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ARTIKELS

<i>Tredoux and Van der Linde</i> : The taxation of dividend stripping transactions: a comparison between South Africa, Australia and Canada.....	1
<i>Coetzee</i> : Promoting fair individual labour dispute resolution for South African educators accused of sexual misconduct (part 1)	29
<i>Obiri-Korang</i> : Party autonomy: promoting legal certainty and predictability in international commercial contracts through choice of law (justification)	43
<i>Adams</i> : Choice of Islamic law in the context of the wider <i>lex mercatoria</i> : an express choice of non-state law in contract.....	59
<i>Broeckx and De Groot</i> e: The European Account Preservation Order (EAPO): a solution for cross-border seizure of bank accounts in the European Union.....	75
<i>Behari</i> : Proving a causal link between pregnancy and dismissal: an analysis of the disclosure of pregnancy and the protection of pregnant employees in the South African workplace	106

AAANTEKENINGE

Insurance policies, the Matrimonial Property Act and alienation of assets of the joint estate without value to the detriment of the non-consenting spouse – Reinecke and Sonnekus.....	123
Third-party appointments – may the tax collector please comply? – Legwaila.....	136

REGSPRAAK

Die konstitusionele hof verwyder die reg van werknemers om nie onbillik ontslaan te word nie uit die beskermingsveld van die handves van regte – grondwetlike gesigspunte – Rautenbach.....	145
Can a conduct rule banning short-term letting for less than six months in a residential sectional title scheme be declared invalid because it constitutes commercial use of the unit, and then be enforced by a final interdict and declared constitutional? – Van der Merwe	160
Liability of police for investigation of rape– Neethling	171
Einde van gemeenskaplike boedel van 'n egpaar getroud in gemeenskap van goed en aanvang van uitwissende verjaring van tersake vordering val saam– Sonnekus.....	184
Towards a new form of customary marriage and ignorance of precedence – Manthwa	199



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The European Account Preservation Order (EAPO): a solution for cross-border seizure of bank accounts in the European Union*

K BROECKX**

B DE GROOTE***

SAMEVATTING

DIE EUROPESE BANKBESLAGVERORDENING

Op 18 Januarie 2017 het in alle lidstate van die Europese Unie, met uitsondering van die Verenigde Koninkryk en Denemarke, die Europese Bankbeslagverordening in werking getree. Die verordening bied skuldeisers wat beoog om oor te gaan tot invordering van hul skuldvordering in burgerlike en handelsake in situasies met grensoorskrydende karakter, die moontlikheid om 'n Europese bevel tot behoudende of bewarende beslag aan te vra met betrekking tot die bankrekening van hul skuldnaars (die sogenaamde *European Account Preservation Order* ofte wel *EAPO*). Die *EAPO* stel 'n skuldeiser in staat om die krediet in enige bankrekening van sy skuldenaar in enige ander Europese lidstaat te blokkeer.

Die Europese Bankbeslagverordening verteenwoordig 'n belangrike afwyking van die territoria-liteitsbeginsel wat normaalweg toepassing vind. Die beginsel is voorheen as 'n fundamentele en dus kenmerkende beginsel van die eksekusiereg beskou en kom daarop neer dat slegs die nasionale howe bevoeg is om 'n beslagleggingsmaatreël toe te staan ten aansien van krediete wat binne die nasionale grense voorkom en om kennis te neem van en uitspraak te gee oor litigasie wat verband hou met sodanige beslagleggingsbevele binne hul grensgebied. Die beginsel berus op die premis dat tenuitvoerlegging ten nouste verbonde is met die uitoefening van staatsgesag.

Die behandeling van 'n aansoek om 'n *EAPO* verloop eensydig en dus sonder dat die skuldenaar van die aansoek in kennis gestel word. Die eensydige karakter het ten doel om die verrassingseffek te behou en daardeur die kanse vir 'n geslaagde bankbeslag te verbeter. Daar word gebruik gemaak van dieselfde standaardformuliere in alle lidstate.

'n Skuldeiser wat so 'n *EAPO* wil bekom, moet aantoon dat daar 'n dringende behoefte daartoe bestaan ten einde 'n bewaerhoudingsbevel te bekom en dat by gebrek daaraan 'n reële risiko bestaan dat die latere inning van die skuldvordering onmoontlik gemaak sal word of minstens wesenlik bemoeilik sal word.

Die Europese Bankbeslagverordening voer ook die moontlikheid in vir skuldeisers wat beskik oor 'n gepaste titel om 'n versoek tot inligting met betrekking tot die tersake bankrekening te formuleer voordat daarop beslag gelê word. Die verordening voorsien egter ook die verpligting, ofte wel die moontlikheid dat skuldeisers sekerheid moet stel ten einde enige belanghebbendes teen benadeling te vrywaar indien die verordening uitgevoer word.

Die Europese Bankbeslagverordening is van belang vir skuldeisers met 'n domisilie, woonplek of setel in die Europese Unie wat vanuit hul lidstaat beslag wil lê op die bankrekening van hul skuldnaar ongeag die feit dat laasgenoemde se woonplek of bedryfsetel in 'n ander Europese lidstaat is.

* Recognition is given to Cuniberti and Migliorini *The European Account Preservation Order Regulation A Commentary* (2018) 488.

** Judge of the court of appeal Ghent and Professor, Institute for Procedural Law, Faculty of Law, Ghent University, Belgium.

*** Professor, Faculty of Economics, Ghent University, Belgium.

1 Introduction

As from 18 July 2017¹ the European Regulation (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 matters² entered into force in all member states of the European Union (except the United Kingdom and Denmark). Creditors aiming to recover their debts in cross-border civil and commercial cases are given the opportunity to launch a procedure to obtain a European Account Preservation Order (hereafter cited as a preservation order or an order). The preservation order allows creditors to block their debtors' funds held in bank accounts in another member state.³

The procedure enables a creditor to obtain an order which prevents the subsequent enforcement of the creditor's claim from being jeopardized through the transfer or withdrawal of funds in an account which is held with a bank in another member state in the name of the debtor or a third party on behalf of the (supposed) debtor, up to the amount that is specified in the order.⁴ It allows a creditor in certain circumstances to secure the payment of a sum of money due to him by preventing the removal or transfer of funds held to the credit of his debtor in one or several bank accounts within the territory of the European Union. The attachment order under this system is a protective measure issued by a court in summary proceedings which allows a creditor to block funds.

This deviation from the principle of territoriality, traditionally seen as a characterizing feature of execution law, is a major novelty that the regulation brings. The principle of territoriality implies that only the national courts have jurisdiction to allow the seizure of assets that are to be found in the court's own national territory

¹ with the exception of a 50 (concerning the information to be given by the EU member states), which entered into force on 18 July 2016.

² *Verordening (EU) nr 655/2014 van het Europees Parlement en de Raad van 15 Mei 2014 tot Vaststelling van een Procedure Betreffende het Europees Bevel tot Conservatoir Beslag op Bankrekeningen om de Grensoverschrijdende Inning van Schuldvorderingen in Burgerlijke en Handelszaken te Vergemakkelijken* pb nr L 189, 27 Jun 2014, 59; see also the *Uitvoeringsverordening (EU) 2016/1823* of 10 Oct 2016, where the commission formulated the applicable form, mentioned in *Verordening 655/2014*, pb nr 283, 19 Oct 2016. See on the first commentaries Dirix "Het Europees bankbeslag komt eraan" 2015-16 *RW* 21; Payan "Les perspectives d'une procédure européenne de saisie conservatoire des avoirs bancaires" *Conférence Thomson Reuters* 596 ff; Van Leenhove "Europees conservatoir bankbeslag: nieuw wapen voor schuldeisers in grensoverschrijdende gevallen" 2015 *Juristenkrant* 8-9; Raffelsieper "Le nouveau Règlement no 655/2014 portant création d'ordonnance européenne de saisie conservatoire de comptes bancaires" 2016 *Tijdschrift voor Belgisch Handelsrecht (TBH)* 1; Meijssen and Jongbloed "Voorstel Europees Bankbeslag te eenzijdig. Voorstel voor Europees beslag op bankrekeningen (EAPO) is schrijnend eenzijdig en onvoldoende uitgewerkt: rigoureuze aanpassing is noodzakelijk [Vergelijking met Nederlands conservatoir beslag]" 2012 *NJB* 102-108; Georges "Le règlement UE no 655/2014 créant une ordonnance européenne de saisie conservatoire des comptes bancaires" 2015 *Revue Luxembourgeoise de Bancassurfinance* 137-143; Feltkamp "Verordening no 655/2014 van het Europees Parlement en de Raad van 15 mei 2014 tot vaststelling van een procedure betreffende het Europees bevel tot conservatoir beslag op bankrekeningen om de grensoverschrijdende inning van schuldvorderingen in burgerlijke en handelszaken te vergemakkelijken" 2014 *TBH* 931-932; Atema and Netten "Het Europees bankbeslag: een ruwe diamant" 2012 *Maandblad voor Vermogensrecht* 11.

³ Van Kasbergen "Het Europees bankbeslag: de voor- en nadelen ten opzichte van een Nederlands conservatoir derdenbeslag onder een bank" 7128 (2016) *WPNR* 970.

⁴ Cf a 1, § 1 of Regulation 655/2014. For the definition of the major concepts used in the regulation (such as "bank account" and "debtor"), see a 4. Payan "Inwerkingtreding van de Verordening (EU) nr 655/2014: de nieuwe Europese procedure voor conservatoir beslag op bankrekeningen is een feit!" 2017 *De Gerechtsdeurwaarder* 14-18.

and to hear and determine a case concerning conflicts and to hear and determine disputes pertaining to enforcement in the court's country.⁵

One can refer in this regard to article 24 (5) EU-Regulation 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 stating that, regardless of the domicile of the parties, in proceedings concerned with the enforcement of judgments, the courts of the member state in which the judgment has been or is to be enforced have exclusive jurisdiction. It is, based on the principle of territoriality, considered that only a national judge can authorize a garnishment when the third-party debtor is established in his country and that in that country a garnishment is not allowed in the hands of a national bank or employer based on an order from a foreign judge.⁶

Even if a foreign court has jurisdiction to pronounce judgment on the merits, the principle of territoriality forces the aforementioned conclusion. Only a Belgian judge has, by virtue of the principle of territoriality, the power to order measures of seizure regarding assets located in the Belgian territory. On the other hand, the Belgian judge has no power to order compulsory enforcement measures that affect assets in another state. Disputes regarding foreclosure are exclusively settled on the basis of Belgian seizure law.

For the settlement of cross-border commercial disputes (especially within the European Union), this principle of territoriality is unsurprisingly problematic. Creditors are forced to litigate in several member states: on the one hand, they have to launch a procedure for the judge that has jurisdiction to hear the case on its merits and on the other hand, in one or several (member) states, if they want to make assets of the debtor subject to an executive/conservatory attachment, depending on the (member) state in which the debtor's assets are to be found.

According to the European legislature, the internal market⁷ is negatively impacted by accumulation of procedures – as mentioned above – in the different member states.⁸

In order to tackle this problem, the European legislature took the initiative to abolish the *exequatur* procedure/enforcement procedure in some previously issued regulations. One may refer in this regard to Regulation 805/2004 of the European parliament and of the council of 21 April 2004 creating a European Enforcement Order for uncontested claims.⁹ Moreover, one can mention Regulation 1896/2006 of the European parliament and of the council of 12 December 2006 creating a European Order for payment procedure.¹⁰

⁵ See Cass 26 Sept 2008, 2009-10 *Rechtskundig Weekblad (RW)* 237 and 2009 *Revue de Jurisprudence de Liège, Mons et Bruxelles (JLMB)* 840, with an annotation of Frankignoul. Cf Fransis "Het territorialiteitsbeginsel in het executierecht" 2009-10 *RW* 219-227.

