Special point: Follow up of the legislative work on the creation of a European bank account preservation order (EAPO)

- News on legislation [1]

Fri, 06/01/2012

The proposal for a regulation creating a European Account Preservation Order (EAPO) to facilitate cross-border debt recovery in civil and commercial (COM (2011) 445 final), published by the European Commission on 25th July, 2011, has now been transmitted to the Council of the European Union and the European Parliament. Within the Council of the European Union, the United Kingdom has decided to exercise its right to opt out, unlike Ireland which has announced its participation (opt in). Within the European Parliament, Raffaele Baldassare, Member of the European Parliament, was appointed rapporteur within the "Legal Affairs" Committee – responsible Committee - while Elena Basescu was appointed rapporteur in the "Economic and Monetary Affairs" Committee – Committee asked for an opinion. The vote of the Legal Affaires Committe is scheduled for November 2012 while the vote of the Plenary Session is scheduled for February 2013.

In accordance with the Treaty on the Functioning of the European Union, the European Commission has asked the European Data Protection Supervisor and the European Economic and Social Committee for an opinion. Both have given their opinion. At the same time, the Council of Notaries of the European Union has published a position paper on this issue.

As a reminder, the EJE project partners submitted comments on the proposal for a Regulation creating a European Account Preservation order, which was subject of particular attention in previous newsletters and which is available at the following address: http://www.europe-eje.eu/en/actualite/members-eje-project-comments-proposal-regulation-creating-european-account-preservation-or [2]

• The opinion of the European Data Protection Supervisor (EDPS)

On 13th October 2012, the European Data Protection Supervisor (EDPS) gave its opinion on the proposal for a regulation creating a European Account Preservation Order. This opinion was published in the Official Journal of the European Union.

The EDPS is pleased to see the efforts taken to address the different data protection aspects which are raised by the proposed instrument of an EAPO. More in particular, he appreciates the application of and the references to the principle of necessity. However, the EDPS believes the proposed Regulation would still require some further improvements and clarifications. The EDPS recommends:
- to consider including in Article 25 (Service of the EAPO on the defendant) the possibility for the claimant to request the removal of his address details from the information provided to the defendant;
- to remove the optional data fields (the telephone number and e-mail address of the defendant) from Annex I (Application form) if the actual need is not proven;
- to restrict the information provided by the claimant under Article 17 (Request for obtaining account information) (2) to what is necessary to identify the defendant and to determine his or her bank account(s) (Article 17 (2) provides that : « The application shall include all information available to the claimant about the defendant and the defendant's bank accounts »);
- to consider replace the reference in Article 17(4) to 'all appropriate and reasonable means' by 'one

of the two methods referred to in paragraph 5' (Article 17 (4) provides that : « The competent authority shall use all appropriate and reasonable means available in the Member State of enforcement to obtain the information referred to in paragraph 1 » while Article 17 (5) provides two methods for obtaining information (Member States are invited to provide for one or the other) : the possibility to oblige all banks in their territory to disclose whether the defendant holds an account with them / access by the competent authority to the information referred to in paragraph 1 where that information is held by public authorities or administrations in registers or otherwise.) ;
- to explain what is meant by the 'existing public registers' referred to in Article 17(5)(b).

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:373:0004:0007:EN:PDF [3]

• The opinion of the European Economic and Social Committee (EESC)

Following the report of M. Jorge PEGADO LIZ, Member of the EESC, the ESSC gave, on 26th April 2012, its opinion on the proposal for a regulation creating a European Account Preservation Order.

The EESC welcomes the presentation of the proposal. However, the EESC considers that it should be accompanied by a simultaneous initiative – although it should logically have come first – on the transparency of debtors' accounts, as set out in the 2008 Green Paper on the transparency of debtors' assets.

The EESC is pleased that the Commission has succeeded in proposing, in an area of great technical difficulty, a legal regime that strikes a proper balance between the various interests at stake and a fair balance between the rights of the various parties concerned. The EESC welcomes the fact that the Commission has taken on board a considerable part of the recommendations made by the EESC in its opinion on the above-mentioned green paper, including (i) the extension of its scope beyond cash held in bank accounts to include other financial instruments, (ii) the issue of a European Account Preservation Order (EAPO) after obtaining an enforceable title, (iii) the wide-ranging definition of courts having jurisdiction, (iv) the non-inclusion of requests for any amounts other than those due and not repaid together with default interest, and recognised costs, and (v) the clear definition of rules for contesting and opposing the measure and for admissible appeals, in order to guarantee the lawfulness of the procedure and safeguard the rights of claimants, defendants and third parties.

