

European Preservation Order on Bank Accounts: Cross-Border Debt Recovery Easier for SMEs

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As of Wednesday, January 18th 2017, Regulation EU No 655/2014 of 15.05.2014 has, at last, been made applicable. This regulation establishes a European Account Preservation Order procedure that is a uniform procedure in the whole European Union to facilitate cross-border debt recovery in civil and commercial matters (the “Procedure”).

This procedure—conceived with the needs of the Small and Medium-sized Enterprises (SMEs) in mind, which lose about 600 million Euros every year because of the difficulties associated with debt recovery—should serve as an additional and optional means for the creditor, who remains free to make use of any other procedure for obtaining an equivalent measure under national law.

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So, anyone who has a pecuniary claim in civil and commercial matters now has, in cross-border cases, the right to ask the court for a measure to prevent the debtor from withdrawing or transferring the sums of money held in a bank account in another Member State when there is danger that—without the measure—the subsequent enforcement of the claim is impeded or made very difficult.

On this basis, it is clear how the cross-border nature of the claim represents the essential requirement: it is fulfilled when the bank account or accounts to be preserved by the Preservation Order are held in a Member State different from the Member State in which the creditor is domiciled and from the one where the court was seized.

Once the requirement is fulfilled, the Preservation Order is now available to the creditor both before initiating 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, and after obtaining in a Member State a measure which requires

the debtor to pay the creditor’s claim. Clearly, the requirements to obtain a Preservation Order change depending on the time of the application for it: in fact, while in the hypothesis of application *ante causam* the creditor must prove both *fumus bonis iuris* and *periculum in mora*, in the opposite case he must demonstrate only the existence of the second requirement, being exonerated from proving the first one.

Another peculiar characteristic of the procedure consists of its unilateral nature: in fact, the debtor is not notified of the application for a Preservation Order nor are they heard prior to the issuing of the order. The debtor will only become aware of procedure when notified after the positive declaration of the bank indicating whether and to what extent the funds in the debtor’s account or accounts have been preserved.

In this context, the protection of the debtor in the case of a Preservation Order asked and issued *ante causam* consists—in addition to his right to seize the court in order to revoke or modify the Preservation Order—first of all, of an obligation of the creditor to provide security for an amount—set by the court from time to time—sufficient to prevent abuse of the procedure under examination and to ensure compensation for any damage suffered by the debtor as a result of the order, to the extent of the creditor’s liability; secondly, one should consider the obligation of the creditor, who has applied for a Preservation Order before initiating proceedings on the substance of the matter, to initiate proceedings to obtain a measure which requires the debtor to pay the creditor’s claim.

The last essential characteristic—strictly connected to its nature as a uniform procedure for the whole European Union—relates to the provision according to which a Preservation Order issued—usually within 10 days—in a Member State shall be recognised 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.

In summary, through very short time limits, formalities reduced to the strict minimum and the possibility to catch the debtor by surprise, the European Union wishes to give the creditors—with particular focus on SMEs—a means to make the cross-border debt recovery faster, less expensive and more efficient, deleting useless formalities and high legal costs and preventing the debtors from moving money to avoid paying their debts.