
ПРИВРЕДНИ СПОРОВИ - СУДСКИ И АРБИТРАЖНИ

Dr. Dr. h.c. *Christa* JESSEL-HOLST
Affiliate, Max Planck Institute for Comparative
and International Private Law, Hamburg

THE EUROPEAN ACCOUNT PRESERVATION ORDER (EAPO) AS A MEANS TO FACILITATE CROSS-BORDER DEBT RECOVERY IN CIVIL AND COMMERCIAL MATTERS

Summary

This contribution contains a presentation of the Regulation (EU) No 655/2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters which is applicable from 18 January 2017. With EAPO, the Union has created an effective mechanism for the cross-border attachment of bank accounts in the EU. The author provides a survey of the procedure for obtaining a preservation order, of the recognition, enforceability and enforcement of the preservation order and of possible remedies against it. She also gives an outline of the implementation of the EAPO-Regulation in Germany and in Croatia.

Key words: *Regulation (EU) No 655/2014, European Account Preservation Order (EAPO), cross-border debt recovery, freezing bank accounts, implementation in Germany, Croatia.*

I Introduction

The core topic of the 26th Congress of Business Lawyers of Serbia places at the focus of attention “economy and case law of courts and arbitral tribunals”. However, economic disputes do not terminate with the rendering of

a judgment or of an arbitral award. The real difficulties often arise on the level of enforcement, in particular in cross-border cases.

The focus in the present contribution shall therefore be on the newly introduced European Account Preservation Order as a means of improving the enforcing judgments in the European Union. Since the start of negotiations for EU-accession of the Republic of Serbia (candidate country since March 2012) in 2014, several chapters have been opened, among them Chapter 24 “Justice, Freedom and Security”. As a consequence, one of the tasks facing Serbia will be to prepare for implementation of art. 81 of the Treaty on Functioning of the European Union (TFEU)¹ which deals with judicial cooperation in civil matters. In this respect, the Union possesses comprehensive regulatory competences.

Declared goal is the creation of a European Area of Justice. The competences of the Union include *inter alia* the adoption of measures aimed at ensuring the so-called “free movement of judgments”, by establishing mechanisms for the mutual recognition and enforcement of judgments between the Member States.

The cross-border enforcement of judgments was already addressed in the earliest European instrument in the field of judicial cooperation in civil matters, namely the Brussels Convention of 27.9.1968 on jurisdiction and the enforcement of judgments in civil and commercial matters², which was later on replaced by the Brussels I Regulation³, now Brussels I Regulation (recast).⁴

It is true that already the Brussels Convention, as well as the Brussels I Regulation and the recast contained provisions which empowered the courts of a Member State to take provisional, including protective measures even if the courts of another state had jurisdiction for the merits of the case (e.g. art. 35 Regulation Brussels I (recast)). However, in practice it remained extremely difficult for creditors to obtain protective measures in the form of account preservation orders under EU-law. One of the reasons was that no mechanism existed for providing the creditor with reliable information on the debtor’s bank accounts in other Member States. It was also not possible to catch the

1 Consolidated version *OJ C* 326, 26.10.2012, p. 47.

2 For OJ reference see *OJ C* 27, 26.01.1998, p. 1.

3 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ L* 12, 16.1.2001, p. 1.

4 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), *OJ L* 351, 20.12.2012, p. 1.

debtor by surprise (see art. 2(a) subpara. 2, 2nd sentence Brussels I Regulation (recast)). The Regulation did not prevent the use of national procedures for obtaining protective measures, but these could be costly and cumbersome, especially where the debtor had bank accounts in several Member States.

The need was therefore seen for establishing “a Union procedure enabling a creditor to obtain a European Account Preservation Order ... which prevents the subsequent enforcement of the creditor’s claim from being jeopardised through the transfer or withdrawal of funds up to the amount specified in the Order which are held by the debtor or on his behalf in a bank account maintained in a Member State”.⁵

On 15 May 2014, Regulation (EU) No 655/2014 of the European Parliament and of the Council establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters⁶ has been adopted.⁷ The Regulation applies from 18 January 2017.