⁶ Dirix and Broeckx *Algemene Practische Rechtsverzameling (APR) tw Beslag* (2010) 79 nr 94.

⁷ See recital 1 of the regulation.

⁸ Volders "Internationaal beslagrecht" 2018 *CBR-Actualia* 3 nr 4.

⁹ OJ L 143, 30 Apr 2004 15-39.

¹⁰ OJ L 399, 30 Dec 2006 1-32.

At last the European Union opted for a general abolishment of the enforcement procedure (“*exequatur*”) in the revised Brussels I-Regulation.¹¹

As a consequence, neither a judgment¹² nor an authentic instrument or a court settlement in the member state of origin¹³ requires that the Belgian court in which enforcement is sought should grant an *exequatur* decision¹⁴ prior to the delivery of a writ of enforceability that allows enforcement in Belgium. A Belgian bailiff can immediately, on the basis of a condemning sentence delivered by a court in another European Union member state, proceed to seizure.¹⁵

The regulation establishing a European Account Preservation Order similarly makes it possible to proceed to an account preservation order without a detour via the Belgian judge of attachments/attachment judge.¹⁶

This regulation is one of a series and completes further regulatory initiatives in order to facilitate the recovery of cross-border claims of companies and citizens.¹⁷ For the recovery of a claim, it might not be relevant whether a domestic or a foreign claim is involved. Facilitating an account preservation order for the recovery of cross-border claims is meant to have a positive economic impact, as it contributes to a reduction of irrecoverable claims.

Regulation 655/2014 establishing a European Account Preservation Order has the objective to simplify the recovery of cross-border claims in civil and commercial matters. The fact that a debtor’s attachable assets are located or situated abroad and that consequently a cross-border attachment/seizure is necessary is experienced as an impediment, prevents many creditors from proceeding to a preservation order. This is caused by the differences between and complexity of the different national procedures that are involved and must be carefully followed. It is precisely the aim of the regulation concerning the European Account Preservation Order to remedy the aforementioned issues. It therefore introduces a simplified European procedure apart from the national seizure or attachment procedures. The European Account Preservation Order can in this regard be characterized as an additional tool in the hands of the creditor in a cross-border context.

¹¹ Regulation 1215/2012 of the European parliament and of the council of 12 Dec 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; OJ L 351, 20 Dec 2012. A 39 (s 2 enforcement) states that a judgment given in a member state which is enforceable in that member state shall be enforceable in the other member states without any declaration of enforceability being required. According to a 40, an enforceable judgment shall carry with it by operation of law the power to proceed to any protective measures which exist under the law of the member state addressed. *Cf* a 58 concerning “authentic instruments” and a 59 concerning “court settlements”:

“(b) ‘court settlement’ means a settlement which has been approved by a court of a member state or concluded before a court of a member state in the course of proceedings;

(c) ‘authentic instrument’ means a document which has been formally drawn up or registered as an authentic instrument in the member state of origin and the authenticity of which:

(i) relates to the signature and the content of the instrument; and

(ii) has been established by a public authority or other authority empowered for that purpose.”

¹² a 39 of Regulation 1215/2012.

¹³ a 58 of Regulation 1215/2012.

¹⁴ a prior apposition of the enforcement order.

¹⁵ executive measures/provisional seizure order.

¹⁶ *ie* conservatory attachment.

¹⁷ Jongbloed “Europees bankbeslag: nuttig, noodzakelijk of onvoldragen en een brug te ver?” 2012 *Tijdschrift voor Procespraktijk* 56 58. A 4(6) defines a “creditor” as “a natural person domiciled in a member state or a legal person domiciled in a member state or any other entity domiciled in a member state having legal capacity to sue or be sued under the law of a member state, who or which applies for, or has already obtained, a Preservation Order relating to a claim”.

The European Account Preservation Order shall be available as an alternative to the creditor, alongside the national preservation measures. The creditor can choose between the national and the European Preservation Orders. The latest regulation is a new and important step in the development of a real European judicial space for civil and commercial matters. From as far back as 1998, the European authorities pointed out that a space in which judgments could freely circulate (and be enforced) was a major opportunity for the European Union to take up.¹⁸

The entry into force on 1 May 1999 of the Treaty of Amsterdam, which amended the Treaty on the European Union, the treaties establishing the European Community and certain related acts, gave a major impetus to the potential to unify legislation within the European Union.¹⁹

In the Treaty of Amsterdam, the European Union set itself the goal of gradually creating an area of freedom, security and justice. In the field of civil justice, article 65 of the EC-Treaty envisages, amongst other things, the taking of measures to improve and simplify the recognition and enforcement of judgments in civil and commercial cases.

Following the adoption of the Treaty of Amsterdam, the commission issued, in 1998, a communication, titled *Towards Greater Efficiency in Obtaining and Enforcing Judgments in the European Union*, outlining possible ways to improve efficiency in enforcing judgments in the European Union.

Article 65 of the Treaty on the European Community – nowadays article 81 of the Treaty on the Functioning of the European Union (13 Dec 2007)²⁰ – became

¹⁸ The commission already did so in a communication to the council and the European parliament (with the title: *Towards Greater Efficiency in Obtaining and Enforcing Judgments in the European Union*) (COM/97/0609 final). See OJ C 33, 31 Jan 1998 3.

¹⁹ OJ C 340, 10 Nov 1997 1-4 (2 Oct 1997).

²⁰ A 81 of the Treaty on the functioning of the European Union reads as follows: “Article 81 (ex Article 65 TEC)

1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the member states.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring:

- (a) the mutual recognition and enforcement between member states of judgments and of decisions in extrajudicial cases;
- (b) the cross-border service of judicial and extrajudicial documents;
- (c) the compatibility of the rules applicable in the member states concerning conflict of laws and of jurisdiction;
- (d) cooperation in the taking of evidence;
- (e) effective access to justice;
- (f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the member states;
- (g) the development of alternative methods of dispute settlement;
- (h) support for the training of the judiciary and judicial staff.

3. Notwithstanding paragraph 2, measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament.

The Council, on a proposal from the Commission, may adopt a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure. The Council shall act unanimously after consulting the European Parliament.

The proposal referred to in the second subparagraph shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision shall not be adopted. In the absence of opposition, the Council may adopt the decision.”

a solid basis for measures developing judicial cooperation in civil matters having cross-border implications, necessary for the sound functioning of the internal market. In this regard, measures can be adopted that aim at and/or ensure the mutual recognition of enforcement between member states of judgments and of decisions in extrajudicial cases as well as the elimination of obstacles to the proper functioning of civil proceedings, if necessary, by promoting the compatibility of the rules on civil procedure applicable in the member states. This framework was the basis for several consecutive regulations with a harmonizing effect.²¹

A number of measures have been taken to fulfil the aim of establishing a genuine European area of justice. In line with the objective laid down by the treaty, the program on mutual recognition, adopted by the council in December 2000, requested that measures be taken to improve the mutual recognition of judicial decisions in the member states, by, amongst other things, establishing devices at the European level to enable a protective measure issued in one member state to take effect against the debtor's assets in the whole territory of the European Union. This could possibly, for example, enable a person who has obtained judgment against a debtor in one member state to have the debtor's property forthwith frozen in another member state as a protective measure, without recourse to a further procedure.

It was only with the adoption by the European Commission on 24 October 2006 of a green paper titled "Improving the efficiency of the enforcement of judgements in the European Union: the attachment of bank accounts"²² that the preparatory works for the development of the European procedure for the attachment of accounts were

²¹ See Jongbloed (n 17) 56-65; Council Regulation 44/2001 of 22 Dec 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 12 Jan 2001 1), repealed by Regulation 1215/2012 of 12 Dec 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (OJ L 351, 20 Dec 2012 1); Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ L 160, 30 June 2000); Regulation 1393/2007 of the European parliament and of the council of 13 Nov 2007 on the service in the member states of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000 (OJ L 324, 10 Dec 2007 79); Council Regulation 2201/2003 of 27 Nov 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (OJ L 338, 23 Dec 2003 1); Council Regulation 1206/2001 of 28 May 2001 on cooperation between the courts of the member states in the taking of evidence in civil or commercial matters (OJ L 174, 27 June 2001 1). Council Regulation (EC) No 4/2009 of 18 Dec 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (OJ L 7, 10 Jan 2009); In the field of seizure law and execution law, the following EU-instruments were adopted: Regulation 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims (OJ L 143, 30 April 2004 15); Regulation 1896/2006 of the European Parliament and of the Council of 12 Dec 2006 creating a European order for payment procedure (OJ L 399, 30 Dec 2006 1) and Regulation 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (OJ L 199, 31 Jul 2007 1).

²² Com (2006) 618, Oct 2006. See as well the commission staff working document annex to the green paper on improving the efficiency of the enforcement of judgments in the European Union: the attachment of bank accounts (SEC (2006) 1341) (24 Oct 2006). Alongside this initiative, see green paper on the effective enforcement of judgments in the European Union: the transparency of debtors' assets (COM (2008) 6 March 2008) 128.

really launched.²³ The purpose of this green paper was to launch a broad consultation among interested parties on how to improve the enforcement of monetary claims in Europe. The green paper described the problems and proposed the creation of a European system for the attachment of bank accounts as a possible solution.

For this reason, the European Commission ordered, in 2004, a comparative legal study on – *inter alia* – the attachment of bank accounts in the European Union member states.²⁴ The Green Paper is a consultative document. Its focal question is how a European system for the attachment of bank accounts can best be organized.²⁵ Hess's legal comparative study demonstrated that there are important/structural differences between the different national regulations of the member states concerning (provisional) attachment of bank accounts. Some member states have more severe conditions on which a provisional attachment of bank account depends, and there is a variety of systems of enforcement (*exequatur*) in the member states, impacting the efficiency of enforcement proceedings, which are different from one member state to another.

In the framework of the Stockholm Program of December 2009,²⁶ the European council invited the commission – in order to support the economic activity in the single market – to assess the need for and the feasibility of, providing for certain provisional, including protective, measures at Union level to prevent, for example, the disappearance of assets before the enforcement of a claim.²⁷ Furthermore, the commission was invited to put forward appropriate proposals for improving the efficiency of enforcement of judgments in the Union regarding bank accounts and debtors' assets, based on the 2006 and 2008 green papers.

On 25 July 2011, the European Commission presented a Proposal 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.²⁸ In its final drafting, the regulation – as adopted – differs on several

²³ COM (2006) 618 final. See *Improving the Efficiency of the Enforcement of Judgements in the EU Attachment of Bank Accounts* (European Parliament resolution of 25 Oct 2007 on the green paper on improving the efficiency of the enforcement of judgments in the European Union: the attachment of bank accounts) (2007/2026(INI)), OJ C 263, 16 Oct 2008, E/655; *Opinion of the European Economic and Social Committee of September 26 2007 on the Green Paper on Improving the Efficiency of the Enforcement of Judgments in the European Union the Attachment of Bank Accounts* COM (2006) 618 final (2008/C 10/02) (OJ C 10, 15 Jan 2008 2). The regulation is based on the commission's Proposal 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* (COM/2011/0445 final - 2011/0204 (COD))) (25 Jul 2011).

²⁴ Hess "Study No JA1/AR/2002/02: on making more efficient the enforcement of judicial decisions within the European Union: transparency of a debtor's assets, attachment of bank accounts, provisional enforcement and protective measures", 18 Feb 2004 http://ec.europa.eu/civiljustice/publications/docs/enforcement_judicial_decisions_180204_en.pdf (9 Sept 2018).

