

## Highest European Court Rules German Equitable Subordination Applies Despite Foreign Governing Law of Shareholder Loan

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### 1. At a Glance

The Court of Justice of the European Union (CJEU) has [held](#) that the European Insolvency Regulation (EIR) does not protect shareholder loan repayments from claw-back under German insolvency law where the claw-back serves to enforce the statutory ranking of claims, especially in respect to shareholder loans.<sup>1</sup> Accordingly, German equitable subordination rules prevail in German insolvency proceedings and cannot be bypassed by selecting a different law to govern a shareholder loan.

- **Scope of safe harbour limited:** The safe harbour under Article 16 EIR provides that transactions are not voidable under national insolvency law if (a) another Member State's laws apply to the transaction and (b) the transaction is not voidable in that other Member State. The CJEU held that:
  - this only protects the transaction from avoidance as an act "detrimental to the general body of creditors" (Art. 7(2)(m));
  - it does not extend to Article 7(2)(g) and (i), which govern the treatment and ranking of claims – therefore any outstanding claims under a shareholder loan will be treated as subordinated debt in German insolvency proceedings regardless of their governing law (subject to certain exceptions); and
  - claw-back provisions that serve to enforce the distribution waterfall – such as section 135 of the German Insolvency Code (*Insolvenzordnung*, InsO) – therefore fall outside the safe harbour. A German insolvency administrator can therefore challenge repayments made on shareholder loans made within one year before the insolvency filing (subject to certain exceptions).

- **Structuring option eliminated:** The ruling rules out that equitable subordination and claw-back risks could be mitigated by subjecting shareholder loans into a borrower with its COMI in Germany to the law of another EU Member State. Contrary to the (former) view of certain market participants, a choice of non-German governing law does not shield repayments or security interests from German insolvency claw-back if the German borrower's centre of main interests (COMI) is in Germany.
- **Broader trend:** This judgment is part of an emerging pattern of court rulings asserting the primacy of domestic insolvency and restructuring rules over structuring under non-German law, as also evidenced by the Frankfurt Regional Court's refusal to recognise a UK Part 26A restructuring plan in *Aggregate/Project Lietzenburger* – see our [Alert](#).

## 2. Background

### 2.1 German Equitable Subordination Regime

German insolvency law imposes two key risks on shareholder loans to a (direct or indirect) German subsidiary or affiliate:

- **Subordination of repayment claims:** In German insolvency proceedings, repayment claims arising from shareholder loans rank junior to all other unsubordinated insolvency claims. In practice, this means that shareholder loans will only be repaid after the full satisfaction of all non-shareholder and non-subordinated creditors – a situation that seldom arises.
- **Claw-back of repayments and security interests:** Repayments of a shareholder loan made within one year prior to a German insolvency filing are subject to claw-back without further requirements. Security interests granted for the shareholder loan within 10 years prior to the filing are equally voidable. Successful repayments must be returned to the insolvency estate and respective security interests are to be disregarded by the administrator.

### 2.2 The Case at Hand

SML, an Austrian company, and Maplan, a German company, were part of the same Austrian group of companies. SML granted two loans totalling €5 million to Maplan in 2015, both governed by Austrian law. To secure the first loan, Maplan assigned receivables of €3 million to SML.

Maplan made partial repayments of principal (€500,000) and interest (approximately €191,000) less than a year before filing for insolvency in Germany on 1 October 2016. In the insolvency proceedings, SML sought to participate as an ordinary insolvency creditor. The insolvency administrator took the opposite view: the loans qualified as equitably subordinated shareholder loans, ranking behind ordinary insolvency creditors, and the pre-insolvency repayments were subject to claw-back under the German Insolvency Code.

### 2.3 The Conflict-of-Laws Question

The legal question at hand concerned the interplay between two conflict-of-laws rules in the EIR:

- **General rule (Art. 7):** The law of the Member State in which insolvency proceedings are opened (the *lex fori concursus*) determines, among other things, the ranking of claims (Art. 7(2)(i)) and the rules on avoidance of detrimental acts (Art. 7(2)(m)).
- **Safe harbour (Art. 16):** As an exception to Art. 7(2)(m), a transaction governed by the law of another Member State cannot be avoided if it is not susceptible to challenge under its governing law. SML argued that because the loans were governed by Austrian law – which does not provide for equitable subordination of shareholder loans – the repayments were protected by this safe harbour.

