

# CROSS-BORDER ATTACHMENT OF BANK ACCOUNTS

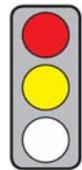
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## MAIN ISSUES

**Objective of the Regulation:** The creation of a European Account Preservation Order is to facilitate cross-border debt recovery.

**Parties affected:** All citizens and companies, banks.

**Pros:** Cross-border debt recovery is improved.



**Cons:** (1) An EU regulation on the cross-border attachment of bank accounts may not be introduced until the rule of law prevails at high levels in all Member States.

(2) The provisions for account data lie beyond EU competency and are problematic due to data protection law.

(3) The network of competences is inefficient.

(4) Requiring fixed deadlines for courts and prohibiting the hearing of the debtor before the EAPO is issued are not in line with the principle of judiciary independence and with the debtor's right to be heard before a court.

## CONTENT

### Title

**Proposal COM(2011) 445** of 25 July 2011 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

### Brief Summary

#### ► Objective and scope

- The aim of the European Account Preservation Order (official abbreviation "EAPO") is to enable private creditors to preserve their debtors' bank accounts throughout the EU.
- The EAPO can be used in addition to existing national procedures for recovering cross-border debt (Art. 1 (2), Art. 2 (1)).
- A debt is considered to have no cross-border implication only if the seat of the court to which an application for an EAPO has been made, the domicile of the parties and the bank accounts to be preserved are located in the same Member State (Art. 3).
- The EAPO does not apply to public claims, insolvency proceedings, composition and analogous proceedings, social security and arbitration (Art. 2).

#### ► Jurisdiction for the issuing of a EAPO

- It is important to differentiate between a case in which no enforceable title exists at all or only in the Member State of origin, and a case in which an enforceable title exists in the Member State of enforcement.
- Jurisdiction without an enforceable title in the Member State of enforcement: the creditor may apply for the EAPO
    - with a court of the Member State in which the proceedings must be brought, or where more than one court has jurisdiction for the substance of the matter, the court in which the proceedings are to or should be brought has jurisdiction (Art. 6 (2)) ; or
    - "additionally" with the court of the Member State of enforcement (Art. 6 (3)).
  - Jurisdiction with an enforceable title in the Member State of enforcement (Art. 14): the creditor may apply for the issue of an EAPO
    - with the court that delivered the judgment in the proceedings, or
    - with the competent authority of the Member State in which the enforceable title was issued, or
    - with the competent authority of the Member State of enforcement.

#### ► Conditions for obtaining an EAPO

- Obtaining an EAPO without an enforceable title in the Member State of enforcement:
  - The creditor must make credible that a claim exists and that a later enforcement without an EAPO would be impossible or at least substantially more difficult (Art. 7).
  - The creditor must add all relevant documents to the application (Art. 8 (3)).
  - The court may ask for additional evidence, in particular the hearing of oral testimony (Art. 11), and oblige the creditor to provide a security deposit (Art. 12).
  - Within thirty days at the latest of the date of issue of the EAPO order, the creditor must initiate proceedings. The court may also set a shorter deadline. (Art. 13)

