Publication of the proposal for a Regulation creating a European Account Preservation Order.

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On 25 July 2011, the European Commission presented its proposal for a Regulation creating a European Account Preservation Order to facilitate debt recovery in civil and commercial matters (COM(2011) 445 final).

On 25 July 2011, the European Commission presented its proposal for a Regulation creating a European Account Preservation Order to facilitate debt recovery in civil and commercial matters (COM(2011) 445 final). The term "Preservation" shall henceforth appear in the title of the proposal.

This publication is part of re-launching work on the issue. To recap, work on improving the enforcement of judgments in the European Union was launched with the publication of a Green Paper in 2006 which proposed the creation of a European order for the attachment of bank accounts (Green Paper on improving the efficiency of the enforcement of judgments in the European Union: the attachment of bank accounts (COM (2006) 618 final). In the Stockholm Programme of December 2009, the European Council invited the Commission to present appropriate proposals to improve the efficiency of the enforcement of judgments in the Union, both in terms of the attachment of bank accounts and the disclosure of debtor's assets. At the plenary session of 10 May 2011, the European Parliament adopted a resolution containing recommendations for the Commission on the proposals for interim measures for the freezing and disclosure of debtor's assets in cross-border cases. It was in this context that the EEJ project partners adopted a position on what was to be included in this future procedure, believing that creating a European order for the attachment of bank accounts would enable accounts held in different Member States to be attached quickly and at a lower cost, but that fail-safe measures had to be put in place. In particular, the EEJ project partners emphasised that the judicial officer, the enforcement agent, must be competent to carry out the attachment at the bank and serve the attachment order on the debtor. His intervention guarantees legal certainty and the protection of the debtor's rights, which is a fundamental protective measure, since the European order for the attachment of bank accounts would be issued following ex parte legal proceedings.

Consulting the EEJ project partners' position **[2]**

The proposal for a Regulation presented by the European Commission on 25 July 2011 would thus introduce a new European procedure to attach funds held by the debtor in a bank account in another Member State. This procedure would apply under identical conditions in all the Member States of the Union. It would be optional, autonomous and independent of existing national procedures, which would not be modified.

This procedure, which would be essentially protective, would only have the effect of blocking the debtor's account, without the money in the account being able to be transferred to the creditor.

This instrument would be applicable in civil and commercial affairs to cases with a cross-border dimension. All situations would be regarded as having cross-border implications unless the court hearing the request, the bank accounts referred to in the order and the parties involved are located in the same Member State.

The instrument proposed specified common rules regarding how to determine the court's jurisdiction, the conditions and procedure to be complied with in serving the order, the arrangements for its implementation and various aspects connected with the debtor's protection.

The creditor will be able to implement this procedure, even if he does not yet have an enforcement order, as soon as he is able to demonstrate that his debt is justified and that, without the order of attachment being issued, the final enforcement of an order against the defendant may be prevented or made substantially more difficult, in particular because there is a real risk that the defendant might remove or conceal assets held in the bank account in question.

The jurisdiction for serving the order should be restricted to courts competent to apply European instruments or instruments of national law. The Regulation sets specific deadlines for serving and implementing the European order. For example, the proposal for a Regulation specifies that if the creditor does not yet have an enforcement order, the competent court must supply the order within 7 days.

The proceedings will be ex parte and without mandatory representation.

The creditor must then obtain a judgment on merit so that this protective measure can become final and the funds owed to the creditor can be transferred. The proposal for a Regulation specifies that the applicant must initiate proceedings on the substance of the case within 30 days from the issue of the order or in a shorter time-scale as specified in the order and that, failing this, the order shall be revocable.

The exequatur will be abolished: in line with existing European procedures, account preservation orders issued under this Regulation in one Member State will be automatically recognised and enforced in another Member State without any special procedure being required.

The European Commission has emphasised that the provisions on the actual enforcement of the European order to be issued under the new procedure constitute the main novelty of the proposed Regulation. An account preservation order issued by a national court will be enforced under this European procedure by serving it on the bank or banks holding the accounts targeted, which will be under an obligation to implement the order immediately by blocking an amount corresponding to the amount of the order. In order to ensure that the defendant's rights are respected, the debtor must be immediately advised of the implementation of the order and the entry into effect of the measure by means of its service or notification. The proposed Regulation gives the debtor the right to dispute the preservation order on material and procedural grounds.

We should note that the European Commission is removing the difficulties that the creditor may encounter in obtaining information on his debtor's bank account(s) and is obliging Member States to facilitate access to this information while still leaving them responsible for choosing between two mechanisms. The Member States must either specify the option of obliging all banks on their territory of declaring whether the debtor has an account with them or authorise access by the competent authority to the information involved if this information is held by public authorities or administrations and entered in registers or in another form. It is very important that the European institutions to take into account the difficulty for the enforcement agents of gaining access in certain situations to the information on the debtor's assets. Facilitating the enforcement agent's access to this information guarantees, in effect, improved enforcement.

Next, the proposal includes a series of provisions intended to answer questions likely to be posed as part of this procedure. It addresses the issue of amounts exempt from enforcement for ensuring the livelihood of the debtor and his family or for allowing a company to continue its ordinary course of business. After stating that national law varies substantially from one Member State to another in this matter, the proposed Regulation allows Member States to maintain their national system. It will be the responsibility of the enforcement agent, on the one hand, to specify this amount on receipt of the order, as soon as this amount can be specified without the defendant supplying additional information and, on the other hand, to inform the bank that this amount must be made available to the defendant after the order is implemented. To determine this amount, the competent authority will apply the legislation of the enforcing Member State, i.e. the Member State of the place where the

account is held, even if the defendant lives in another Member State.

Finally, the Commission emphasises, in assessing the impact of this proposal on basic rights, that "*by creating a swift and low cost European procedure for the preservation of bank accounts, the proposal improves the right of the creditor to an effective enforcement of his claims, which forms part of the right to an effective remedy as laid down in Article 47 (1) of the Charter. At the same time, the proposal ensures that the rights of the debtor are safeguarded in full compliance with the requirements of the right to a fair trial (Article 47 (2) of the Charter) and the right to respect of human dignity and family life (Articles 1er and 7 of the Charter respectively). Protection of the debtor's rights is ensured in particular by the following elements of the proposal:*

- *the requirement to notify the debtor immediately after the order is implemented with all documents which the creditor submitted to the court;*
- *the possibility of the debtor to contest the order by applying for a review to the court of origin, the court of enforcement or - if the debtor is a consumer, employee or insured – to the court at his place of domicile;*
- *the fact that amounts necessary to ensure the livelihood of the debtor and his family will be exempt from enforcement."*

The proposed Regulation creating a European Account Preservation Order was sent to the European Parliament and the Council of the European Union for adoption in accordance with the ordinary legislative procedure.

At their next meeting, which will take place in Rome on 17 and 18 October, the EEJ project partners will adopt a position on this proposal.

Consulting the proposal:
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0445:FIN:EN:PDF [3]

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