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Advocate General's Opinion in Case C-41/25 | Orsay

Advocate General Norkus: a Member State cannot rely on immunity from jurisdiction to prevent the courts of the State in which insolvency proceedings have been opened from exercising their jurisdiction

The Insolvency Regulation contains an implied waiver of that immunity

The insolvency administrator appointed by court order to handle the insolvency proceedings of the German company Orsay GmbH brought an action before a German court seeking partial reimbursement of sums paid by that company to the Polish State Treasury in respect of value added tax (VAT). Those payments, made after the application for the opening of insolvency proceedings was filed, have reduced the insolvency estate and should therefore be recovered.

Taking the view that the Polish State Treasury enjoys immunity from jurisdiction,¹ the two lower German courts rejected the insolvency administrator's application as inadmissible.

Hearing an appeal on a point of law, the German Federal Court of Justice asked the Court of Justice whether the EU Insolvency Regulation² contains an implied waiver by Member States of their immunity from jurisdiction in respect of an action, such as that brought by Orsay's insolvency administrator (the so-called 'avoidance action').

According to Advocate General Rimvydas Norkus, **the answer to that question is affirmative.**

In the first place, **he confirms that the Insolvency Regulation applies to the action in question.** The fact that it is directed against the tax authorities of a Member State (other than the State in which the insolvency proceedings were opened), for the purpose of recovering VAT payments, has no effect on that application. A contrary interpretation would unduly restrict the scope of that regulation and run counter to its objectives.

In the second place, Mr Norkus considers that **EU law, including secondary legislation such as the regulation, may, in certain cases, contain a waiver of immunity from jurisdiction, even impliedly, that is to say, resulting from its terms or its logic.** He points out that the Member States which established the legal order of the European Union have thereby agreed to limit their sovereign rights for the benefit of that legal order in ever wider fields. However, that limitation, which derives from the will of the Member States, is circumscribed by the Treaties and forms part of a process guaranteeing them a right of co-decision.

In the third place, such a 'revision' of immunity from legal proceedings is justified under the regulation in question. **Allowing a Member State to rely on that immunity to oppose the exercise of the jurisdiction provided for by that regulation could, in particular, give rise to unequal treatment between creditors and undermine the effectiveness of insolvency proceedings.** It could also deprive the insolvency administrator of any right to an effective remedy, thereby creating a situation where he or she is denied access to the courts.

Finally, **the implied waiver of immunity from jurisdiction is consistent with the Treaties.** First, upon accession to the European Union, Member States accepted (in principle without reservation) that certain cross-border disputes should be adjudicated by the courts of other Member States. Second, allowing immunity from jurisdiction to be relied on would give

rise to a **breach of the principles of equality and loyal cooperation between Member States**, by enabling them to prioritise national interests over EU law and their common interests.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of EU law or the validity of an EU act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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¹ This is a principle of customary international law, according to which a State cannot be sued in the courts of another State without its consent. Immunity from jurisdiction is generally recognised where the dispute concerns acts of public authority.

² [Regulation \(EU\) 2015/848](#) of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings.