company, a limited liability company (GmbH) under Austrian law. SML had granted MAPLAN two loans totalling €5 million, of which MAPLAN had repaid €500,000 plus interest prior to the opening of insolvency proceedings. The parties had agreed that Austrian law should apply to the loan agreement. Following the opening of insolvency proceedings against MAPLAN’s

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- 1 Unless otherwise stated, cited below are the provisions of the EIR 2000 which formed the subject matter of the CJEU judgment. All comments apply *mutatis mutandis* to the corresponding provisions of the EIR 2015.
- 2 CJEU, 19 March 2026, C-43/25 – *SML Maschinengesellschaft mbH v AK, acting as liquidator in the insolvency proceedings concerning the assets of MAPLAN Maschinenfabrik und Anlagen für Kunststofftechnik Schwerin GmbH*, ECLI:EU:C:2026:220 = ZRI 2026, 351 with case note by *Bitter*.
- 3 *Kratzmeier*, NZG 2025, 307, 312 para. 23; see also *Theiselmann*, ZInsO 2025, 847 (“The final days of German shareholder loan law?”); *Zehlicke*, FD-InsR 2025, 802777 (“audible swan songs for German (insolvency) shareholder loan law”).

assets, the insolvency administrator contested the repayment of the loan and demanded the return of the €500,000 to the insolvency estate.

## 1. Assessment under German law

2. Under German law, this was a straightforward case. Pursuant to section 135(1) No. 2 of the *Insolvenzordnung* (InsO)<sup>4</sup>, the repayment of a shareholder loan or an equivalent transaction is voidable if it took effect in the year preceding the filing of the insolvency petition. According to established case law of the German *Bundesgerichtshof* (Federal Court of Justice), an act equivalent to a shareholder loan also exists where the loan is granted to a GmbH not directly by one of its shareholders but by a third company in which a shareholder of the borrowing GmbH holds a significant stake.<sup>5</sup> These conditions were met in this case, as the Austrian company, which held a 33% stake in MAPLAN as the borrowing company, held 78% of the shares in SML as the lending company and thus, as the majority shareholder, had a decisive influence on the fortunes of SML. The partial repayment of the loan took place six and a half months before the insolvency application and thus within the relevant period under section 135(1) No. 2 InsO.

## 2. Significance of Article 13 EIR 2000

3. Since the voidability under German law – as the applicable *lex fori concursus* pursuant to Article 4 EIR 2000 – was thus unquestionably established, the question arose as to whether SML could defend itself under Article 13 EIR 2000 by arguing that the loan agreement was governed by Austrian law, that the *lex causae* was therefore Austrian law, and that the repayment of the loan was in no way voidable under that law – which is to be assumed here.<sup>6</sup> In German case law and academic literature, it had long been disputed whether the avoidance under section 135 InsO fell within the scope of this provision.<sup>7</sup> The reasoning essentially

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4 Insolvent Code; English text available at [https://www.gesetze-im-internet.de/englisch\\_inso/](https://www.gesetze-im-internet.de/englisch_inso/) (last accessed on 10 April 2026).

5 Most recently BGH, 19 September 2024 – IX ZR 173/23 = BGHZ 241, 321 para. 22; cf. the overview in *Bork*, ZIP 2023, 1721, 1722 et seq.

6 In the German proceedings, this had not been examined at any instance. Rather, the courts of fact had immediately taken the legal view that Article 13 EIR 2000 and thus the *lex causae* were irrelevant, because this provision did not apply to challenges under section 135 InsO; see LG Schwerin BeckRS 2020, 66826 para. 46 et seq. and OLG Rostock BeckRS 2023, 54649 para. 16 et seq., 22.

7 See, regarding the state of opinion, the overview in the *Bundesgerichtshof's* request for a preliminary ruling, 16 January 2025 – IX ZR 229/23 = ZRI 2025, 121 para. 26, 32 with case note by *Bork* in ZRI 2025, 127 et seq. and EIRJ 2025-2 (<https://eirjournal.com/article/view/22254>); furthermore, *Bork*, Festschrift für Barbara Grunewald, 2021, p. 97 et seq.; *Bork*, Festschrift 200 Jahre Carl Heymanns Verlag, 2015, p. 263 et seq.; *Stender*, Grenzüberschreitende Insolvenzanfechtung der Rückgewähr eines Gesellschafterdarlehens, 2024, p. 46 et seq., 98 et seq.

followed two lines of argument. One line posited that the rules on shareholder loans did not constitute insolvency law but rather company law and were therefore not part of the *lex fori concursus*, with the consequence that neither Article 4 EIR 2000 nor Article 13 EIR 2000 was applicable. The other line of argument advocated a restrictive interpretation of Article 13 EIR 2000, with the consequence that, in the event of a challenge under section 135 InsO, Article 4 EIR 2000 would apply, but not Article 13. The *Bundesgerichtshof* also leaned towards this view in its request for a preliminary ruling.<sup>8</sup> The overwhelming majority, however, argued against any exception to section 135 InsO.

