

Revisiting Cross-Border Debt Recovery Tools (part 1): the European Account Preservation Order

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In times of geopolitical and economic uncertainty, which give rise to a constantly increasing number of cross-border disputes, it is more than ever crucial that European creditors can rely on clear, simple, and harmonized tools for recovering their claims across all Member states.

One of these tools is the European Account Preservation Order (EAPO), which aims to facilitate the seizure of funds held in bank accounts located in the EU, thereby securing claims in civil and commercial matters.

Despite its potential to streamline cross-border enforcement and to foster a more integrated European judicial system, the EAPO remains relatively unknown and underutilized more than a decade after its adoption.

This article delves into the legal framework and procedural intricacies of this underrated tool, which could prove more useful to international litigators.

BACKGROUND

The EAPO was designed by the EU legislator to address the challenges posed by the fragmented nature of national procedures for obtaining protective measures, such as account preservation orders.

Indeed, prior to its introduction, creditors faced significant hurdles in securing claims across borders, as national procedures varied widely in terms of conditions and efficiency.

These efforts culminated in the adoption of Regulation 655/2014 on May 15, 2014 (the "**EAPO Regulation**")¹, effective since January 2017, which established a uniform procedure for the seizure of bank accounts in cross-border cases in the various member states of the European Union, except for Denmark.

SCOPE AND APPLICATION

The EAPO applies to **pecuniary claims in civil and commercial matters** in cross-border cases, whatever the nature of the court or tribunal concerned.

¹ Regulation (EU) n°655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters.

The Regulation defines a "**cross-border case**" as one where the bank account to be preserved is maintained in a Member State different from that of the court handling the application or the creditor's domicile².

However, the Regulation excludes certain areas such as rights in property arising out of a matrimonial relationship, wills and successions, insolvency proceedings, social security or arbitration³.

It should be noted that the EAPO is designed to be an **additional and optional means for the creditor**, who remains free to make use of any other procedure for obtaining an equivalent measure under national law.

JURISDICTION

Jurisdiction to issue the EAPO is determined by Article 6 of the regulation, which distinguishes various situations:

- **If the creditor has not yet obtained a judgment**, court settlement or authentic instrument, jurisdiction lies with the **courts of the Member State which have jurisdiction to rule on the substance** of the matter⁴.
- **If the creditor has already obtained a judgment** or court settlement, jurisdiction to issue an EAPO for the claim specified in the judgment or court settlement shall lie with the **courts of the Member State in which the judgment was issued** or the court settlement was approved or concluded⁵.
- For **authentic instruments**, jurisdiction lies with the courts designated by the law of the **Member State where the instrument was drawn up**⁶.
- If the debtor is a **consumer**, special protection is provided, as jurisdiction lies exclusively with the courts of the Member State **where the consumer is domiciled**⁷.

CONDITIONS FOR ISSUING THE EAPO

The EAPO procedure begins with the creditor lodging an *ex parte* application with the competent court.

The conditions for issuing the EAPO vary, depending on whether the creditor has already obtained a judgment, court settlement or authentic instrument.

In any case, the creditor must submit sufficient evidence to satisfy the court that there is an **urgent** need for an EAPO, because there is a real risk that, without such a measure, the subsequent enforcement of the creditor's claim against the debtor will be impeded or made substantially more difficult⁸.

² EAPO Regulation - Article 3.

³ EAPO Regulation - Article 2.

⁴ EAPO Regulation - Article 6(1)

⁵ EAPO Regulation - Article 6(3)

⁶ EAPO Regulation - Article 6(4)

⁷ EAPO Regulation - Article 6(2)

⁸ EAPO Regulation - Article 7(1)

If the creditor has not yet obtained a judgment, he must also submit sufficient evidence to satisfy the court that he is **likely to succeed on the substance of his claim** against the debtor⁹.

The **application** must include detailed **information about the creditor, debtor, and the bank account(s)** to be preserved, as well as **evidence** supporting the claim and the need for the preservation order¹⁰.

The court assesses the application based on the evidence provided and may request **additional information**, if necessary¹¹.

Where the creditor has applied for an EAPO before initiating proceedings on the substance of the matter, he must initiate such proceedings and provide **proof of such initiation to the court within 30 days** of the date on which he lodged the application **or within 14 days** of the date of the issue of the Order, whichever date is **the later**¹².

EX PARTE PROCEDURE

To ensure the **element of surprise**, which is crucial for the effectiveness of the EAPO, the debtor is not notified of the application or heard prior to the issuance of the order¹³.