²⁵ 68 responses of interested parties were received: "2. Results of consultations with interest parties and impact assessment" of the Explanatory Memorandum of the Proposal 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" – COM/2011/0445 final - 2011/0204 (COD)).

²⁶ Notices from European Union Institutions, Bodies, Offices and Agencies – European Council (The Stockholm Programme – An open and secure Europe serving and protecting citizens) (2010/C 115/01). See OJ C 115, 4 May 2010 1.

²⁷ OJ C 115 (n 26).

²⁸ COM/2011/0445 final - 2011/0204 (COD), 25 July 2011. See the commission staff working paper (Impact assessment – Accompanying the document Proposal for a Regulation of the European Parliament and of the Council Creating an Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters (COM (2011) 445 final) (SEC(2011) 938 final), 25 Jul 2011 (SEC (2011) 937 final).

topics and aspects from the proposal. One may mention in this regard the scope of application of the Account Preservation Order procedure. It is significantly more restricted, both materially and territorially, than the commission originally had in mind.

The regulation establishing a European Account Preservation Order allows creditors to use a uniform European procedure to levy conservatory attachment on the bank accounts of debtors in one of the member states of the European Union, without a preliminary/prior authorization of the territorially competent judge under national law.²⁹

The regulation aims to address the differences between the member states' sets of national legislation. Those differences explain why the regulation leaves several topics – for instance regarding enforcement – to the applicable national law of the concerned member state(s). An example is the fact that it is up to the member states to appoint or assign the concerned authorities. Member states also determine how banks have to execute a European Account Preservation Order and how they have to deal with a request for obtaining account information, sought pursuant to the regulation.

The Regulation on the European Account Preservation Order entered into force on 18 January 2017³⁰ – with the exception of its article 50 regarding the information the member states had to provide to the commission by 18 July 2016.

In order to facilitate the application or use of the regulation, Implementing Regulation 2016/1823 (10 Oct 2016) establishing the forms referred to in Regulation (EU) 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 was adopted by the commission.³¹ It contains standard forms, for instance to apply for an order to conservatory attachment, a European Account Preservation Order.³² Another form assists with the application for a revocation of a European Account Preservation Order pursuant to article 10(2) Regulation 655/2014.³³

This contribution deals with the regulation's content. For this, the field of application has to be addressed, in material, territorial, personal and temporal

²⁹ Eg a subcontractor having its seat in member state A delivers engine components to a machine manufacturer in member state B. The manufacturer refuses to pay the bill, alleging that the delivered goods were defective. The subcontractor sues the manufacturer for payment in the courts of member state A (on the basis of a choice of court clause contained in its standard contract terms). Having heard through the grapevine that the manufacturer was in financial difficulties, the subcontractor is concerned that the judgment – when eventually rendered (court proceedings in member state A take two years on average) – will be worthless because the manufacturer will have become insolvent in the meantime. He therefore wants to secure the payment of the debt owed to him by freezing the manufacturer's account in a bank in member state B. Today, he could apply for an attachment order under national law but such an order would not be automatically recognized in member state B, in particular if it was rendered without a hearing of the debtor in order to safeguard the "surprise effect" of the measure. The intention is to improve that situation with a European system for the attachment of bank accounts and to grant the creditor an effective provisional remedy operating across the entire European Union. See http://europa.eu/rapid/press-release_MEMO-06-398_en.htm?locale=en (10-10-2020).

³⁰ a 54.

³¹ OJ L 283, 19 Oct 2016 1.

³² based on a 8(1) of Regulation 655/2014.

³³ The commission implementing Regulation 2016/1823 also contains a standard form to request a declaration concerning the preservation of funds; see a 25(1) of Regulation 655/2014.

terms. Special attention is given to the analysis of what characterizes a preventive seizure/conservatory attachment as “cross-border”.³⁴

Secondly, some procedural aspects will be addressed and evaluated: the competent judge, the model form, the unilateral character of the procedure, the safeguards for the debtor and the acquisition of information regarding the debtor’s accounts.

2 *Field of application*

Regulation 655/2014, establishing a European Account Preservation Order, creates a uniform European procedure. The scope is limited to cross-border claims and, more specifically, pecuniary claims in civil and commercial matters. It serves as an alternative, available to the creditor, to preservation measures under national law.³⁵ The regulation offers an additional and optional tool for creditors that does not affect the opportunities the national legal systems offer to obtain a similar measure.³⁶ It therefore has to be characterized as an alternative, parallel to national procedures to acquire protective measures.

The regulation introduced a new and self-standing European procedure which is available to citizens and companies in addition to existing national procedures for banking seizures. It creates a self-standing European procedure which has the advantage that it supplements the existing remedies under national law without requiring member states to substantially modify their national enforcement systems. Given the wide divergence of these systems, this solution might be preferable.

The field of application of the European Account Preservation Order procedure is significantly more limited than the commission’s proposal. The regulation establishing a European Account Preservation Order (procedure) entered into force on 18 January 2017. Being a regulation, no implementation or transposition by national legislation was required. Unlike a directive, Regulation 655/2014 has immediate application.

In terms of its application, the regulation obliges the member states to supply certain information. Article 50 regarding information to be provided by member states stipulates that the member states have to communicate the information enumerated in that article to the European Commission by 18 July 2016. Article 50(a) obliges the member states, for instance, to communicate the courts they designated as competent to issue a preservation order pursuant to article 6(4).³⁷ Subsequent changes have to be communicated to the commission as well.

³⁴ Kramer “Competitie in de Europese civiele rechtsruimte. Een spanningsveld in de grensoverschrijdende geschillenbeslechting?” 2014 *TPR* 1745 1757.

³⁵ *Cfa* 1(2) on “subject matter”: “The Preservation Order shall be available to the creditor as an alternative to preservation measures under national law.”

³⁶ *Parl St Kamer* 2017-18, 2919/001, 44.

³⁷ The list of information that has to be communicated reads as follows (a 50(1)):

“1 By 18 July 2016, the member states shall communicate the following information to the Commission:

- (a) the courts designated as competent to issue a Preservation Order (Article 6(4));
- (b) the authority designated as competent to obtain account information (Article 14);
- (c) the methods of obtaining account information available under their national law (Article 14(5));
- (d) the courts with which an appeal is to be lodged (Article 21);
- (e) the authority or authorities designated as competent to receive, transmit and serve the Preservation Order and other documents under this Regulation (point (14) of Article 4);
- (f) the authority competent to enforce the Preservation Order in accordance with Chapter 3;
- (g) the extent to which joint and nominee accounts can be preserved under their national law (Article 30);
- (h) the rules applicable to amounts exempt from seizure under national law (Article 31);

The information – related to all member states – can be found on the website of the European judicial network in civil and commercial matters, since the European Commission has to make it publicly available through any appropriate means.³⁸

The public accessibility of this information through the European judicial network is a very important tool for the success and the use of the order within the European Union.

2.1 Material scope of application

Regarding the regulation's subject matter, article 1 states that it establishes 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 jeopardized 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.³⁹ The order is available to the creditor as – as was already pointed out – an alternative to preservation measures under national law.

The material scope of application as determined in article 2 of the European Account Preservation Order procedure is defined by pecuniary claims in civil and commercial matters. Exigible/claimable monetary debts (on the basis of a judgment or an authentic instrument) (whether determined or determinable) can be at stake, as well as debts that will only be exigible in a later phase.⁴⁰ Both can be the subject of a European Account Preservation Order.

In so far as the creditor's claim is not yet recognized in a judgment, court settlement or authentic instrument he obtained – requiring the debtor to pay the creditor's claim – the creditor shall submit sufficient evidence to satisfy the court that he is likely “prima facie” to succeed on the substance of his claim.⁴¹ This means

- (i) whether, under their national law, banks are entitled to charge fees for the implementation of equivalent national orders or for providing account information and, if so, which party is liable, provisionally and finally, to pay those fees (Article 43);
- (j) the scale of fees or other set of rules setting out the applicable fees charged by any authority or other body involved in the processing or enforcement of the Preservation Order (Article 44);
- (k) whether any ranking is conferred on equivalent national orders under national law (Article 32);
- (l) the courts or, where applicable, the enforcement authority, competent to grant a remedy (Article 33(1), Article 34(1) or (2));
- (m) the courts with which an appeal is to be lodged, the period of time, if prescribed, within which such an appeal must be lodged under national law and the event marking the start of that period (Article 37);
- (n) an indication of court fees (Article 42); and
- (o) the languages accepted for translations of the documents (Article 49(2)).

The member states shall apprise the Commission of any subsequent changes to that information.”

³⁸ a 50(2); https://e-justice.europa.eu/content_european_judicial_network_in_civil_and_commercial_matters-21-en.do (8 Sept 2018).

³⁹ a 1(1).

⁴⁰ Cf a 5. According to this article, the preservation order is available to the creditor before he initiates proceedings in a member state against the debtor on the substance of the matter, or at any stage during such proceedings up until the issuing of the judgment or the approval or conclusion of a court settlement. Moreover, the creditor can launch the procedure after he has obtained in a member state a judgment, court settlement or authentic instrument which requires the debtor to pay the creditor's claim, see a 5(b).

⁴¹ See a 7(2) of Regulation 2014/655. According to a 7(1) (conditions for issuing a preservation order), in order for the court to issue the preservation order, the creditor has to submit sufficient evidence to satisfy the court that there is an urgent need for a protective measure (in the form of a preservation order). The creditor therefore has to make it credible that there is real risk that without this measure, the subsequent enforcement of the claim of the creditor will be impeded or at least made substantially more difficult.

that the creditor has to convince the judge to whom he applies for an order that his claim cannot be seriously disputed by the debtor. The aforementioned essential requirements of an order show important similarities to the Belgian seizure or execution law.

For the content of the wording “civil and commercial affairs” one can refer to the comparable or analogous content of the material scope of the Brussels *Ibis*-Regulation.⁴² The interpretation that has to be given to these notions, used in several European private international law regulations, needs to be similar, considering the case law of the court of justice of the European Union in this regard.⁴³

The bank account subject to the order procedure⁴⁴ must be held with a credit institution established in a European Union member state.⁴⁵

Covered are a credit institution,⁴⁶ including its branches, having its or their head offices in the European Union as well as a credit institution outside the European Union which has a branch or branches within the European Union.⁴⁷ A credit institution, in the context of the regulation establishing a European Account Preservation Order procedure,⁴⁸ is an undertaking of the business of which to take deposits or other repayable funds from the public and to grant credits for its own account. A “bank” refers only to a credit institution as defined in article 4(2) of Regulation 655/2014. This article refers to article 4(1) of Regulation 575/2013. The preservation order must concern accounts that are connected to the aforementioned bank activities. Other accounts held with financial institutions that do not pursue the abovementioned banking activities cannot be the subject of an order.

⁴² Regulation 1215/2012 of the European parliament and of the council of 12 Dec 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20 Dec 2012 1. On the abolition of the “exequatur” in this instrument: Isidro *Recognition and Enforcement in the new Brussels I Regulation (Regulation 1215/2012, Brussels I recast) 1 The Abolition of Exequatur*, Barcelona, 11 July 2014 http://www.ejtn.eu/PageFiles/6333/Requejo_Doc.pdf (8 Sept 2018).

⁴³ A 2(2)(a) to (e) excludes from the Regulation’s scope bank accounts which are immune from seizure under the law of the member state in which the account is maintained and accounts maintained in connection with the operation of any system as defined in a 2(a) Directive 98/26/EC of the European Parliament and of the council of 19 May 1998 on settlement finality in payment and securities settlement systems (OJ L 166, 11 June 1998, 45). According to a 2(4), the regulation does not apply to bank accounts held by or with central banks when acting in their capacity as monetary authorities either.