- Obtaining a title which is enforceable in the Member State of enforcement:  
The creditor must add a copy of the enforceable title to the application and confirm that the debtor has not yet settled the debt (Art. 15 (2) lit. e and f).
- ▶ **Procedure to issue an EAPO**
  - The EAPO is to be applied for by means of a standard form (Art. 8 (1), Art. 15 (1), Annex I).
  - The creditor must provide information as to the accounts to which recovery payments are to be transmitted (Art. 8 (2), Art. 15 (2)).
  - The creditor can request the competent authority to investigate the bank account(s) of the debtor. Member States must allow for such an investigation by
    - either obliging banks to provide, upon request, the enforcement authority with information on all of the debtor's bank accounts, or
    - entitling the enforcement authority to access all relevant account information available in state databases. (Art. 17 (5))
  - Representation by a lawyer is not mandatory for the procedure (Art. 41).
  - The creditor must provide information as to whether an application for an EAPO or a national protective measure has already been filed with another authority. If so, the issuing of the EAPO can be rejected. (Art. 19)
  - The EAPO is to be issued (Art. 21 (3) and (5)):
    - within 7 calendar days from the lodging of the application if an enforceable title does not exist;
    - within three calendar days from the lodging of the application if an enforceable title already exists.
- ▶ **Creditor's right to appeal**  
If the competent court or authority decides not to issue an EAPO, the creditor may appeal the decision within 30 days following the notification of such decision (Art. 22).
- ▶ **Procedure following the issuing of the EAPO**
  - The EAPO is transmitted to the competent authority for enforcement (Art. 17 (3)).
  - The competent authority is to serve the EAPO on the bank or banks within three working days of receipt at the latest. Thereupon, the creditor and the competent authority are informed of the service to the bank(s). (Art. 24 (3) lit. c and d).
  - The bank served with an EAPO shall implement it immediately upon receipt; if served outside business hours, it is to do so immediately after the beginning of the following business period (Art. 26).
  - The debtor is not notified of the preservation until its implementation, unless the creditor requests a hearing of the debtor (Art. 10, 14 (4)).
  - Within three working days of receipt of the EAPO, the bank informs the competent authority and the creditor electronically as to what extent funds of the debtor have been preserved. The bank must not disclose any bank deposits exceeding the claimed amount of debts. (Art. 27)
  - Where the EAPO covers several accounts, the creditor must release within 48 hours of receipt of the enforcement order any amount exceeding the creditor's claim vis-à-vis the national competent authority (Art. 28).
  - Immediately upon the receipt of the bank's enforcement declaration, the competent authority is to submit to the debtor the EAPO and the relating documents (Art. 25).
- ▶ **Legal effect of the EAPO**
  - The exequatur procedure has been abolished: every EAPO must be recognised in all Member States and be enforced without any special enforcement declaration being required; recognition cannot be opposed (Art. 23).
  - The debtor remains in possession of the bank account amount exceeding the preserved amount (Art. 21 (6)).
  - The competent authority must terminate the enforcement of the EAPO where the debtor provides sufficiently high security deposits (Art. 38).
- ▶ **Remedies of the debtor**
  - General:
    - If the affected debtor is a consumer, an employee or policyholder, he may address the application for review to the competent court in the Member State where he is domiciled (Art. 36).
    - A remedy is by all means substantiated if the creditor fails to initiate proceedings on the substance within 30 days (Art. 34 (1) lit. b and Art. 35 (2)).
    - If the competent authority follows the remedy, it must take a decision within 30 calendar days (Art. 34 (5) and Art. 35 (7)).
  - A remedy is substantiated in the Member State of origin if:
    - the EAPO cannot be applied to the matter in question, e.g. insolvency proceedings (Art. 34 (1) lit. a in conjunction with Art. 2),
    - the court delivering the order was not competent (Art. 34 (1) lit. a in conjunction with Art. 6); or if
    - the conditions for issuing an EAPO were not met (Art. 34 (1) lit. a in conjunction with Art. 7).

- A remedy is substantiated in the Member State of enforcement if, amongst other things:
  - national preservation limits were infringed (Art. 35 (1) lit. a),
  - a court in the Member State of enforcement delivered a judgement dismissing the claim covered by the EAPO (Art. 35 (1) lit. b (i)),
  - the underlying title of the claim was exempted from enforcement in the Member State of origin (Art. 35 (3) (ii)) or
  - the underlying title was set aside in the Member State of origin (Art. 35 (3) (i)).
- Decisions on remedies can be appealed under national law (Art. 37).

#### ► **Supplementary provisions**

- The Member States appoint and inform the Commission as to (Art. 48 (1)):
  - the competent authority for issuing an EAPO in case a title is to be enforced in a Member State of enforcement;
  - the court with which an appeal against a decision not to issue an EAPO is to be lodged;
  - the competent authority for the EAPO;
  - the courts to which the application for a review of the EAPO may be submitted;
  - the courts with which debtors who are consumers, employees or policyholders may appeal against an EAPO;
  - the extent to which joint and nominee accounts can be preserved under its national law;
  - the rules applicable to amounts exempt from enforcement under national law;
  - the rank conferred to protective measures equivalent to an EAPO under national law;
  - the single fixed fees for the banks, authorities and issuing courts;
  - the languages accepted for translations of the documents in each Member State.
- The Commission publishes all information on procedures, including the competent authorities in the European Judicial Network in civil and commercial matters (Art. 48 (3)).
- Where, “in exceptional circumstances”, it is not possible for the court or authorities to respect the time limits, the necessary steps are to be taken “as soon as possible”. Upon request they must “justify” the reasons (Art. 44).
- All procedural issues not specifically dealt with in this Regulation shall be governed by national law (Art. 45).

### **Changes to the Status quo**

There are no existing European rules on the attachment of bank accounts.

### **Statement on Subsidiarity by the Commission**

According to the Commission, the differences in national enforcement rules impede the internal market. These impediments can be better removed through EU action than through national action.

### **Policy Context**

Prior to the Proposal, a Green Paper was published on the attachment of bank accounts [COM(2006) 618; s. [CEP Policy Brief](#)] and a Green Paper on the Transparency of Debtors’ Assets [COM( 2008) 128; s. [CEP Policy Brief](#)].