### 3. Reasons given by the CJEU

4. In the proceedings underlying the CJEU's decision, the action for annulment was successful at first and second instance. Following the defendant's appeal, the *Bundesgerichtshof* referred, inter alia, the question to the CJEU as to whether Article 13 EIR 2000 is also applicable where the insolvency administrator's claim for repayment serves to enforce a subordination rule applicable under the *lex fori concursus*. The CJEU answered this question extremely tersely, in no more than two pages comprising a mere 11 paragraphs, to the effect that it did not apply. It prefaced its reasoning by stating that it was bound by the referring court's interpretation of national law (paras. 27–31), presumably in order to be able to align itself with the *Bundesgerichtshof's* thesis – which, by the way, is entirely correct<sup>9</sup> – that section 135 InsO serves to enforce the order of priority laid down in section 39(1) No. 5 InsO.<sup>10</sup> It is then stated, in line with established case law, that the CJEU is bound by the unambiguous wording when interpreting a Union provision (para. 32) and that Article 13 EIR 2000, as an exception to Article 4(2) s. 2 lit. m EIR 2000, must in principle be interpreted narrowly (para. 33). Having thus used up three-quarters of the grounds, the CJEU, in para. 34, once again reproduces the wording of Article 4(2) s. 2 lit. m EIR 2000. The Chamber then addresses the actual issue in two paragraphs. The reasoning provided on this point is limited to two sentences that are not particularly meaningful in substance:<sup>11</sup> It follows from the relationship between Article 13 EIR 2000 and Article 4(2) s. 2 lit. m EIR 2000 that its scope of application is limited to cases concerning provisions on the nullity, voidability, or relative invalidity of legal acts that disadvantage the general body

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8 BGH, 16 January 2025 – IX ZR 229/23 = ZRI 2025, 121 para. 24 et seq.

9 For a general discussion on this topic, see *Bork/Veder*, Harmonisation of Transactions Avoidance Laws, 2022, para. 3.63 et seq., 4.182 et seq.

10 BGH, 16 January 2025 – IX ZR 229/23 = ZRI 2025, 121 para. 29.

11 Similarly, *Bitter*, ZRI 2026, 354, 355: “The reasoning is downright cryptic and therefore difficult to follow.”

of creditors as a whole, but not to provisions on the claims to be lodged or their ranking (para. 35). Nor is the wording of Article 13 EIR 2000 extended to cover the subject matter regulated in Article 4(2) s. 2 lit. g and i EIR 2000 (para. 36).

## II. Criticism

5. The decision is, with its rather thin reasoning,<sup>12</sup> not acceptable, but nevertheless to be welcomed in its outcome.

### 1. Systematics of the law on insolvency avoidance

6. The Seventh Chamber of the CJEU considers it appropriate to settle the matter in dispute – on which certainly more than a thousand pages have been written in Germany alone – in paragraphs 35 and 36 with no more than two sentences, which essentially say the same thing: Article 13 EIR 2000 concerns the detriment to the general body of creditors as a whole, but not the enforcement of the order of priority. This statement not only demonstrates that, contrary to its lip service in paragraph 32, the Court does not feel bound by the wording of the provision,<sup>13</sup> but it also shows that the Chamber has failed to understand the structure of transactions avoidance law. This system requires a distinction to be made between the disadvantage to creditors as a general prerequisite for avoidance and the specific avoidance ground applicable under the respective avoidance provision. This is not a feature unique to German law (section 129(1) InsO), but is standard in virtually all Member States of the European Union.<sup>14</sup> The recently published Directive harmonising certain aspects of insolvency law<sup>15</sup> also follows this system by requiring, in its Article 6(1), that the body of creditors be prejudiced as a general prerequisite for avoidance, and by regulating the grounds for avoidance in Article 7 et seq.
7. a. Every provision under insolvency law relating to avoidance requires a detriment to the general body of creditors as a whole. This is the central criterion for any avoidance claim and is therefore rightly emphasised in Article 4(2) s. 2 lit. m EIR 2000. The fact that this article distinguishes between whether the

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12 *Bitter*, ZRI 2026, 354, 355: “We are thus ultimately faced with a judgment without any reasoning.”