⁴⁴ Meant for the delimitation of the regulation’s scope is any account containing funds which is held with a bank in the name of the debtor or in the name of a third party on behalf of the debtor. See a 2(1) of Regulation 655/2014.

⁴⁵ set out in Regulation 655/2014; Denmark and the United Kingdom are excluded from the regulation’s territorial scope. *Cf* recitals 50-51.

⁴⁶ See a 4(2) of Regulation 655/2014.

⁴⁷ For the scope, in view of defining “bank”, of the concepts “credit institution” and “branch”: Regulation 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms, amending Regulation (EU) 648/2012, OJ L 176, 27 June 2013 1.

To determine whether a credit institution/branch has its head office inside or outside the European Union: Directive 2013/36/EU of the European parliament and of the council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, OJ L 176, 27 June 2013 338.

⁴⁸ a 4(2) of Regulation 655/2014 defining a “bank” as a credit institution (including its branches), for which definition it refers to a 4(1) under (1) of Regulation 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms amending Regulation (EU) no 648/2012.

As is usual, revenue, customs and administrative matters are excluded from the regulation's scope, as well as state liability for *acta iure imperii*, acts or omissions in the exercise of state authority.⁴⁹

The following are also excluded: bankruptcy and insolvency law (the regulation may not be applied against a debtor who is involved in an insolvency procedure), social security, arbitration, wills and succession, as well as rights in property arising out of a matrimonial relationship or out of a relationship deemed by the law applicable to such relationship to have comparable effects to marriage.⁵⁰

From a European perspective one has to bear in mind that it is not possible to issue an order against a debtor who is the subject of a European insolvency procedure.

Neither can one apply the order procedure to freeze assets on bank accounts that are immune from seizure under the (applicable national) law of the member state in which the account is maintained.⁵¹ Funds on bank accounts held by or with central banks (acting in their capacity as monetary authorities) do not fall within the order's scope either.⁵²

2.2 Personal scope of application

Regarding the personal delimitation of the field of applicability, the creditor can be a natural person or a legal person.⁵³ The creditor must have his domicile or seat in a member state of the European Union.⁵⁴ A creditor domiciled in the United Kingdom or in Denmark cannot rely on the order procedure. Even if the debtor has a bank account maintained⁵⁵ in a European Union member state and that account is the order's aim, it does not change the inapplicability in this regard.

⁴⁹ a 2(1) of Regulation 655/2014.

⁵⁰ See a 2(2).

⁵¹ a 2(3) of Regulation 655/2014.

⁵² a 2(4) of Regulation 655/2014.

⁵³ A creditor can be any other entity domiciled in a member state as well, in as far as it has legal capacity to sue or be sued under the law of a member state, who or which applies for, or has already obtained, a preservation order relating to a claim - a 4(6).

⁵⁴ a 4(6), combined with a 4(15), refers to a 62 and 63 of Regulation 1215/2012 of the European parliament and the council of 12 Dec 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast). According to a 62, a court shall apply its internal law in order to determine whether a party is domiciled in the member state whose courts are seized of a matter. If a party is not domiciled in the member state whose courts are seized of the matter, then, in order to determine whether the party is domiciled in another member state, the court shall apply the law of that member state. A 63 determines that a company of other legal person or an association of natural or legal persons is domiciled at the place where it has its statutory seat, central administration, or principal place of business. For the purposes of Ireland, Cyprus and the United Kingdom, "statutory seat" means the registered office or, where there is no such office anywhere, the place of incorporation or, where there is no such place anywhere, the place under the law of which the formation took place.

⁵⁵ According to a 4(4) of Regulation 655/2014, the member state in which the bank account is maintained is the member state indicated in the account's IBAN (International Bank Account Number). For a bank account which doesn't have an IBAN, the concerned state is the one in which the bank with which the account is held has its head offices or the state in which the branch at which the account is held is located. The account has to be maintained in the EU in order for the European Account Preservation Order procedure (Regulation 655/2014) to be applicable (a 3(1) ("For the purposes of this Regulation, a cross-border case is one in which the bank account or accounts to be preserved by the Preservation Order are maintained in a member state ...").

The debtor's domicile, in contrast, has no relevance at all, nor does his nationality.⁵⁶ A creditor domiciled in Belgium can apply for an order on an account of his debtor maintained in France, although the case is heard on the merits in Belgium regardless of where the debtor may be domiciled or what his nationality might be. For example, a creditor domiciled in Berlin can apply for an order on an account of his debtor maintained in Brussels, although the case is heard on its merits in Germany, even if the debtor is domiciled in Pretoria. Bank accounts in a member state of the European Union held by debtors having their domicile in South Africa can be subject to an order by creditors residing in an EU member state if the dispute is heard on its merits in another member state.

2.3 Territorial scope of applicability

Regarding the territorial field of applicability, one must bear in mind that the order procedure can be applied in cross-border cases only. Article 2(1) establishes that the regulation applies to pecuniary claims in civil and commercial matters in cross-border cases as defined in article 3. Denmark and the United Kingdom do not participate in the gradual expansion of the European private international law. Consequently, the order procedure does not apply in these states.⁵⁷ In terms of the regulation, they are not characterized as "member states".

Concretely, creditors domiciled in the United Kingdom or Denmark cannot make use of the procedure drawn up by Regulation 655/2014. An order cannot be enforced on a bank account maintained in one of these two states since they are not member states for the application of Regulation 655/2014.

A case is considered to be "cross-border"⁵⁸ if the bank account(s) to be preserved are maintained in a member state other than (a) the member state of the court seized to obtain the preservation order or (b) the member state in which the creditor is domiciled. It is not possible to apply for an order on an account that is maintained in the same member state as the one of the court where one applies for the order if the creditor has his domicile in the same member state. This means that application of Regulation 655/2014 is excluded if the seized court, the bank account that will be subject to the order and the creditor's domicile are situated in the same member state.

The cross-border character of a case will be assessed at the date on which the application for the order is lodged with the court having jurisdiction to issue the order.⁵⁹ Changes occurring after the application – leading to a cross-border case turning into an internal one or *vice versa* – are irrelevant. If the creditor's objective

⁵⁶ Cf in this regard the wording of a 4(7) to that of a 4(6). The first states, "'debtor' means a natural person or a legal person or any other entity having legal capacity to sue or be sued under the law of a member state, against whom or which the creditor seeks to obtain, or has already obtained, a Preservation Order relating to a claim". The latter reads, "'creditor' means a natural person domiciled in a member state or a legal person domiciled in a member state or any other entity domiciled in a member state having legal capacity to sue or be sued under the law of a member state, who or which applies for, or has already obtained, a Preservation Order relating to a claim."

⁵⁷ See in this regard recital 50 and 41 of the regulation's preamble. Due to the fact that Denmark did not use the possibility to "opt-in" and the United Kingdom "opted out", neither state participated in the regulation's adoption. The regulation is therefore also not applicable in those two countries. A protocol gives the United Kingdom the right to state that it is bound by the order. In view of Brexit, this seems pretty unlikely though.

⁵⁸ See a 3(1). The cross-border character is determined on the date on which the application for the order is lodged with the court having jurisdiction to issue the order (a 3(2)).

⁵⁹ See a 3(2).

is an order and the case turns into a transboundary one only after the application is filed, the creditor has to launch a new application before the competent court.

3 *Relation of the Regulation Establishing a European Account Preservation Order Procedure with national procedures*

In general as well as for specific issues, the regulation refers to the rules of national law. Article 46(1) determines that all procedural issues not specifically dealt with in the regulation shall be governed by the law of the member state in which the procedure takes place. Apart from that, the regulation contains some concrete references to national law, especially regarding joint and nominee accounts, subject to preservation;⁶⁰ the determination of the amounts that are exempt from preservation;⁶¹ the rank of the order, which is – if any – as an equivalent order in the member state of enforcement;⁶² the right of a third party to contest the enforcement of an order, being respectively the law of the member state of enforcement and the law of the member state of origin;⁶³ the fate of costs incurred by the bank and the determination of and limits to their height (hereby referring to the complexity of the implementation of the order and the cost actually incurred),⁶⁴ and the determination of the fees⁶⁵ charged by any authority or other body in the member state of enforcement, involved in the processing or enforcement of an order.⁶⁶

This extensive reference to the national (international) legislation for several aspects of the procedure undoubtedly expedited the adoption of Regulation

⁶⁰ a 30 of Regulation 655/2014: “Funds held in accounts which, according to the bank’s records, are not exclusively held by the debtor or are held by a third party on behalf of the debtor or by the debtor on behalf of a third party, may be preserved under this Regulation only to the extent to which they may be subject to preservation under the law of the member state of enforcement.”

⁶¹ a 31 of Regulation 655/2014: “1 Amounts that are exempt from seizure under the law of the member state of enforcement shall be exempt from preservation under this Regulation. 2 Where, under the law of the member state of enforcement, the amounts referred to in paragraph 1 are exempted from seizure without any request from the debtor, the body responsible for exempting such amounts in that member state shall, of its own motion, exempt the relevant amounts from preservation. 3 Where, under the law of the member state of enforcement, the amounts referred to in paragraph 1 of this Article are exempted from seizure at the request of the debtor, such amounts shall be exempted from preservation upon application by the debtor as provided for by point (a) of Article 34(1).”

⁶² a 32.

⁶³ a 39. Jurisdiction in this regard is given (without prejudice to other rules of jurisdiction laid down in union law or national law) to the courts of the member state of origin to contest an order and to contest the enforcement of the order in the member state. Enforcement jurisdiction shall lie with the courts of the member state of enforcement (or, where the national law of that member state so provides, with the competent enforcement authority). See a 39(3) of Regulation 655/2014.

⁶⁴ In this regard, a 43, reads “1. A bank shall be entitled to seek payment or reimbursement from the creditor or the debtor of the costs incurred in implementing a Preservation Order only where, under the law of the member state of enforcement, the bank is entitled to such payment or reimbursement in relation to equivalent national orders. 2. Fees charged by a bank to cover the costs referred to in paragraph 1 shall be determined taking into account the complexity of the implementation of the Preservation Order, and may not be higher than the fees charged for the implementation of equivalent national orders. 3. Fees charged by a bank to cover the costs of providing account information pursuant to Article 14 may not be higher than the costs actually incurred and, where applicable, not higher than the fees charged for the provision of account information in the context of equivalent national orders.”

⁶⁵ According to a 44, the fees have to be determined on the basis of a scale of fees or other set of rules established in advance by each member state and transparently setting out the applicable fees. The height of the fees may be influenced by the amount of the order and the complexity involved in processing it. A 44 further states that, where applicable, the fees may not be higher than the fees charged in connection with equivalent national orders.

⁶⁶ or involved in providing account information pursuant to a 14 of Regulation 655/2014.

655/2014. Its influence on a uniform application of the order procedure is however questionable.

4 Procedure

A characteristic of the procedure to obtain an order is the use of model forms or standard forms. The procedure, moreover, takes the form of a written document. The request or application for an order is filed unilaterally by means of a standard form that the creditor has to fill out. The issuance of the order, the declaration of the bank where the account is seized, as well as the possible application for remedies against the order all have a written character.

Legal representation (by a lawyer or another legal professional) is not mandatory in proceedings to obtain an order.⁶⁷ To launch a remedy against an order representation isn't mandatory either, except in cases where the law of the member state of the court/authority with which the application for a remedy is lodged imposes this representation, irrespective of the parties' domicile or nationality.

The procedure to obtain a European Account Preservation Order can be split in two major phases: (a) the procedure for obtaining a Preservation Order and the issuance of the latter and (b) procedure for the effective enforcement of the order.

