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*Committee on Legal Affairs*

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## **WORKING DOCUMENT**

on the proposal for a regulation of the European Parliament and of the Council  
– Creating a European Account Preservation Order to facilitate  
cross-border debt recovery in civil and commercial matters (COM(2011)0445  
– C7-0211/2011 – 2011/0204(COD))

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Rapporteur: Raffaele Baldassare

## 1. Introduction

There are, at present, a number of EU instruments, such as the European Small Claims Procedure, the European Order for Payment procedure and the European enforcement order for uncontested claims. Even though these make it easier for judgments on cross-border debt recovery to be recognised, much remains to be done as regards transitional measures.

It is estimated that each year about 2.6% of the annual turnover of EU companies is lost in unpaid debts. The fragmentation of national rules on debt recovery enables debtors to move their money easily from a bank account in one Member State to another.

As evidenced by the Commission report<sup>1</sup>, four main shortcomings of the current situation can be identified:

- the conditions for issuing orders preserving assets in bank accounts under national law vary considerably between Member States<sup>2</sup>;
- it is impossible, in many Member States, for a creditor to obtain information about the whereabouts of his debtor's bank account;
- the costs of obtaining and enforcing an account preservation order in a cross-border situation are generally higher than in domestic cases;
- the differences between, and duration of, national enforcement procedures constitute a serious problem for creditors.

In order to address the above issues, the Commission has proposed the adoption of a regulation to introduce a new legal instrument of a protective nature called the EAPO (European Account Preservation Order), as an alternative to national procedures. The Commission estimates that by using the proposed measure companies would be able to recover up to EUR 600 million in unpaid debts<sup>3</sup>.

The Commission's main aim is to ensure that there is a real 'surprise effect' in the implementation of the EAPO, so as to prevent debtors from withdrawing or transferring amounts held in other bank accounts in a state different from that of the procedure. To that end, it is proposed that the EU procedure be available even before an enforcement order has been obtained in the Member State where the debtor is located<sup>4</sup> and that the EAPO be issued in an *ex parte* procedure, i.e. without having first heard the debtor<sup>5</sup>.

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<sup>1</sup> Cfr: Report on the proposal for a regulation (COM(2011)445, p.3).

<sup>2</sup> Writs of attachment are not a 'universal' concept in the legal system of the Union. On the contrary, there are several transitional measures in the various legal systems, ranging from general instruments, such as injunctions (Ireland) or orders (Denmark), to special instruments such as the Garnishment Order (Malta). In this regard, see the comparative analysis of national procedures for obtaining an order of attachment, by the CSES in a study commissioned by the European Commission and published in 2011: 'Study for an Impact Assessment on a Draft Legislative Proposal on the Attachment of Bank Accounts' (pages 70-85).

<sup>3</sup> Cfr: Commission's impact assessment on the proposal for a regulation (p. 35), available through the following link: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2011:0937:FIN:EN:PDF>.

<sup>4</sup> Article 5 (Availability)

<sup>5</sup> Article 10 (Ex parte procedure)

## 2. Analysis of the key measures of the proposal

### 2.1 Definitions

- **'Matters having cross-border implications' (Article 3)**

In defining the scope of the regulation, the proposal stipulates that the matter must always have cross-border implications *'unless the court seised with the application for an EAPO, all bank accounts to be preserved by the order and the parties are located or domiciled in the same Member State.'*

With a view to increasing legal certainty, your rapporteur considers it appropriate to consider reversing the presumption of that provision and to provide that *'a matter is considered to have cross-border implications if the debtors are domiciled and/or the bank accounts to be preserved by the order are located in a Member State other than that of the court seised for the issuing of the EAPO.'*

- **'Bank account' (Article 4(1))**

Your rapporteur is of the view that the inclusion of 'financial instruments' in the definition of 'bank account' could raise a number of problems in terms of the possible loss of accrued interest. In this regard, Article 26(3) provides that the value of financial instruments shall be determined by reference to the relevant market rate applicable on the day of implementation.

Paragraph 4 of the same article stipulates that *'where the currency of the funds held in the account is not the same as that in which the EAPO was issued, the bank shall convert the amount by reference to the official exchange rate of the day of implementation.'* These solutions could be problematic and run counter to the interests of the debtor, as the value of financial instruments is exposed to currency risk due to fluctuations in market rates. The bank should therefore be exempt from any responsibility in this regard, or rather, in order to make the procedure less complicated, the account preservation order should be limited to cash alone.