## 3. Key Ruling

The CJEU ruled decisively in favour of Maplan’s insolvency administrator, holding that Art. 16 EIR cannot be relied upon to defend against a claw-back action that serves to enforce the statutory ranking of claims.

The court’s reasoning is as follows:

- **Limited scope of safe harbour:** Art. 16 deviates solely from Art. 7(2)(m), which concerns the avoidance of legal acts which are detrimental to the creditors. It does not extend to Art. 7(2)(g) (treatment of claims) nor Art. 7(2)(i) (ranking of claims and distribution of proceeds). The CJEU emphasised that Art. 16 must be narrowly interpreted as an exception to the general rule.
- **Section 135 of the German Insolvency Code establishes the ranking of claims:** The German claw-back provision under section 135 InsO – which establishes a procedure which seeks to ensure that third-party creditors have priority over a shareholder creditor – is functionally linked to the subordination rule in section 39(1) number 5 InsO – which provides that claims relating to the repayment of a

shareholder loan are generally of a lower rank. Together, they ensure that third-party creditors maintain priority over a shareholder creditor in accordance with the statutory distribution waterfall.

## 4. Implications for Investors and Lenders

### 4.1 Existing Structures

Investors and sponsors who grant shareholder loans or economically equivalent instruments to German borrowers should assess their exposure to equitable subordination and claw-back risk. The choice of a non-German governing law for the loan agreement will not insulate repayments or security interests from the German insolvency regime where the borrower's COMI is in Germany. This applies regardless of the Member State whose law governs the loan.

### 4.2 Structuring Alternatives

Given the now confirmed non-existence of the governing-law arbitrage (by which parties could attempt to avoid/mitigate German equitable subordination risk by providing for a shareholder loan to be governed by the law of another Member State), stakeholders should consider alternative approaches to manage subordination risk, including:

- genuine third-party financing (which falls outside the shareholder loan regime at least if not secured by a shareholder, cf. below);
- structuring debt at a non-German holding level or lending into a non-German domiciled group company to achieve structural rather than contractual seniority; or
- try to recoup loan proceeds as dividends (with potentially converting shareholder loans into equity instruments) where commercially feasible.

### 4.3 What did the CJEU not decide?

The CJEU did not decide if the repayment and collateralisation of a third-party loan which has been secured by a shareholder guarantee governed by a law other than that of the insolvency proceedings falls within scope of Art. 16 EIR. This is one of the most disputed German claw-back law questions and a frequently deployed defence. Nor did the CJEU need to consider the so-called "Rule in *Gibbs*", which concerns the compromise or discharge of English law-governed debt (and not its *ranking* in non-English insolvency proceedings).

## 4.4 Broader Cross-Border Context

The judgment reinforces a broader trend, also reflected in German case law, of protecting the integrity of domestic insolvency and restructuring rules against structuring under non-German law. In *Aggregate/Project Lietzenburger*, the Frankfurt Regional Court refused to recognise a UK Part 26A restructuring plan that sought to compromise German law-governed debt, citing (among other grounds) that the plan lacked the collectivity required for recognition as an insolvency proceeding under section 343 InsO. (This preliminary decision remains subject to appeal and a more substantive hearing.) Together, these decisions signal that international investors should expect heightened scrutiny when non-German restructuring or financing tools are used to modify or circumvent German creditor protections.

For tailored advice on your restructuring or cross-border financing, contact our team.

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1. Art. 13 of the original EIR; now Art. 16 of the recast EIR. The CJEU's judgment focused on the original EIR; however, the interpretation is expected to apply equally to the equivalent provisions in the recast EIR. For ease of understanding, we use the provisions of the recast EIR in this *Alert*. [↩](#)

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- 19 March 2026 Award *Chambers Europe* Recognizes 10 Kirkland Practice Areas and 30 Lawyers
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