For technical details see Commission Implementing Regulation (EU) 2016/1823 of 10 October 2016 establishing the forms referred to in Regulation (EU) No 655/2014 of the European Parliament and of the Council establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters.⁸

II European Account Preservation Order (EAPO)

1. Scope of application

The EAPO-Regulation is only available to creditors as an option, that is: as an alternative to preservation measures under national law (art. 1(2) EAPO-Regulation).

The material scope of application is limited to pecuniary claims in civil and commercial matters (art. 2 EAPO-Regulation) and practically corresponds to the scope of the Brussels I Regulation (recast).

The use of EAPO is limited to cross-border cases. These are legally defined in art. 3 EAPO-Regulation. Namely, either the court carrying out the

5 Regulation (EU) No 655/2014 – EAPO-Regulation, Art. 1(1).

6 OJ L 189, 27.6.2014, p. 59.

7 See in this context J. von Hein, “Account Preservation Order Regulation”, in: Basedow, Rühl, Ferrari, de Miguel (eds.), *Encyclopedia of Private International Law*, Vol. 1, (in print) with further references.

8 OJ L 283, 19.10.2016, p. 1.

procedure or the country of domicile of the creditor must be in a different Member State than the one in which the debtor's account is maintained.

As regards the territorial scope, the EAPO is not applicable in relation to Denmark (rec. 51) and to the United Kingdom (rec. 50).

2. Structure

The EAPO-Regulation addresses in six chapters the following issues:

- Subject-matter, scope and definitions,
- Procedure for obtaining a preservation order,
- Recognition, enforceability and enforcement of the preservation order,
- Remedies,
- General provisions,
- Final provisions.

3. Essential characteristics

a) Procedure for obtaining a preservation order

The creditor may apply for a preservation order either before initiating proceedings against the debtor on the substance of the matter, or during the proceedings, or after obtaining a judgment or other title in a Member State (art. 5 EAPO-Regulation).

For many procedural steps, uniform forms exist which may be completed online.⁹

Where the creditor has already obtained a judgment, jurisdiction to issue a preservation order shall lie with the courts of the Member State in which the judgment was issued (art. 6(3) EAPO-Regulation).

If not, the courts of the Member State shall be competent which have jurisdiction to decide on the substance of the matter (art. 6(1) EAPO-Regulation). It is conceivable that more than one court is internationally competent. In such situation, art. 16 EAPO-Regulation prohibits simultaneous parallel EAPO-applications to several courts. If the debtor is a consumer who has concluded a consumer contract, exclusive competence shall lie with the courts of the Member State in which the debtor is domiciled (art. 6(2)).

⁹ For the 9 EAPO forms see: https://e-justice.europa.eu/content_european_account_preservation_order_forms-378-en.do?clang=en.

Where the creditor has not yet obtained in a Member State a judgment, conditions for issuing a preservation order are particularly strict. The creditor must then not only submit sufficient evidence showing an urgent need for such protective measure, but shall in addition submit proof as to the well-founded nature of his claim against the debtor (art. 7 EAPO-Regulation). For practical examples see also rec. 14.

Applications for a preservation order shall be lodged using a detailed standard form (art. 8). The application can also be submitted electronically, provided the Member State in which the application is lodged allows this.

Representation by a lawyer is possible but not mandatory (art. 41 EAPO-Regulation).

The court decides in a written procedure and on the basis of the information and evidence provided by the creditor (art. 9 EAPO-Regulation).

The debtor shall not be notified of the application, or be heard prior to the issuing of the order (art. 11 EAPO-Regulation). The surprise-effect is one of the major advantages of EAPO. However, this does not mean that the debtor is left without proper protection.

Namely, in a case where the creditor has not yet obtained a judgment, before the preservation order is issued, the creditor shall be required to provide security to prevent abuse and to ensure compensation for potential damages suffered by the debtor (art. 12 EAPO-Regulation).

If the creditor has applied for a preservation order before even initiating proceedings, he must initiate these proceedings within 30 days from the day on which the application for the preservation order was lodged, or within 14 days after the issue of the order, whichever date comes later, and must provide proof in support of this to the court. If the creditor fails to do so, the preservation order shall be revoked or shall terminate (art. 10 EAPO-Regulation).

Liability of the creditor for damages caused to the debtor by the preservation order is stipulated in art. 13 EAPO-Regulation.