- **'Claim' (Article 4(7))**

Your rapporteur is of the view that the definition of 'claim' set out in the proposal should be expanded in order to specify the nature of the claim. To that end, an explicit reference to liquidity and collectability requirements could help best to determine whether the claim is well-founded and would avoid discrepancies in the interpretation of the nature of the claim for which the court is required to issue the EAPO.

### 2.2 Balancing the rights of debtors and creditors

Although the surprise effect needs to be safeguarded by the use of the *ex parte* procedure for the issuance of an EAPO, your rapporteur takes the view that the wording of certain provisions should be revised in order to strike a fair balance between the rights of the creditor and those of the debtor. The proposal, in fact, appears to be overly biased in favour of the claimant and does not offer the necessary safeguards to mitigate the potentially draconian nature of the EAPO.

In this regard, your rapporteur considers it appropriate to consider making some changes to the proposal for a regulation, to strengthen the protection of debtors in the event of any 'abuse' of the procedure by creditors. According to your rapporteur, such changes could relate to aspects concerning the evidence (Article 11) and the implementing arrangements (Articles 16 and 17), in order to strengthen the rights of debtors whilst maintaining the surprise effect guaranteed by the *ex parte* procedure.

In view of the above analysis, your rapporteur would welcome the introduction of a provision whereby, in exceptional and duly justified cases, the court seised would have the right to summon the defendant in order to obtain further information<sup>1</sup>, so that a more accurate assessment can be made of the merits of the application. At the same time, should the appearance of the debtor be liable to adversely affect the settlement of the creditor's claim and the actual implementation of the measure, the court could decide *inaudita altera parte* to accept or reject the application.

With regard to the implementing arrangements, Article 16 refers to all information '*necessary to enable the bank or banks to identify that defendant*'. In this regard, your rapporteur is of the view that the information referred to in points (iii) and (iv) of that article, namely the date of birth, national identity or passport number or number of the legal person in the business register, should always be communicated in order to raise the level of information necessary for the identification of the debtor's account, thus raising the level of protection of the latter's rights. Such a provision would also enable the debtor's account to be identified more quickly and reliably.

Should the creditor not have the information required, under Article 17 he or she may request it from the competent authority of the Member State of enforcement. This option is highly likely to be used, but could result too easily in the creditor affirming in general terms that the defendant has an account in a particular Member State.

In keeping with the opinion expressed by the European Data Protection Supervisor<sup>2</sup>, your rapporteur proposes some amendments to regulate and limit the request for, and obtaining of, information on the defendant's bank account to that which is genuinely necessary for the purpose of identifying the defendant and his or her accounts. In this regard, the wording of Article 17(2)<sup>3</sup> is too general and could lead to the disclosure of information that is not relevant or important in the context of the proceedings, and to the disclosure of bank secrets.

### **2.3 Costs relating to the application of the procedure**

The Commission proposal stipulates that the payment or reimbursement of costs incurred by the banks in implementing the EAPO is to be governed by national law (Article 30(1)). In the

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<sup>1</sup> The adversarial principle is one of the fundamental principles of the legal systems of the Member States.

<sup>2</sup> Cfr: Opinion of the European Data Protection Supervisor, Official Journal of the European Union, C 373/4 (21/12/2011).

<sup>3</sup> Where the claimant does not have all the account information required pursuant to Article 16, that claimant may request that the competent authority of the Member State of enforcement obtain the necessary information. Such request, to be submitted together with the application for an EAPO, '*shall include all information available to the claimant about the defendant and the defendant's bank accounts*' (Article 17(2)).

light of the differences in national legal systems, a provision of this kind is likely to discriminate against those banks for which there is no provision for such reimbursement.

It is undeniable that the proposed procedure will involve the use of human and economic resources, the burden of which cannot be ignored given that no public interest is being pursued here, but rather that of private individuals. Your rapporteur therefore considers that Article 30 should lay down explicit, harmonised provisions for the payment of the costs incurred by banks and should also specify the relevant arrangements and time frame.

### **3. Conclusions.**

Your rapporteur is of the opinion that the EAPO is a vital instrument for the development of the internal market, as it will facilitate cross-border transactions. At present, it is complex and costly to secure provisional measures to attach the assets of a debtor abroad. Quick and easy access to such provisional measures is often crucial to ensure that the debtor does not remove or dissipate his assets before the creditor manages to secure and enforce a decision on the matter.

Given the importance of the measure and in the light of the above, your rapporteur calls for further reflection on what exact measures the legislation in question should introduce and looks forward to the in-depth debate that is to take place in the coming months.