4.1 Procedure for obtaining a preservation order

The procedure to obtain an order is in principle exclusively written *ex parte*,⁶⁸ and consequently, the debtor shall not be notified of the application prior to the issuing of the order and consequently the principle "auditor et altera pars" does not apply here.⁶⁹ The debtor will also be without obligatory legal representation.

A creditor can apply for an order before or after he obtains a title from a judgment, a court settlement or an authentic instrument that requires the debtor to pay the creditor's claim and thus grants the creditor a right of action.

4.1.1 If the creditor does not have a title evidencing his right of action, a creditor can apply for an order before he initiates proceedings on the substance of the matter against his (supposed) debtor in the competent court for the substance of the matter in a member state.⁷⁰ This may be done at any stage during proceedings on the substance of the matter initiated by the creditor, until the issuing of the judgment or the approval or conclusion of a court settlement.⁷¹ A creditor can lodge an order before or during each phase of a procedure he launched before the courts of a member state (with the exclusion of Denmark and the United Kingdom) on the substance of

⁶⁷ a 41.

⁶⁸ A 9 states, "1. The court shall take its decision by means of a written procedure on the basis of the information and evidence provided by the creditor in or with his application. If the court considers that the evidence provided is insufficient, it may, where national law so allows, request the creditor to provide additional documentary evidence."

⁶⁹ a 11 of Regulation 655/2014.

⁷⁰ According to a 10(1) (Initiation of proceedings on the substance of the matter), where the creditor has applied for a preservation order before initiating proceedings on the substance of the matter, he shall initiate such proceedings and provide proof of such initiation to the court with which the application for the preservation order was lodged 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. The court may also, at the request of the debtor, extend that time period, for example in order to allow the parties to settle the claim, and shall inform the two parties accordingly.

⁷¹ a 5(a).

the matter as long as a judgment, court settlement or authentic instrument has not yet been issued. In this context a “pre-judgment order” is at stake.

When the application can be characterized as an application for a pre-judgment order, jurisdiction is given to the courts of the member state with jurisdiction to rule on the substance of the matter in accordance with the relevant rules of jurisdiction applicable.⁷²

4.1.2 The creditor has a title that gives evidence of his right of action

A creditor can already have obtained a title: a judgment, a court settlement (*eg* a settlement a judge approved – homologation) or an authentic instrument (enforceable or not) which required the debtor to pay his claim, confirms the creditor’s title.

In the case of a “post-judgment order”, the creditor files his application for an order for the claim specified in the judgment or court settlement with the courts of the member state in which the judgment was issued or the court settlement was approved/concluded.⁷³

In other words, even if a creditor has a title proving his claim, he has to follow the European Account Preservation Order-procedure to be able to attach the assets of his debtor on bank accounts maintained abroad.

4.2 Conditions for issuing a preservation order

The conditions for issuing the order aim at a fair and appropriate balance. They consider the interest of the creditor in obtaining an order and the interest of the debtor in preventing abuse of the order.⁷⁴

The regulation allows the creditor to obtain an order in every phase of the proceedings on the substance of the matter. An application for the order can be lodged at any stage: before, during and after the proceedings on the substance of the matter.⁷⁵

4.2.1 Formal requirements for obtaining a European Account Preservation Order

The creditor lodges an application for an order by means of a standard form – the form established in accordance with the advisory procedure referred to in article 52(2) Regulation 655/2014.⁷⁶

The form contains information on the court (address, name) with which the application is lodged,⁷⁷ the creditor,⁷⁸ the debtor,⁷⁹ as well as concerning the amount

⁷² See a 6(1). For the applicable rules of jurisdiction on the substance of the matter, see for instance Regulation 1215/2012. When the debtor is a consumer who has concluded a contract with the creditor for a purpose which can be regarded as being outside the debtor’s trade or profession, jurisdiction to issue an order intended to secure a claim relating to that contract shall lie only with the courts of the member state in which the debtor is domiciled (a 6(2) of Regulation 655/2014).

⁷³ The jurisdiction rule is laid down in a 6(3). In the case in which the creditor already disposes of an authentic instrument: a 6(4).

⁷⁴ recital 14 of the Explanatory Memorandum of Regulation 655/2014.

⁷⁵ *Cf* a 5.

⁷⁶ a 8.

⁷⁷ a 8(2)(a).

⁷⁸ a 8(2)(b).

⁷⁹ a 8(2)(c).

– of the principal and of any interest and cost⁸⁰ – for which the order is sought.⁸¹ The procedure is thus initiated by filing a standard form.

The standard forms or model forms (nine in total) are drafted in Commission Implementing Regulation (2016/1823) of 10 October 2016 referred to in Regulation 655/2014 of the European parliament and of the council establishing an order procedure to facilitate cross-border debt recovery in civil and commercial matters.⁸²

The forms can be consulted on the website of the European judicial network via the European e-justice portal, aiming to be a future electronic one-stop shop in the area of justice,⁸³ where the forms can be filled out electronically as well as downloaded.⁸⁴ Furthermore, the application contains evidence that proves that the conditions to acquire an order are met⁸⁵ or a declaration as to whether the creditor has lodged with other courts or authorities an application for an equivalent national order or whether such an order has already been obtained or refused and, if obtained, the extent to which it has been implemented,⁸⁶ and a number that enables the identification of the bank concerned (such as the IBAN or BIC and/or the name and address of the bank).⁸⁷ If it is known to the creditor, he should also mention the account number(s) of the debtor's account(s) to be preserved and give an indication as to whether any other accounts held by the debtor with the same bank should be preserved.

⁸⁰ Regarding the amount of interest and costs included in the order, see a 15: “1. At the request of the creditor, the Preservation Order shall include any interest accrued under the law applicable to the claim up to the date when the Order is issued, provided that the amount or type of interest is not such that its inclusion constitutes a violation of overriding mandatory provisions in the law of the member state of origin. 2. Where the creditor has already obtained a judgment, court settlement or authentic instrument, the Preservation Order shall, at the request of the creditor, also include the costs of obtaining such judgment, settlement or instrument, to the extent that a determination has been made that those costs must be borne by the debtor.”

The member state of origin is the one in which the order is issued (a 4(11)), whereas the member state of enforcement is the one in which the bank account to be preserved is maintained (a 4(12)).

⁸¹ a 8(2) under (g), (h) and (i):

“(g) the amount for which the Preservation Order is sought:

- (i) where the creditor has not yet obtained a judgment, court settlement or authentic instrument, the amount of the principal claim or part thereof and of any interest recoverable pursuant to Article 15;
- (ii) where the creditor has already obtained a judgment, court settlement or authentic instrument, the amount of the principal claim as specified in the judgment, court settlement or authentic instrument or part thereof and of any interest and costs recoverable pursuant to Article 15;
- (h) where the creditor has not yet obtained a judgment, court settlement or authentic instrument:
 - (i) a description of all relevant elements supporting the jurisdiction of the court with which the application for the Preservation Order is lodged;
 - (ii) a description of all relevant circumstances invoked as the basis of the claim, and, where applicable, of the interest claimed;
 - (iii) a statement indicating whether the creditor has already initiated proceedings against the debtor on the substance of the matter;
- (i) where the creditor has already obtained a judgment, court settlement or authentic instrument, a declaration that the judgment, court settlement or authentic instrument has not yet been complied with or, where it has been complied with in part, an indication of the extent of non-compliance.”

⁸² OJ L 283, 19 Oct 2016 L.

⁸³ <https://e-justice.europa.eu/home.do?action=home&plang=en> (9 Sept 2018).

⁸⁴ https://e-justice.europa.eu/content_european_account_preservation_order_forms%20-378-en.do (9 Sept 2018).

⁸⁵ See a 8(j), read with 8(k) and referring to the requirements set out in a 7(1).

⁸⁶ a 8(m), read with a 16 of Regulation 655/2014.

⁸⁷ a 8(d).

A creditor who already has a title has to fill out a standard form as well. The information he has to provide is slightly different from the information a creditor without a title has to produce. As an example, a creditor who has already obtained a judgment, a court settlement or an authentic instrument has to testify that the judgment or settlement has not yet been complied with or, where it has been complied with in part, has to give an indication of the extent of non-compliance.⁸⁸

The creditor who obtains a title also has to provide information that allows the identification of the bank with which the debtor holds the account(s) to be preserved. If the creditor is not in possession of this information, he – unlike the creditor who is lacking a title – has access to the procedure for obtaining account information.⁸⁹ In this situation, a European Account Preservation Order procedure offers added value if the creditor wants to find out in which member state the debtor possesses sufficient assets or funds.

The creditor can be assisted in this regard by the application for account information pursuant to the regulation.⁹⁰ The requirements for issuing an order are less severe if a creditor already possesses a title. In this situation, the court also has a shorter deadline to assess the application.⁹¹

The mandatory communication of bank (account) information is mainly problematic for a creditor who is not in possession of the bank data of his debtor. The regulation contains a mechanism for *asset transparency*, but its scope is limited to procedures in which the creditor is already in possession of a title that gives evidence of his claim (right of action). This means that the European Account Preservation Order Procedure Regulation is not a real remedy for creditors who have no title and lack the information to identify their debtor's bank. The request for the account information of the debtor has to be filed according to article 14 of Regulation 655/2014. The court shall take its decision by means of a written procedure on the basis of the information and evidence provided by the creditor in or with his application. If, however, it is the court's opinion that the standard forms that are handed in do not contain all necessary information or useful evidence, it may – where national law so allows – request additional documentary evidence from the creditor.⁹²

Moreover, the court may organise, as another appropriate method of taking evidence, for instance, an oral hearing of the creditor or of his witness(es).⁹³ As already pointed out, legal representation is not mandatory in the framework of the procedure to obtain an order.

⁸⁸ See in this regard, a 8(i) of Regulation 655/2014.

⁸⁹ a 14(1). It states that where the creditor has obtained in a member state an enforceable judgment, a court settlement or an authentic instrument which requires the debtor to pay the creditor's claim and the creditor has reason to believe that the debtor holds one or more accounts with a bank in a specific member state, but does not know the name and/or address of the bank or the IBAN, BIC or another bank number allowing the bank to be identified, he may request the court with which the application for the preservation order is lodged to request that the information authority of the member state of enforcement obtain the information necessary to allow the bank or banks and the debtor's account or accounts to be identified.

⁹⁰ The "Request for the obtaining of account information" is the subject of a 14 of Regulation 655/2014.

⁹¹ Van Kasbergen (n 2) 971. See a 18, especially (1) and (2), that results in a deadline of respectively ten and five working days after the creditor lodged or, where applicable, completed his application.

⁹² a 9(1).

⁹³ The court will only do so if it does not unduly delay the proceedings. It may opt for videoconferencing or other communication technologies. See a 9(2). It may hear the creditor's legal representative as well.

4.2.2 Substantial conditions

According to article 7(1) of the regulation establishing a European Account Preservation Order Procedure, the creditor will always have to satisfy the court – submitting sufficient evidence – that there is an urgent need for a protective measure in this form as 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 difficult. The creditor must, according to article 7(2), also submit sufficient evidence to satisfy the court that he is likely to succeed on the substance of his claim against the debtor (at least in a pre-judgment procedure).

In other words, the creditor who applies for an order, before he acquires a “title”, must – analogously to the Belgian legislation (seizure law or execution law) – provide evidence. This evidence has to clarify that his claim is “prima facie” justified/valid. One must learn from the evidence that the claim is not subject to serious dispute and that the creditor therefore has a serious chance of success in the proceedings on the substance of the case.