13 The wording of Article 4(2) s. 2 lit. m EIR 2000 is undoubtedly satisfied: the repayment of a shareholder loan is a legal act that disadvantages the general body of creditors as a whole and is therefore voidable.

14 See *Bork/Veder* (above fn. 9), para. 4.38 et seq.

15 Directive (EU) 2026/799 of the European Parliament and of the Council of 30 March 2026 harmonising certain aspects of insolvency law, OJ L2026/799.

legal acts are void, voidable, or relatively ineffective does not alter this, as it concerns only the legal consequence, not the prerequisites for avoidance.

8. b. A distinction must be drawn between the detriment to creditors and the further conditions on which this legal consequence depends under the *lex fori concursus*,<sup>16</sup> in particular the grounds for avoidance. Traditionally – again, not only in Germany but certainly across Europe<sup>17</sup> – at least three typical avoidance grounds have been codified: preferential treatment of creditors (congruent and incongruent coverage, known as “preferences” in English terminology), gratuitous performance (transactions at an undervalue), and transactions intentionally disadvantaging creditors (the classic *actio pauliana*). This is also reflected in Articles 7–9 of the Harmonisation Directive. In addition, national insolvency laws occasionally provide for further avoidance grounds.<sup>18</sup> In Germany, but also in Austria, Croatia, Italy, Portugal, and Slovenia, this includes the avoidance ground relating to payments on shareholder loans. In most cases, these avoidance provisions correspond to further rules that subordinate claims arising from shareholder loans. It can therefore indeed be said that an avoidance ground such as that under section 135 InsO aims to secure the order of priority.<sup>19</sup> However, this does not alter the fact that even avoidance provisions aimed at enforcing priority rules are only applicable if there is a detriment to the general body of creditors. If, for example, the shareholder loan is secured from the debtor’s assets by a security (right *in rem*) that is itself not voidable, then loan repayments do not disadvantage the general body of creditors because (and to the extent that) the loss of funds is offset by the release of the security. Voidability under section 135 InsO is excluded in this case.
9. c. If one clarifies this relationship between the disadvantage/detriment to creditors as a general prerequisite for avoidance and the specific avoidance grounds, the reasoning of the CJEU referred to above is hardly tenable. For neither Article 4(2) s. 2 lit. m EIR 2000 nor Article 13 EIR 2000 addresses the avoidance grounds. In the vast majority of national legal systems, all avoidance grounds are subject to further conditions going beyond the detriment

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16 See in this regard *Virgós/Schmit*, Report on the Convention on Insolvency Proceedings (reproduced, inter alia, in *Bork/van Zwieten*, Commentary on the European Insolvency Regulation, 2nd ed., 2022, Appendix 4) para. 135: “This same law” [i.e. the *lex fori concursus*] “determines the conditions to be met” (...); see also *Bork/Mangano*, European Insolvency Law, 2nd ed. 2022, para. 4.30; *Bork/van Zwieten-Garcimartín/Virgós* (ibid.), para. 16.06; *Magnus/Mankowski-Mankowski*, European Insolvency Regulation, 2025, Art. 7 para. 181.

17 For further details, see *Bork/Veder* (above fn. 9), para. 4.54 et seq.

18 See in this regard *Bork/Veder* (above fn. 9), para. 4.179 et seq.

19 See fn. 9 above.

to the general body of creditors. However, the reasons why, and the additional conditions under which, national law declares a legal act detrimental to the general body of creditors to be void, voidable, or relatively ineffective are irrelevant to the interpretation and application of the provisions of the EIR. They are 'catch-all' provisions,<sup>20</sup> for which it is sufficient that the legal act is detrimental to the body of creditors.<sup>21</sup> Put another way, if a provision of the *lex fori concursus* declares legal acts to be void, voidable, or relatively ineffective on the grounds of detriment to the general body of creditors, then Article 4(2) s. 2 lit. m EIR 2000 applies and, with it, Article 13 EIR 2000, regardless of the (avoidance) grounds and the additional conditions under which the legislature has provided for voidability.