### **Legislative Procedure**

25 July 2011	Adoption by the Commission
Open	Adoption by the European Parliament and the Council, publication in the Official Journal of the European Union, entry into force

### **Options for Influencing the Political Process**

Leading Directorate General:	DG Justice
Committees of the European Parliament:	Legal Affairs (in charge), rapporteur: still open; Economic and Financial Affairs
Committees of the German Bundestag:	Legal Affairs (in charge); Finance; Economies and Technology; Affairs of the European Union
Decision mode in the Council:	Qualified majority (approval by a majority of Member States and at least 255 out of 345 votes; Germany: 29 votes)

### **Formalities**

Legal competency:	Art. 81 (1) TFEU (Judicial cooperation in civil matters)
Form of legislative competency:	Shared competence (Art. 4 (2) TFEU)
Legislative procedure:	Art. 294 TFEU (ordinary legislative procedure)

## ASSESSMENT

### Economic Impact Assessment

#### Ordoliberal Assessment

An effective legal system is absolutely essential for legal certainty and thus for the functionality of the market economy. The differences between the national procedures regarding the attachment of bank accounts goes against this, for they make it easier for debtors to evade obligations they have vis-à-vis creditors. An EU-wide harmonised procedure for the attachment of bank accounts is therefore appropriate in principle.

However, the fact that very different levels of the rule of law exist in Member States stands in opposition to this principle and thus there is the danger of abuse. For courts in constitutionally underdeveloped Member States might require too little when it comes to providing evidence for alleged claims. Thus people and undertakings run the risk of becoming victims of unjustified attachments of accounts. **The cross-border attachment of accounts therefore remains problematic as long as not all Member States attain a high level of the rule of law.**

#### Impact on Efficiency and Individual Freedom of Choice

With the proposed procedure and **due to the abolition of the exequatur procedure, the duration and costs of the procedure can be reduced significantly.** However, the Proposal achieves this objective only partly: **the network of competences is inefficient.** For where the level of the rule of law is equally high, it suffices if only the court competent for the substance of the matter, or the authority which has issued an enforceable title, issues the EAPO which is to be enforced by the national authority.

#### Impact on Europe as a Business Location

The quality of Europe as a business location is enhanced if cross-border claims can be recovered cheaply and quickly. However, this advantage is significantly relativised by the currently existing danger of abuse.

### Legislative Competency

#### Competency

The EU is empowered to adopt measures in order to develop judicial cooperation in civil matters with a cross-border implication (Art. 81 TFEU). The Proposal is mainly within the scope of this competency.

However, **the Member States' obligation to order that the debtors' account data be investigated by the competent authorities lies beyond the EU scope of competency,** for the investigation of account data has nothing to do with creating a harmonised enforcement procedure.

#### Subsidiarity

Unproblematic.

#### Proportionality

The possible division of the court competent for the issuing of the EAPO and the court competent for the substance of the matter can, during the application for the EAPO and prior to the end of the proceedings, lead to contradictory decisions regarding whether or not the alleged claim is justified. It would be better to restrict competency to the court seized as to the substance.

Inappropriate is the condition that in order to issue an EAPO there must be a real risk that the debtor shifts his assets, as this possibility always exists due to the free movement of capital.

#### Compatibility with EU Law

Cross-border electronic transmission requires a European framework, otherwise data protection and technical compatibility cannot be ensured.

#### Compatibility with German Law

The high levels of the rule of law in Germany raises further concerns: **the specification of fixed** – and, moreover, very short – **deadlines** for courts, together with the obligation to justify exceeding said deadlines, **and prohibiting the debtor from being heard** before the enforcement of the EAPO if the creditor does not allow it (Art. 10), **are not in line with the principle of judiciary independence and with the debtor's right to be heard before a court.** The competent court must have the discretionary power to conduct a hearing.

**The gathering of information on the debtor's account** depends only on the creditor requesting this. This extremely low hurdle **is highly problematic in terms of data protection.** There is no special public interest which might justify such an approach.

### Conclusion

The proposed Regulation could make the cross-border attachment of bank accounts much easier, in particular through the abolition of the exequatur procedure. However, for this to happen, high levels of the rule of law would have to prevail in all Member States; this is currently not the case. The network of competences is not efficient. The provision regarding account data lies beyond EU competency and is therefore highly problematic in terms of data protection. Requiring fixed deadlines for courts and prohibiting debtors from being heard before the EAPO is issued are not in line with the principle of judiciary independence and with the debtor's right to be heard before a court.