The evidence that has to be submitted can concern the debtor’s behaviour regarding the claim that is at stake or the way in which the debtor dealt with a previous dispute, the debtor’s credit record, or the nature of his assets or recent transactions with regard to his assets.⁹⁴ The mere non-payment or contesting of the claim or the mere fact that the debtor has more than one creditor should not, according to recital 14, in itself, be considered sufficient evidence to justify the issuing of an order. Furthermore, one reads in recital 14 that the mere fact that the financial circumstances of the debtor are poor or deteriorating should not in itself constitute a sufficient ground for the issuing of an order.

The court does an overall assessment of the existence of the risk. In this regard it may take the aforementioned factors into account. The regulation does not require that the creditor reports the defences the debtor already developed against the creditor’s claim.

4.3 Initiation of proceedings on the substance of the matter

In the case of a pre-judgment application for a preservation order, the creditor is obliged to initiate proceedings on the substance (and provide proof of such initiation)⁹⁵ within 30 days of the date on which he lodged the application. If that date is a later one, he may as well initiate the proceedings on the substance within fourteen days of the date of the issue of the order.⁹⁶

⁹⁴ Cf recital 14: “The court should assess the evidence submitted by the creditor to support the existence of such a risk. This could relate, for instance, to the debtor’s conduct in respect of the creditor’s claim or in a previous dispute between the parties, to the debtor’s credit history, to the nature of the debtor’s assets and to any recent action taken by the debtor with regard to his assets. In assessing the evidence, the court may consider that withdrawals from accounts and instances of expenditure by the debtor to sustain the normal course of his business or recurrent family expenses are not, in themselves, unusual.”

⁹⁵ a 10(1) of Regulation 655/2014.

⁹⁶ a 10(1) of Regulation 655/2014. According to a 10(1), the time period may, at the request of the debtor, be extended by the court, for example in order to allow the parties to settle the claim.

If, within the deadline article 10(1) sets out, the proof of the initiation of proceedings is lacking, the preservation order shall *ex officio* be revoked or shall terminate,⁹⁷ and the parties shall be informed accordingly.⁹⁸

4.4 Provision of security by the creditor

In a case where the creditor has not yet obtained a title, the creditor will normally have to provide security. The court shall require so, pursuant to article 12(1) of Regulation 655/2014. The court shall require from the creditor an amount sufficient to prevent abuse of the procedure provided for by this regulation. In exceptional circumstances, the court may dispense with this requirement when it considers that the provision of security is inappropriate in the circumstances of the case.⁹⁹ A creditor who has obtained a title that proves his claim normally won't have to provide security.¹⁰⁰

The court determines the amount of the security. It must in principle be sufficient to prevent abuse of the regulation's procedure. Moreover, it has to ensure compensation for any damage suffered by the debtor as a result of the order¹⁰¹ if the creditor is liable for such damage pursuant to article 13.

A determining factor to decide whether or not security must be provided is the question of whether the creditor applying for an order has an enforceable title or not. The regulation requires that a creditor without an enforceable title at the time of issuance of the preservation order provides security. This security must guarantee to the debtor that he will be reimbursed in case he suffers damage due to an unjustified order.

4.4.1 If the creditor does not have a title, the competent court can, only by way of exception, dispense with the requirement to provide security if it considers that the provision of security is inappropriate in the circumstances of the case. The court can also, for instance, determine an amount lower than the one that is covered by the preservation order.¹⁰² In this regard, one may mention recital 18, which reads as follows:

“The court should have discretion in determining the amount of security sufficient to prevent abuse of the Order and to ensure compensation to the debtor and it should be open to the court, in the absence of specific evidence as to the amount of the potential damage, to consider the amount in which the Order is to be issued as a guideline for determining the amount of the security.”

⁹⁷ Where the court that issued the order is located in the member state of enforcement, the revocation or termination of the order in that member state shall be done in accordance with the law of that member state. If the revocation/termination needs to be implemented in a member state other than the member state of origin, a model revocation is used and transmitted (according to a 29) to the competent authority of the member state of enforcement.

⁹⁸ a 10(2) of Regulation 655/2014.

⁹⁹ a 12(2) of Regulation 655/2014. When applying for a preservation order the creditor can, referring to a 8(2) under (k) indicate the reasons why he believes he should be exempted from providing security (see a 12).

¹⁰⁰ For an exception if the court considers this necessary and appropriate in the circumstances of the case see a 12(2).

¹⁰¹ For the circumstances, leading to the creditor's liability see a 13 of Regulation 655/2014.

¹⁰² *cf* “One such important safeguard should be the possibility of requiring the creditor to provide security so as to ensure that the debtor can be compensated at a later stage for any damage caused to him by the Preservation Order. Depending on national law, such security could be provided in *the form of a security deposit or an alternative assurance, such as a bank guarantee or a mortgage ...*” – recital 18.

The court may, for instance, decide to dispense with the requirement for security or lower the amount required when the creditor has a particularly strong case but does not have sufficient means to provide security. This could also occur where the claim relates to maintenance or to the payment of wages or where the size of the claim is relatively low, such that the order is unlikely to cause any damage to the debtor (eg a small business debt).¹⁰³

4.4.2 If the creditor has a title, it is in the court's discretion to decide whether security is necessary and, if so, for what amount.¹⁰⁴ The court can exercise its discretion if in its opinion the security is necessary and appropriate in view of the circumstances of the case. When the creditor has a title, such a decision will be rather exceptional. A security can be justified, according to recital 18, where the judgment, that the preservation order intends to secure the enforcement of, is not yet enforceable or is only provisionally enforceable due to a pending appeal.

The security can take the form of a security deposit or an alternative assurance, such as a bank guarantee or a mortgage.¹⁰⁵ This form is determined by the applicable national law. The court has discretion in determining – *ex officio* – the amount of security it requires. The amount has to be sufficient to prevent abuse of the European Account Preservation Order. It has to ensure compensation to the debtor as well. Furthermore, the court can, in the absence of specific evidence as to the amount of the potential damage, consider the amount for which the order is to be issued as a guideline for determining the amount of the security, according to clause 18 of the Explanatory Memorandum.

The latter approach, whereby the amount concerned in the order is used as a guideline in determining the security's amount, is criticized by some authors. If the security aims to avoid abuse by the creditors, it is artificial to link the amount of the security to the amount of the claim for which a preservation order is requested. According to those authors, the right of access to justice, as laid down in article 6 of the European Human Rights Convention, is at risk with this approach. The obligation to provide security may not deprive the creditor of the right to address the court. From this point of view, the amount covered by the order may only be one of several elements that need to be taken into account.¹⁰⁶

¹⁰³ Cf recital 18 of the Preamble of Regulation 655/2014.

¹⁰⁴ Cf recital 18 of the Preamble of Regulation 655/2014.

¹⁰⁵ recital 18.

¹⁰⁶ Volders lc 14, nr 23.

4.5 Pre-judgment procedure and post-judgment procedure: differences

Below, one may find a schematic overview of the differences between the pre-judgment and post-judgment procedures.

Procedure pre-judgment	Procedure post-judgment
In principle, no possibility to acquire account information (IBAN/BIC or name/address of the bank have to be procured by the creditor)	Possibility to acquire account information (IBAN/BIC, or name/address of the bank has to be procured by the creditor)
In principle, the creditor must prove that he initiated proceedings on the substance 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. sanction: revocation or termination of the order	The creditor has to indicate in the standard form whether the debtor has paid the debt claim established in the title and, if so, to what extent.
The creditor is – by way of general rule – held to provide a security (regarding the creditor's liability: article 13 of Regulation 655/2014).	The security by the creditor is facultative.
The creditor has to prove that his claim against the debtor is likely to succeed on the substance or cannot be subject to serious contestation.	As the creditor has a title, in which his claim is established, additional evidence is not required to prove that the claim is well-founded.

A common important condition, characterising both procedures is the fact that the creditor has to submit sufficient evidence to satisfy the court that there is urgency, *ie* that an urgent need for a protective measure in the form of an order exists, since 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 difficult and can be regarded as a proof of urgency.¹⁰⁷

In order to prove the urgency, the creditor can point out one of the following elements: the debtor's passivity regarding non-contested claims against him, the debtor's credit history, the nature of the debtor's assets, or recent actions taken by the debtor with regard to his assets.¹⁰⁸

5 *The competent court*

Where the creditor does not yet have an enforceable title (pre-judgment), jurisdiction to issue an order lies with the courts of the member state which have jurisdiction

¹⁰⁷ a 7(1).

¹⁰⁸ recital 14 of the Preamble of Regulation 655/2014. The mere non-payment or contesting of the claim or the mere fact that the debtor has more than one creditor should not be considered sufficient evidence either. Furthermore, the mere fact that the financial circumstances of the debtor are poor or deteriorating does not, in itself, constitute a sufficient ground. The court may, however, consider these factors in its overall assessment of the risk to be covered by the order the creditor applied for.

to rule on the substance¹⁰⁹ of the matter in accordance with the relevant rules of jurisdiction applicable.

In view of consumer protection – as the consumer is considered to be the “weaker” party – jurisdiction to issue an order intended to secure a claim relating to that contract lies only with the courts of the member state in which the debtor (consumer) is domiciled.¹¹⁰

In the case of a post-judgment request or application (if the creditor already obtained a judgment or court settlement), jurisdiction to issue an order lies with the courts of the member state in which the judgment was issued or the court settlement was approved or concluded.¹¹¹

If the claim is established in an authentic instrument, jurisdiction lies with the court(s) designated for that purpose in the member state in which the instrument was drawn up.¹¹² This situation does not lead to the application of a consumer-protective jurisdiction rule as foreseen in article 6(2).

6 *Decision on the application for the preservation order*

The preservation order needs a surprise effect if it aims to be a useful tool for the recovery of debts in a cross-border context. The procedure to assess the creditor’s application for an order is therefore unilateral. The debtor is neither informed nor heard. Thus, the debtor is not notified of the order prior to its implementation.¹¹³

The court has to make a decision within a restricted time frame.¹¹⁴ Where the creditor has not yet obtained a judgment, a court settlement or an authentic instrument, the court shall issue its decision by the end of the tenth working day after the creditor lodged or, where applicable, completed his application, according to article 18(1). In a post-judgment procedure, the time limit expires by the end of the fifth working day after the procedure is lodged.¹¹⁵

The order is given by means of a standard form.¹¹⁶ It consists of two parts. Part A contains the information to be provided to the bank, the creditor and the debtor. This information concerns, for instance, the bank account subject to the preservation order and the amount to be preserved.¹¹⁷ Part B contains additional information that has to be provided to the creditor and the debtor.¹¹⁸ This information may include, for instance, the court’s reasoning for issuing the preservation order, the amount of security provided by the creditor, or information regarding the remedies available to

¹⁰⁹ a 6(1) of Regulation 655/2014. The article refers to jurisdiction on the substance in accordance with the applicable relevant rules of jurisdiction. In general, this court will be given jurisdiction on the basis of Regulation 1215/2012 of 12 Dec 2012 (Brussel *Ibis*-Regulation). One has to bear in mind that this instrument can lead to several courts (in different member states) having jurisdiction. This is not possible if jurisdiction is derived from a forum clause that gives exclusive jurisdiction to the court it appoints. Regulation 655/2014 is without prejudice to the aforementioned Regulation (a 48(b)).

¹¹⁰ a 6(2) of Regulation 655/2014. Recital 13 of the Preamble to Regulation 655/2014.

¹¹¹ a 6(3) of Regulation 655/2014.

¹¹² a 6(4) of Regulation 655/2014.

¹¹³ Cf the procedure for a garnishment or conservatory attachment under internal Belgian execution law. See recital 15 of the preamble to Regulation 644/2014.