10. d. Nor can this conclusion be circumvented by considering the issue of competing rules.<sup>22</sup> The reference to the order of priority in Article 4(2) s. 2 lit. i EIR 2000 does not mean that – as it were, as a *lex specialis* vis-à-vis Article 4(2) s. 2 lit. m EIR 2000 – provisions on avoidance actions guaranteeing the order of ranking of claims would also be covered. Article 4(2) s. 2 lit. i EIR 2000 concerns the order of priority in the distribution of proceeds; this has nothing to do with avoidance issues. Article 4(2) s. 2 lit. m EIR 2000 concerns insolvency avoidance, regardless of the purpose for which it is granted; this has nothing to do with the order of priority in the distribution of proceeds. In essence, every avoidance provision can be assigned to one of the other examples of rules listed in Article 4(2) s. 2 EIR 2000, such as lit. b (claims for avoidance form part of the insolvency estate and ensure that disposed-of or encumbered assets revert to the estate<sup>23</sup>), lit. d (e.g. if the voidable acquisition of a set-off position is an issue), lit. f (e.g. if the defence of voidability is raised against legal proceedings), or lit. g (e.g. if an insolvency claim has been replaced by a claim against the estate in a voidable manner). If, in all these cases, one were to allow lit. m to take a back seat as a *lex generalis*, little to nothing would remain of this letter (and thus also of Article 13 EIR 2000).

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20 Bork/van Zwieten-Garcimartín/Virgós (above fn. 16), para. 16.12.

21 Magnus/Mankowski-Mankowski (above fn. 16), Art. 7 para. 179.

22 It is not clear from the judgment whether the CJEU has made such considerations. The court's reasoning remains entirely unclear.

23 This is particularly evident in the case of the avoidance of a security interest in property not in the secured creditor's possession. Here, the encumbered asset has always formed part of the insolvency estate, and the avoidance makes it clear that this remains the case and that the secured asset or the proceeds from its realisation are not to be handed over to the secured creditor.

## 2. Extensibility to other grounds for avoidance

11. Quite clearly, the Seventh Chamber has also failed to consider the wider implications of its decision. For if avoidance provisions serving to enforce the order of ranking of claims fall outside the scope of Article 13 EIR 2000, this affects not only avoidance to secure the subordination of shareholder loans but also, for example, avoidance to secure the subordination of claims for gifts.<sup>24</sup> Under German law, for example, claims for a gratuitous performance by the debtor are subordinated pursuant to section 39(1) No. 4 InsO, and the avoidance provision in section 134 InsO may well be understood as intended to secure this subordination. If the present CJEU decision were consistently applied, this would mean that challenges to transactions at an undervalue would also not be covered by Article 13 EIR 2000 – a result that cannot really be seriously advocated, and which would in any case significantly reduce the scope of application of this provision once again.

## 3. Decision in written proceedings

12. The CJEU decided the case in written proceedings and without an opinion from the Advocate General. This only happens when the deciding chamber considers it a clear-cut case that is not worth the effort. In the present case, this is regrettable. Had there been an oral hearing, perhaps someone could have explained to the Chamber what the law on transactions avoidance is all about. As it stands, one must unfortunately conclude that the decision was quite obviously handed down without any detailed knowledge of the law on transactions avoidance. This does not exactly contribute to the acceptance of CJEU decisions. The CJEU should therefore consider whether to establish a specialised internal jurisdiction for references concerning the EIR.<sup>25</sup> The fact that the CJEU believes it can, in a matter concerning a provision as important and contentious as Article 13 EIR 2000 – on which entire libraries have been written in Europe – content itself with a single sentence of reasoning does not, in any event, do justice to the significance of the question referred and the scope of the provision – after all, the fundamental scope of application of a provision of European law is at stake.

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24 See already *Bork*, ZRI 2025, 127, 128; cf. also *Bitter*, ZRI 2026, 354, 355.

25 This would be consistent with Article 25 of the Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency) OJ L172/18, which requires Member States to ensure that “members of the judicial and administrative authorities dealing with procedures concerning restructuring, insolvency and discharge of debt receive suitable training and have the necessary expertise for their responsibilities”.

#### 4. Legal and policy assessment

13. Despite all this, the decision is ultimately to be welcomed. It has been set out in detail elsewhere<sup>26</sup> and is in line with widely held opinion<sup>27</sup> that Article 13 EIR 2000 is a provision that misses the mark in terms of legal policy. It grants protection of trust where such protection is not appropriate, for anyone entering into a contract with a foreign counterparty must expect the application of foreign insolvency law – and indeed foreign avoidance actions – in the event of that counterparty’s insolvency. Therefore, any curtailment of this provision – even if it occurs for the wrong reasons – is welcome. As long as the European legislator does not bow to the demands for the deletion of the current Article 16 from the EIR 2015,<sup>28</sup> one must simply hope that the CJEU will do its utmost to curtail the scope of this provision.