The success of the EAPO to a large extent depends on the availability of information for the creditor on the whereabouts of the debtor's assets. The creditor may request the court before which the application for a preservation order is pending to request information from the Member State of enforcement. To this purpose, the Regulation establishes a regime of "information authorities" in the participating Member States. All banks in its territory are obliged to disclose to the information authority whether the debtor holds an

account with them. The court may also oblige the debtor to disclose with which banks in its territory he holds accounts.

Requests for the obtaining of account information are limited to cases where the creditor has already obtained a judgment (for details see art. 14 EAPO-Regulation). This requirement is intended to prevent abuse of the mechanism of the EAPO-Regulation.

b) Recognition, enforceability and enforcement of the preservation order

A preservation order issued in a Member State shall be recognized automatically and shall be enforceable in the other participating Member States without a need for a declaration of enforceability (art. 22 EAPO-Regulation).

Accounts held by spouses or other joint or nominee accounts may be preserved only to the extent to which they may be preserved under the law of the state of enforcement (art. 30 EAPO-Regulation). Amounts exempt from seizure under national law shall also be exempt from preservation under the EAPO-Regulation (art. 31 EAPO-Regulation). Last not least, the preservation order shall have the same rank as an equivalent national order in the Member State of enforcement (art. 32 EAPO-Regulation). Information as to the content of the national law of the Member States with regard to the issues mentioned in articles 30-32 EAPO-Regulation is accessible on the European e-Justice Portal.

c) Remedies

The EAPO-Regulation provides for the following remedies:

- Remedies of the debtor against the preservation order (art. 33),
- Remedies of the debtor against the enforcement of the preservation order (art. 34),
- Other remedies available to the debtor and the creditor (art. 35).

The debtor is also given the right to provide security in lieu of preservation (art. 38 EAPO-Regulation).

The rights of third parties which are affected by a preservation order are regulated in art. 39. Their right to contest a preservation order is governed by the law of the Member State of origin, whereas their right to contest the enforcement of an order is governed by the law of the Member State of enforcement.

III Implementation of the EAPO-Regulation in Germany

The regulations of the EU have general application and are binding in their entirety and directly in all Member States (art. 288(2) TFEU). Unlike directives, they are not transposed into the national law of the Member States. Therefore, the EAPO-Regulation is directly applicable in the participating Member States.

Nevertheless, in the case of regulations, implementing provisions must be adopted in the national laws of the Member States in order to ensure that the regulations can be applied properly in the respective country.

For the Republic of Serbia as a candidate state, it may be of interest to see how the Regulation (EU) No 655/2014 has been implemented in countries which already have membership status. In the following it shall therefore be demonstrated in an exemplary manner how Germany and Croatia have proceeded in the matter of implementation of EAPO.

German provisions implementing quite a number of EU-Regulations in the field of judicial cooperation in civil matters are contained in Book 11 of the German Civil Procedure Code (“ZPO”), entitled “Judicial cooperation within the European Union”. Other regulations are implemented by special legislative acts, as for example the International Succession Law Procedure Act¹⁰ which determines the details of application of the Succession Regulation (EU) 650/2012 in Germany. Still other acts, e.g. the International Family Law Procedure Act¹¹ have been adopted for implementing collectively certain EU-Regulations, Hague Conventions and other conventions dealing with related matters.

As regards the EAPO-Regulation, implementing provisions have been adopted in the new sections 946-959 ZPO.¹² By way of an exception, these provisions are not located in the afore-mentioned Book 11, but in the Book 8 ZPO entitled “Compulsory enforcement” (Chapter 5, “Seizure and injunction”).

10 Internationales Erbrechtsverfahrensgesetz (“IntErbRVG”), for the German version see: <http://www.gesetze-im-internet.de/interbrvg/index.html>.

11 Internationales Familienrechtsverfahrensgesetz (“IntFamRVG”), for the English translation see: http://www.gesetze-im-internet.de/englisch_intfamrvg/index.html.

12 The updated version of the ZPO may be accessed free of charge under: <http://www.gesetze-im-internet.de/zpo/index.html>.

An update to the English translation has not been provided yet but should at a later moment be available under: http://www.gesetze-im-internet.de/englisch_zpo/index.html.