¹¹⁴ a 17(2) read with a 18 of Regulation 655/2014.

¹¹⁵ a 18(2) of Regulation 655/2014.

¹¹⁶ a 19(1) of Regulation 655/2014.

¹¹⁷ For an overview of the information given in “Part A”, see a 19(2), referred to in a 19(1) under (a) of Regulation 655/2014.

¹¹⁸ For an overview of the information given in “Part B”, see a 19(3), referred to in a 19(1) under (b) of Regulation 655/2014.

the debtor. The standard form bears a stamp or signature or any other authentication of the court issuing it.¹¹⁹

The creditor is notified of the court's decision in accordance with the relevant rules of the member state of origin for comparable national orders. The creditor is then responsible for notifying the bank and the debtor about the order. The effect of the preservation order ends when the order is revoked. Apart from that, the preserved funds remain preserved until the enforcement of the order is terminated. Furthermore the order's duration ends when a measure to enforce a title obtained by the creditor relating to the claim which the order was aimed at securing has taken effect with respect to the funds the order preserved.¹²⁰

One is not allowed to lodge parallel applications in several courts for an order against the same debtor, aimed at securing the same claim.¹²¹ The creditor must inform the court – *ie* the attachment judge – if this is the case, since the application procedure is unilateral. He must also declare (in his application) whether he lodged previous applications for an equivalent national order and whether they were granted or rejected.¹²²

7 *Obtaining of account information*

Article 14 of the Regulation Establishing a European Account Preservation Order Procedure contains a mechanism that allows the creditor to request the court with which the application for the order is lodged to request that the information authority of the member state of enforcement obtain the information necessary to allow the bank or banks and the debtor's account or accounts to be identified.¹²³ The creditor can beforehand request information regarding the accounts his debtor maintains in several member states. The system is based on an exchange between the authorities of different member states of information concerning bank accounts maintained in the member states at stake. As personal data is involved, as a general rule, the mentioned request is only available for a creditor with an enforceable title on the substance.¹²⁴ Due to the sensitive nature of the data, such a request can only be lodged under exceptional circumstances in a pre-judgment phase.

Account information is requested by the court where the application for a European Account Preservation Order is filed. It can be done by a creditor with a (preliminary) enforceable title. The regulation sets up a system that aims to prevent debtors from hiding their bank accounts from their creditors. A creditor who is convinced that his debtor is not voluntarily providing clarity about the assets he maintains with banks is entitled to file a request for account information.

Due to limitations related to data protection a request for account information can, in principle, only be lodged by a creditor who has an enforceable title. Only in exceptional cases can a creditor with a non-enforceable title ask for account information. The creditor may ask for account information if it has obtained a title on which it may not execute immediately but which confirms his substantive claim.

¹¹⁹ a 19(1) of Regulation 655/2014.

¹²⁰ a 20 of Regulation 655/2014.

¹²¹ a 16(1) of Regulation 655/2014.

¹²² a 16(2) of Regulation 655/2014. See also a 16(3). The importance of this information to the court that has to decide on the application for an order lies in the answer to the question of whether an additional European Account Preservation Order for the creditor is still opportune.

¹²³ Cf recital 21 of the Preamble to Regulation 655/2014. See the privacy concerns expressed there.

¹²⁴ a 14(1).

There is an urgent need for account information while without this information the subsequent enforcement of the claim of the creditor will be jeopardized.¹²⁵

If the court is convinced that the request for account information is sufficiently substantiated and that all the conditions/requirements for issuing the preservation order are met, the court shall transmit¹²⁶ the request for information to the information authority of the member state of enforcement. The member state of enforcement must establish methods for obtaining account information that will be used by its information authorities. The methods a member state has to choose from are established in article 14(5).¹²⁷ The involved authorities have the duty to act expeditiously. To obtain the information referred to in paragraph 1, the information authority in the member state of enforcement shall use one of the methods available in that member state, pursuant to paragraph 5.

The creditor shall make the request referred to in paragraph 1 in the application for the preservation order. The creditor shall substantiate why he believes that the debtor holds one or more accounts with a bank in the specific member state and shall provide all relevant information available to him about the debtor and the account or accounts to be preserved. If the court with which the application for an order is lodged decides that the creditor's request is not sufficiently substantiated, it shall reject the request.

According to some authors, the European Account Preservation Order procedure could have been more effective if creditors without a title substantiating their claim had been given access to account information. To avoid abuse, the access could have been conditional. The European legislature could have required the existence of a justified claim the recovery of which was endangered.¹²⁸

8 *Liability of the creditor*

One of the regulation's principles is the liability of the creditor for any damage caused to the debtor by the preservation order due to fault on the creditor's part.¹²⁹ The creditor's liability has to be determined according to the law of the member state of enforcement. This is the law of the place where the preservation order is implemented.¹³⁰ The burden of proof shall lie with the debtor.¹³¹ He has to give sufficient evidence of the damage he incurred. However, the regulation describes some situations in which the fault of the creditor is presumed, unless he proves otherwise. One of the hypothetical situations put forward by the European

¹²⁵ a 14(1), second line of Regulation 655/2014.

¹²⁶ See a 29 of Regulation 655/2014.

¹²⁷ The Belgian legislator opted for a combination of the methods in a 14(5) under (a) and (b), containing, respectively, an obligation to disclose for the bank and a right to access to information held by public administrations.

¹²⁸ Payan (n 4) 14 16.

¹²⁹ a 13(1) of Regulation 655/2014.

¹³⁰ a 13(4) of Regulation 655/2014 establishes a specific conflicts of law rule if accounts are preserved in more than one member state. The applicable law shall in that case be the law of the member state of enforcement: (a) in which the debtor has his habitual residence, or, failing that, (b) which has the closest connection with the case.

¹³¹ According to a 13(3), member states may – notwithstanding a 13(1) – maintain or introduce in their national law other grounds or types of liability or rules on the burden of proof. Aspects on the creditor's liability towards the debtor that are not addressed in a 13(1) or a 13(2) are governed by national law.

legislature concerns the revocation of the Preservation order because the creditor failed to initiate proceedings on the substance of the matter.¹³²

Apart from providing proof of fault of the creditor, in order to obtain a reimbursement, the debtor has to prove his damage and the causal link between his damage and the fault. Article 13 of the regulation does not deal with the creditor's liability towards the bank or any third party.¹³³

9 *Recognition and enforcement of the European Account Preservation Order*

According to article 22 of Regulation 655/2015, no special procedure is required for the recognition and enforcement of the preservation order. The order shall be recognized in the other member states without any special procedure being required and shall be enforceable in the other member states without the need for a declaration of enforceability. The "procedure for exequatur" is thereby cancelled for the European Account Preservation Order. The regulation established a free moving preservation order. The subsequent acts to enforce the order are subject to "delays" established in the regulation. The regulation does not, however, determine a sanction when the delays are not respected. The way to enforce the order is the same as for a national conservatory garnishment.¹³⁴ In the Belgian context, a bailiff has to intervene. The duties of the bank – to which the European Account Preservation Order is addressed – correspond with the ones set out in the internal Belgian Code of Civil Procedure.

The bank to which a preservation order is addressed shall implement it without delay¹³⁵ following receipt of the order or, where the law of the member state of enforcement so provides, of a corresponding instruction to implement the order. The bank has to preserve the amount that is specified in the order by blocking the account. The bank ensures that the amount concerned is not transferred or withdrawn from the account(s) or, where national law so provides, the bank may transfer that amount to an account dedicated for preservation purposes.¹³⁶

Furthermore, the regulation contains detailed rules and instructions concerning the settlement of transactions which are already pending at the moment when the order or a corresponding instruction is received by the bank;¹³⁷ the bank's behaviour if, at the time of the implementation of the preservation order, the funds held in

¹³² a 13(2) under (a) Regulation 655/2014: "2. In the following cases, the fault of the creditor shall be presumed unless he proves otherwise:

- (a) if the Order is revoked because the creditor has failed to initiate proceedings on the substance of the matter, unless that omission was a consequence of the debtor's payment of the claim or another form for settlement between the parties;
- (b) if the creditor has failed to request the release of over-preserved amounts as provided for in Article 27;
- (c) if it is subsequently found that the issue of the Order was not appropriate or appropriate only in a lower amount due to a failure on the part of the creditor to comply with his obligations under Article 16; or
- (d) if the Order is revoked or its enforcement terminated because the creditor has failed to comply with his obligations under this Regulation with regard to service or translation of documents or with regard to curing the lack of service or the lack of translation."

¹³³ a 13(5) of Regulation 655/2014.

¹³⁴ Cf a 23(1) of Regulation 655/2014.

¹³⁵ See a 24(1): "A bank to which a Preservation Order is addressed shall implement it without delay following receipt of the Order or, where the law of the member state of enforcement so provides, of a corresponding instruction to implement the Order."

¹³⁶ See a 24(2)(a) and (b) of Regulation 655/2014.

¹³⁷ a 24, last line read with a 25(1) of Regulation 655/2014.

the account(s) are insufficient to preserve the full specified amount¹³⁸ or if the account(s) covered by the order contain funds that exceed the amount specified in the preservation order;¹³⁹ and the order in which accounts are to be preserved based on the account types.¹⁴⁰ Where the order covers several accounts held by the debtor with the same bank and those accounts contain funds that exceed the amount specified in the order, the order shall be implemented in an order of priority that, for instance, first affects the debtor's savings accounts and only subsequently his current accounts.¹⁴¹ The regulation also sets out how the bank should behave when the account that has to be preserved is not clearly specified.¹⁴² Lastly, the regulation sets out a conversion rule to be applied when the currency of the funds held in the account(s) is not the same as that in which the preservation order was issued.¹⁴³

Before the end of the third working day following the order's implementation, the bank (or any other entity responsible for enforcing the order in the member state of enforcement) issues a declaration indicating whether and to what extent funds in the debtor's account(s) have been preserved. If applicable, the bank's declaration covers the date of implementation of the order as well. To issue the declaration a standard form (declaration form) is used.¹⁴⁴ The declaration is transmitted without any delay to the creditor and to the court that issued the preservation order.¹⁴⁵

The short delay is favourable for the creditors. They will soon know whether their garnishment was effective and whether it is consequently meaningful to launch a procedure on the substance. As pointed out, according to the Regulation, the proceedings on the substance have to be initiated within fourteen days of the issuing of the order.¹⁴⁶

In exceptional cases, a longer deadline can be given to that bank. This can happen where the circumstances illustrate that it is not possible to issue the declaration meant for the issuing court in the member state where the order was enforced,¹⁴⁷ and to the creditor within three working days following the implementation.¹⁴⁸ In these circumstances, the declaration is issued as soon as possible but by no later than the end of the eighth working day following the implementation of the order.

¹³⁸ a 24(6).

¹³⁹ a 24(5).

¹⁴⁰ a 24(7) of Regulation 655/2014.

¹⁴¹ a 24(7) of Regulation 655/2014: "Where the Preservation Order covers several accounts held by the debtor with the same bank and those accounts contain funds that exceed the amount specified in the Order, the Order shall be implemented in the following order of priority: (a) savings accounts in the sole name of the debtor; (b) current accounts in the sole name of the debtor; (c) savings accounts in joint names, subject to Article 30; (d) current accounts in joint names, subject to Article 30."

¹⁴² a 24(4) of Regulation 655/2014.

¹⁴³ A 24(8) of the Regulation refers to the foreign exchange reference rate of the European Central Bank or the exchange rate of the central bank of the member state of enforcement for sale of that currency on the day and at the time of the implementation of the order.

¹⁴⁴ Cf a 25(1) of Regulation 655/2014 establishing a European Account Preservation Order-procedure.