The clear adoption of an alternative or optional approach (i), the choice of a regulation as the EU instrument to best ensure the completion of the internal market (ii), application of the measure only to cross-border situations (iii) are particularly welcome.

The EESC is moreover not entirely convinced with regard to the essential nature of the measure, especially given that it will not be adopted by the United Kingdom and given the fact that uncertainty about the total cost of the procedure as well as finding out the competent foreign court will remain barriers, certainly for small companies. Neither is the EESC entirely convinced with regard to the proposal's compliance with the principles of subsidiarity and proportionality, since the revision of the Brussels I Regulation envisages the abolition of exequatur and the estimates of the expected results contained in the impact assessment are still imprecise.

Lastly, the EESC considers that the content of some provisions needs to be reviewed and could be improved to make it clearer, less ambiguous and more purposeful, and also to correct some translation and printing errors.

In this regard, some of these specific comments echo the concerns of EJE project partners, such as the comment made under article 25 of the proposal. Article 25 paragraph 1 of the proposal is as follows: " The defendant shall be served with the EAPO and all documents submitted to the court or competent authority with a view to obtaining the order without undue delay after service on the bank has been effected pursuant to Article 24 and the bank has issued the declaration pursuant to Article 27”. The EJE project partners consider, in their position paper, that the notion of "undue delay" cannot provide legal security required by the implementation of a EAPO. A specified period, which could be of 8 days from the date of service of the EAPO, should be stated. The EESC underlines, in its opinion, that « the expression "without undue delay" is dangerously vague: it

should be replaced by a set minimum deadline, such as "on the next working day" ».

The EJE project partners will comment the opinion of the EESC soon.

http://www.eesc.europa.eu/?i=portal.en.int-opinions&itemCode=19924 [4]

• The position paper of the Council of Notaries of the European Union

The Council of the Notaries of the European Union (CNEU) published, on 3rd February 2012, its opinion on the proposal for a regulation creating a European account preservation order.

The Notaries of Europe approve of the European Commission’s initiative to propose an account preservation order that will complete the acquis in enforcement matters.

Accordingly, the Notaries of Europe welcome the proposal in Article 14 making it possible to establish directly the European preservation orders that this regulation would introduce. As a reminder, Article 14 (« Competence for issuing the EAPO » after obtaining an enforceable title) provides that « Where the claimant has obtained an authentic instrument, that claimant may request that the competent authority in the Member State where the authentic instrument has been drawn up and designated for this purpose by each Member State also issue an EAPO ». The CNEU mentions that this mechanism is in line with the extension of the Brussels I Regulation and the Regulation creating a European Enforcement Order according to which notaries can issue European enforcement orders personally and without additional formalities.

The Notaries of Europe approve of the definition of authentic instrument in the body of the regulation (Art. 4, pt 11). This definition comes from the Community Acquis : « authentic instrument means a document which has been formally drawn up or registered as an authentic instrument in a MEmber State and the authenticity of which : a) relates to the signature and the content of the instrument, and (b) has been established by a public authority or other authority empowered for that purpose ». Nevertheless, the Notaries of Europe are concerned about recalling that « the authentic instrument is a conventional document containing the agreement of the parties. A notarised authentic instrument is never established against or going against a party, even though it can be enforced against one of the parties, for example, in the case of a credit ». Therefore, the CNEU asks the European institutions to adapt the proposal’s terminology (« judgment, court settlement or authentic instrument against the defendant ») to conform to the distinctive identity of the authentic instrument.

Finally, the Notaries of Europe are in favour of withdrawing the exequatur as envisaged in Article 23 of the proposal. Nevertheless, the Notaries of Europe support the Commission when it foresees measures so that the debtor of the debt claim is not without the possibility to appeal, giving the debtor the means foreseen in chapter 4 of the proposal.

http://www.notaries-of-europe.eu/index.php?pageID=7557
 [5]

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