The basic information required in art. 50 EAPO-Regulation as to the implementation of the EAPO-Regulation in Germany is accessible on the European e-Justice Portal (so far in German language only).¹³

It may be interesting to know that the *Bundesamt für Justiz* (Federal Office of Justice) in Bonn has been appointed as the German information authority in the meaning of art. 14 EAPO-Regulation.

IV Implementation of the EAPO-Regulation in Croatia

It may be even more interesting from the Serbian perspective to study the implementation of *Uredba (EU) br. 655/2014 Europskog parlamenta i Vijeća od 15. svibnja 2014. o uspostavi postupka za europski nalog za blokadu računa kako bi se pojednostavila prekogranična naplata duga u građanskim i trgovačkim stvarima* in the Republic of Croatia.

The EAPO-Regulation obliged the Member States to communicate by 18 July 2016 to the Commission the information listed in art. 50. The comprehensive and detailed information provided by the authorities in Croatia is accessible on the European e-Justice Portal.¹⁴

The courts designated as competent to issue a preservation order are the municipal courts (*općinski sudovi*) and the commercial courts (*trgovački sudovi*). Croatia has appointed the Financial Agency (*Financijska agencija*) as national information authority in the meaning of art. 14 EAPO-Regulation. The Financial Agency is at the same time the authority competent to enforce the preservation order.

As regards Croatian implementing provisions, these shall apparently be placed in the Act on enforcement (*Ovršni zakon*), in a new Chapter 35 entitled “*Europski nalog za blokadu računa*” (Articles 364.a – 364.d).¹⁵ However, so far on internet only a draft for an amendment to the Act on enforcement could be found, which has not yet been adopted.

V Closing remarks

The intention of this paper is to provide basic information on a recent and highly interesting instrument of EU-law. The concept of EAPO has not met

13 See: https://e-justice.europa.eu/content_european_account_preservation_order-379-de-en.do?clang=de.

14 See: https://e-justice.europa.eu/content_european_account_preservation_order-379-hr-en.do?member=1.

15 See: <https://esavjetovanja.gov.hr/Econ/MainScreen?entityId=3365>.

with unconditional approval¹⁶, but the majority of reactions in German speaking countries have been positive.¹⁷ It is too early for an evaluation of the results in practice since the EAPO-Regulation is only applicable since 18. January 2017.

At present, it will not be possible for creditors in Serbia to apply for a European Account Preservation Order. It will also not be possible for creditors in Member States to apply for such order on a Serbian bank account.

Др Кристиа ЈЕСЕЛ-ХОЛСТ, др *honoris causa*
Макс Планк Институт за упоредно и међународно приватно право,
Хамбург, Немачка

ЕВРОПСКИ НАЛОГ ЗА БЛОКАДУ РАЧУНА (ЕАРО) КАО НАЧИН ДА СЕ ПОЈЕДНОСТАВИ ПРЕКОГРАНИЧНА НАПЛАТА ДУГА У ГРАЂАНСКИМ И ТРГОВИНСКИМ СТВАРИМА

Резиме

Овај рад садржи приказ Уредбе (ЕУ) бр. 655/2014 којом се успоставља поступак европског налога за блокаду рачуна како би се поједноставила прекогранична наплата дуга у грађанским и трговинским стварима, а која се примењује од 18. јануара 2017. Са ЕАРО Унија је створила ефикасан механизам прекограничне плендибе банкарских рачуна у ЕУ. Аутор пружа кратак приказ процедуре за добијање налога за блокаду, за признавање, извршивост и извршење налога за блокаду и за могуће правне лекове против њега. Уз то, она се осврнула на имплементацију Уредбе о ЕАРО у Немачкој и Хрватској.

Кључне речи: *Уредба (ЕУ) бр. 655/2014, Европски налог за блокаду рачуна (ЕАРО), прекогранична наплата потраживања, блокада банларских рачуна, имплементација у Немачкој и Хрватској.*

16 See e.g. J. Stamm, Plädoyer für einen Verzicht auf den Europäischen Beschluss zur vorläufigen Kontenpfändung – Zehn gute Gründe gegen dessen Einführung, IPRax 2014, p. 124.

17 E.g. B. Hess/K. Raffelsieper, Die Europäische Kontenpfändungsverordnung: Eine überfällige Reform zur Effektivierung grenzüberschreitender Vollstreckung im Europäischen Justizraum, IPRax 2015, p. 46.