This *ex parte* nature of the procedure is balanced by safeguards to prevent abuse (see below), including the requirement for the creditor to provide **security** to compensate the debtor for any potential damage. The court has **discretion in determining the amount and form of security**, which **may be waived** in exceptional circumstances¹⁴.

PROCEDURE FOR THE OBTAINING OF ACCOUNT INFORMATION

The EAPO Regulation allows the creditor, in certain circumstances, to obtain the information necessary to identify the debtor's bank accounts.

Where the creditor has obtained in a Member State an enforceable judgment, and has reasons to believe that the debtor holds one or more accounts with a bank in a specific Member State, but knows neither the name and/or address of the bank nor the IBAN, BIC or another bank number allowing the bank to be identified, he may request the court with which the application for the EAPO is lodged to order that the information authority of the Member State of enforcement obtain the information necessary to allow the debtor's account(s) to be identified¹⁵.

For creditors who have a title which is not enforceable yet, the conditions are **stricter**. They must indeed demonstrate (i) that the amount to be preserved is **substantial** and (ii) that there is an **urgent** need for the account information because there is a risk that, without such information, the subsequent enforcement of the creditor's

⁹ EAPO Regulation – Article 7(2).

¹⁰ EAPO Regulation - Article 8.

¹¹ EAPO Regulation - Article 9.

¹² EAPO Regulation - Article 10.

¹³ EAPO Regulation - Article 11.

¹⁴ EAPO Regulation - Article 12.

¹⁵ EAPO Regulation - Article 14.

claim against the debtor is likely to be jeopardized and that this could consequently lead to a substantial deterioration of the creditor's financial situation.

This distinction ensures that the procedure is not misused for speculative purposes.

IMPLEMENTATION AND ENFORCEMENT

Once issued, the EAPO is recognized and **enforceable in all Member States without the need for a declaration of enforceability**¹⁶. It shall be enforced in accordance with the procedures applicable to the enforcement of equivalent national orders in the Member State of enforcement¹⁷.

The **bank** must implement the order promptly, either by **blocking the preserved amount** or transferring it to a dedicated account¹⁸. The bank is also required to declare the **extent** to which funds have been preserved¹⁹. Any **liability of the bank** for failure to comply with its obligations under this Regulation shall be governed by the law of the Member State of enforcement²⁰.

Once issued, the EAPO needs to be **served on the debtor**, using one of the various methods of service or notification set forth at Article 28 of the Regulation, within a short timeframe (within **three working days** following the day of receipt of the declaration made by the bank or by the entity responsible for enforcement indicating that the amounts have been subject to an attachment).

The EAPO has the same rank (if any) as an equivalent national order in the Member State of enforcement²¹.

REMEDIES AND SAFEGUARDS

The EAPO Regulation includes several safeguards to protect the rights of the debtor, who can challenge both the order itself and/or the enforcement of the order.

The debtor can **challenge the order** on various grounds, set forth in Article 33 et seq., such as: non-compliance with the conditions or requirements set out in the Regulation, failure to serve the order within the prescribed timeframe, preserved amounts exceeding the amount of the order not released in due course, claim paid in full or in part, judgment on the substance dismissing the claim, etc.

The **enforcement of the EAPO may also be challenged**, in accordance with the grounds set forth in Article 34 (*e.g.*, if the account preserved is excluded from the scope of the Regulation, or if enforcement of the judgment which the creditor was seeking to secure by means of the EAPO has been refused in the Member State of enforcement or suspended in the Member State of origin).

¹⁶ EAPO Regulation - Article 22.

¹⁷ EAPO Regulation - Article 23.

¹⁸ EAPO Regulation - Article 24.

¹⁹ EAPO Regulation - Article 25.

²⁰ EAPO Regulation - Article 26.

²¹ EAPO Regulation - Article 32.

Additionally, the debtor can request the release of preserved funds by providing security or an alternative assurance²².

The Regulation also provides for the liability of the creditor for any damage caused by the EAPO due to fault, with a presumption of fault in certain cases²³.

Where the application is directed against the order per se, it is addressed to the competent court of the Member State of origin²⁴. On the other hand, where the appeal is directed against the enforcement of the order, it is addressed to the competent court (or the competent enforcement authority, if any) of the Member State of enforcement²⁵.

Although underestimated, the EAPO represents an important step towards the harmonization of cross-border debt recovery between Member States. As the EU evolves, time will tell whether this tool will ultimately live up to the high expectations placed upon it and actually play a central role in promoting a more integrated and expedient legal environment for European creditors and debtors alike.

²² EAPO Regulation - Article 38.

²³ EAPO Regulation - Article 13.

²⁴ EAPO Regulation - Article 33.

²⁵ EAPO Regulation - Article 34.