### III. Consequences

14. Finally, we must consider the consequences. In future – now that the EIR 2015 applies – (German) insolvency practitioners will find it easier to reclaim payments on shareholder loans from foreign shareholders in accordance with section 135 InsO. This provision remains part of the *lex fori concursus*, for even if one were to conclude from the present CJEU judgment that it is not a provision on avoidance within the meaning of Article 7(2) s. 2 lit. m EIR 2015, it is at least a provision concerning claims to be lodged or their ranking within the meaning of Article 7(2) s. 2 lit. g and i EIR 2015, or, in the alternative, a provision not included in the illustrative examples of Article 7(2) s. 2 EIR 2015 but attributable to the *lex fori concursus* pursuant to Article 7(1) and (2) s. 1 EIR 2015. The insolvency administrator can and must continue to bring the claim for repayment before the German courts in accordance with Article 6 EIR 2015, as there can be no doubt, even on the basis of the present CJEU ruling, that this is an action arising directly from the insolvency proceedings and closely linked with them. The shareholders are precluded from raising a defence under Article 16 EIR 2015, which contributes significantly to legal certainty and relieves the courts of the burdensome task of

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26 See, for example, *Bork*, Principles of Cross-Border Insolvency Law, 2017, para. 6.92 et seq. with further references; *Bork*, ZRI 2025, 127 and 129; *Bork/Mangano* (above fn. 16), para. 4.104, 4.107; *KPB-Bork*, InsO, as of March 2026, Art. 16 EulnsVO para. 3.

27 For example, *Brinkmann*, IILR 2013, 371, 378; *Hess/Oberhammer/Pfeiffer-Veder*, European Insolvency Law, 2014, p. 577 et seq.; *Keay*, 41 (2016), ELR 72, 85; *Riedemann/Kersch*, ZIP 2025, 1008, 1009; *Veder*, Party Autonomy and Insolvency, in: *Westrik/van der Weide*, Party Autonomy in International Property Law, 2011, 261, 267; *Veder*, IILR 2011, 285, 294 et seq.

28 See most recently *Bork*, *eurofenix* Winter 2025/2026, 28 et seq.

determining the applicable *lex causae* and the associated battle of expert opinions.<sup>29</sup> This applies even where it has been agreed that a law other than German law is to apply to the loan.<sup>30</sup> The *Bundesgerichtshof* will have to decide, when the opportunity arises, whether it will rule accordingly on section 339 InsO in cases involving third countries – insofar as this provision is not deemed to be entirely superseded by Article 7 EIR 2015.<sup>31</sup> As regards foreign shareholders, it is hardly to be expected that they will henceforth refrain from providing financial assistance to their German companies in the context of group financing. However, there is now a greater incentive to commit to providing equity capital rather than a loan, which would certainly be in the interests of the companies. This would remove the issue from the scope of insolvency law and assign it to company law. In the case of German companies, this would still be governed by German law and would often lead to comparable outcomes, but at least one would have avoided the application of the *lex fori concursus* and thus also section 135 InsO.

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29 A recent paradigmatic example of this is LG Berlin, 18 February 2025 – 9 O 3/23 = ZInsO 2026, 591 et seq.

30 Contrary to some initial comments on the present judgment of the CJEU, the aspect of the choice of law agreement played no role in this decision. Article 16 EIR 2015 will in future not apply to challenges under section 135 InsO even if the loan agreement is governed by foreign law for reasons other than a contractual agreement. This will in fact be the case on a regular basis, since, pursuant to Article 4(2) Rome I Regulation, the law of the state in which the lender has his or her habitual residence is to be applied to loan agreements, because it is the lender who is required to perform the characteristic contractual obligation; see, for example, MünchKomm.BGB-*Martiny*, Vol. 13, 9th ed. 2025, Art. 4 Rome I Regulation, para. 220; Staudinger-*Magnus*, BGB, revised edition 2021, Art. 4 Rome I Regulation, para. 283.

31 This appears to be the prevailing view; see, for example, *Bork*, ZRI 2021, 476; Jaeger-*Mankowski*, InsO, Vol. 9, 2020, Vor §§ 335–338, para. 27 et seq.; Magnus/Mankowski-*Queirolo/Dominelli* (above fn. 16), Art. 16 para. 33; MünchKomm.InsO-*Reinhart*, Vol. 4, 4th ed. 2020, Art. 16 para. 24; Rauscher-*Mäsch*, Europäisches Zivilprozess- und Kollisionsrecht, Vol. II-1, 5th ed. 2022, Art. 16 EulnsVO para. 14; *Stender* (above fn. 7), p. 89; *Thole*, IPRax. 2022, 351, 355; for the opposing view, see, inter alia, Brinkmann-*Knoff/Maesch*, European Insolvency Regulation, 2019, Art. 16 para. 48; MünchKomm.BGB-*Kindler*, Vol. 13, 9th ed. 2025, Art. 16 EulnsVO para. 5; *Paulus*, EulnsVO, 7th ed. 2026, Art. 16 para. 9; all with further references.