¹⁴⁵ A 25(1), last article read jointly with a 25(2) and a 25(3). The delay is much shorter than the one that a 1452 Belgian Code of Civil Procedure establishes. One may doubt whether banks – depending on the efficiency of the banking systems in the different member states – will always be able to timely issue the declaration.

¹⁴⁶ a 10(1).

¹⁴⁷ See a 25(2) of Regulation 655/2014. If the order is issued in a member state other than the member state of enforcement, the declaration has to be transmitted to the entity that is responsible for the enforcement. That authority transmits the declaration to the issuing court and the creditor. See a 25(2). The declaration is transmitted in accordance with a 29 of Regulation 655/2014.

¹⁴⁸ a 25(1).

Regarding the question to whom the declaration concerning the preservation of funds has to be transmitted, the regulation establishes two options: (1) where the order was issued in the member state of enforcement, the bank transmits the declaration concomitantly to the issuing court¹⁴⁹ and, by registered post attested by an acknowledgment of receipt, or by equivalent electronic means, to the creditor; and (2) where the order was issued in a member state other than the member state of enforcement, the declaration shall be transmitted to the competent authority of the member state of enforcement.¹⁵⁰ By the end of the first working day following the receipt or issue of the declaration, that authority shall transmit the declaration to the issuing court according to article 29 and to the creditor by registered post attested by an acknowledgment of receipt, or by equivalent electronic means.¹⁵¹ Within three working days following the day of receipt of the declaration showing that amounts have been preserved, the debtor (domiciled in the member state of origin) shall be serviced by the issuing court or the creditor.¹⁵² This servicing involves the preservation order, the declaration meant in article 25 and the application for the order as well as copies of all documents submitted by the creditor to the court in order to obtain the order.¹⁵³

The debtor can ask the bank or other entity responsible for enforcing the order to disclose to him the details of the order. The bank or entity may also do so in the absence of such a request. The form and content of the European Account Preservation Order is standardized in order to facilitate its enforcement.

Service has to be effected in accordance with the national rules of procedure. In a cross-border case, Regulation 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the member states of judicial and

¹⁴⁹ not to the bailiff – a 25 refers to a 29 (transmission of documents). Regulation 655/2014 requires that transmission (as meant in a 29) is carried out by any appropriate means, provided that the content of the document received is true and faithful to that of the document transmitted and that all information contained in it is easily legible (a 29(1)). The court or authority that received documents (as stipulated in a 29(1)) sends, by the end of the working day following the day of receipt, an acknowledgment of receipt, employing the swiftest possible means of transmission. A standard form is used for this means. See a 29(2).

¹⁵⁰ unless it was issued by that same authority.

¹⁵¹ a 25(3).

¹⁵² Belgian national law foresees a time frame of eight days. A 28(3) establishes that where the debtor is domiciled in a member state other than the member state of origin, the issuing court or the creditor, depending on who is responsible for initiating service in the member state of origin, shall, by the end of the third working day following the day of receipt of the declaration pursuant to a 25 showing that amounts have been preserved, transmit the documents referred to in par 1 of this a in accordance with a 29 to the competent authority of the member state in which the debtor is domiciled. That authority shall, without delay, take the necessary steps to have service effected on the debtor in accordance with the law of the member state in which the debtor is domiciled. Where the member state in which the debtor is domiciled is the only member state of enforcement, the documents referred to in par 5 of a 28 shall be transmitted to the competent authority of that member state at the time of transmission of the order in accordance with a 23(3). In such a case, that competent authority shall initiate the service of all documents referred to in par 1 of a 28 by the end of the third working day following the day of receipt or issue of the declaration pursuant to a 25 showing that amounts have been preserved. The competent authority shall inform the issuing court or the creditor, depending on who transmitted the documents to be served, of the result of the service on the debtor.

¹⁵³ a 25(1), read with a 25(5): “The following documents shall be served on the debtor and shall, where necessary, be accompanied by a translation or transliteration as provided for in Article 49(1):

- (a) the Preservation Order using parts A and B of the form referred to in Article 19(2) and (3);
- (b) the application for the Preservation Order submitted by the creditor to the court;

(c) copies of all documents submitted by the creditor to the court in order to obtain the Order.” See a 28(6) for servicing the declaration (a 25) if the preservation order concerns more than one bank.

extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) 1348/2000¹⁵⁴ or another instrument that controls cross-border service, is applicable.

Reimbursement of the costs for the declaration referred to in article 25 can be sought by the bank from the creditor or the debtor if the bank is entitled to payment or reimbursement in relation to an equivalent national order.¹⁵⁵ The extent of the fees charged – covering the costs referred to in article 43(1) – is limited to the highest rate of the fees charged for the implementation of equivalent national instruments.¹⁵⁶

The bank's liability (as third-party garnishee) for failure to comply with its obligations under Regulation 655/2014 (late/incorrect/incomplete declaration) is assessed by the national law of the member state of enforcement.¹⁵⁷

10 Remedies against the European Account Preservation Order and its enforcement

The regulation concerning the European Account Preservation Order safeguards the debtor's right to a fair trial and his right to an effective remedy. Having regard to the *ex parte* nature of the proceedings for the issue of the order, it enables the debtor to contest the order or its enforcement on the grounds provided for in the regulation immediately after the implementation of the order. To protect the interests of the debtor, the regulation provides some guarantees: the preservation order, all documents submitted by the creditor to the court in the member state of origin and the necessary translations have to be served on the debtor promptly after the implementation of the order; the limitations provided by national law for the attachment of certain goods also apply for an order; the regulation makes it possible to translate the order;¹⁵⁸ the debtor has the right to provide for a security instead of an order; and, in some cases, the liability of the creditor is presumed, *eg* when he neglected to ask for the release of any funds preserved that exceed the amount specified in the order.

10.1 Remedies of the debtor against the preservation order

Upon application by the debtor to the competent court of the member state of origin, the preservation order shall be revoked or, where applicable, modified on the grounds that (a) the conditions or requirements set out in this regulation were not met; (b) the order, the declaration pursuant to article 25 and/or the other documents referred to in article 28(5) were not served on the debtor within fourteen days of the preservation of his account or accounts; (c) the documents served on the debtor in accordance with article 28 did not meet the language requirements set out in article 49(1); (d) preserved amounts exceeding the amount of the order were not released in accordance with article 27; (e) the claim which the creditor was seeking to secure the enforcement of by means of the order has been paid in full or in part; (f) a judgment on the substance of the matter has dismissed the claim which the creditor was seeking to secure the enforcement of by means of the order; or (g) the judgment

¹⁵⁴ OJ L 324, 10 Dec 2007 79.

¹⁵⁵ a 43(1) of Regulation 655/2014.

¹⁵⁶ a 43(2). The bank could, according to Belgian law, charge approximately €70 for the declaration, to be paid by the creditor who may recover it from the debtor.

¹⁵⁷ See a 26 of Regulation 655/2014.

¹⁵⁸ a 40.

on the substance of the matter, or the court settlement or authentic instrument which the creditor was seeking to secure the enforcement of by means of the order has been set aside or, as the case may be, annulled.

10.2 Remedies of the debtor against enforcement of the preservation order

Upon application by the debtor to the competent court or, where national law so provides, to the competent enforcement authority in the member state of enforcement, the enforcement of the preservation order in that member state shall be (a) limited on the grounds that certain amounts held in the account should be exempt from seizure in accordance with article 31(3), or that certain amounts exempt from seizure have not or not correctly been taken into account in the implementation of the order in accordance with article 31(2); or (b) terminated on the grounds that (i) the account preserved is excluded from the scope of this regulation pursuant to article 2(3) and (4); (ii) enforcement of the judgment, court settlement or authentic instrument which the creditor was seeking to secure by means of the order has been refused in the member state of enforcement; (iii) the enforceability of the judgment which the creditor was seeking to secure the enforcement of by means of the order has been suspended in the member state of origin; or (iv) point (b), (c), (d), (e), (f) or (g) of article 33(1) applies. Article 33(3), (4) and (5) shall apply as appropriate.

Upon application by the debtor to the competent court in the member state of enforcement, the enforcement of the preservation order in that member state shall be terminated if it is manifestly contrary to the public policy (*ordre public*) of the member state of enforcement.¹⁵⁹

10.3 Appeal of the creditor against the refusal to issue a preservation order

The creditor has the right to appeal against any decision of the court rejecting, wholly or in part, his application for a preservation order.

Such an appeal shall be lodged within 30 days of the date on which the decision referred to in paragraph 1 was brought to the notice of the creditor. It shall be lodged with the court which the member state concerned has communicated to the commission pursuant to article 50(1)(d). Where the application for the preservation order was rejected in whole, the appeal shall be dealt with in *ex parte* proceedings as provided for.¹⁶⁰

10.4 Remedies available to the debtor and the creditor

The debtor or the creditor may apply to the court that issued the preservation order for a modification or a revocation of the order on the ground that the circumstances on the basis of which the order was issued have changed. The court that issued the preservation order may also, where the law of the member state of origin so permits, of its own volition, *proprio* or *mero motu*, modify or revoke the order due to changed circumstances. The debtor and the creditor may, on the ground that they have agreed to settle the claim, apply jointly to the court that issued the order for revocation or modification of the order or to the competent court of the member state of enforcement or, where national law so provides, to the competent enforcement authority in that member state for termination or limitation of the enforcement of the order.

¹⁵⁹ a 34, § 4 of the EAPO.

¹⁶⁰ a 11.EN L 189/78 *Official Journal of the European Union* 27-06-2014.

The creditor may apply to the competent court of the member state of enforcement or, where national law so provides, to the competent enforcement authority in that member state for modification of the enforcement of the preservation order, consisting of an adjustment to the exemption applied in that member state pursuant to article 31, on the ground that other exemptions have already been applied in a sufficiently high amount in relation to one or several accounts maintained in one or more other member states and that an adjustment is therefore appropriate.

Either party shall have the right to appeal against a decision issued pursuant to article 33, 34 or 35. Such an appeal shall be submitted using the appeal form established by means of implementing acts adopted in accordance with the advisory procedure referred to in article 52(2).

11 *Concluding remarks*

The analysis, above, of the European Account Preservation Order made it clear that this new instrument is subject to formalities and conditions of applicability that were not known before in the national (internal) legislation of the European Union member states. Creditors have now obtained a new – and important – tool for “freezing” their debtor’s bank accounts throughout Europe with one single order. The regulation is good news for claimants and is a potentially powerful tool. The expectations for the procedure are high as it should reduce barriers and costs when recovering cross-border debts. However, several aspects are still governed by national law (including the enforcement of the order in a member state), and so the regulation’s practical use and importance remain unclear.

Banks may also be less pleased as the regulation imposes significant administrative burdens on them. Given the time available to prepare, they should by now have processes in place to comply with the regulation. The regulation establishing a European Account Preservation Order procedure does not establish how the creditor has to behave if he lacks information to fill out the application form. It is nowhere mentioned that the necessary statements are imposed under penalty of nullity. One may therefore assume that the court can nevertheless grant an application and issue a preservation order. It is the court’s sovereign decision.

Finally, the regulation does not determine how a conservatory European Account Preservation Order turns into an attachment in execution when an enforceable title is signified to the garnishee and the third-party garnishee.¹⁶¹ The regulation also does not solve the problem of when a European Account Preservation Order attachment or garnishment of bank accounts is given pursuant to an order that was given when the creditor already had an enforceable title. It is probable that a new seizure would be necessary – an execution of attachment – in order to pass execution.

¹⁶¹ One may wonder whether this is a procedural issue which, according to a 46 of the regulation, is covered by the law of the member state in which the procedure takes place.

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