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Welcome on EJE Newsletter

PUBLICATION OF THE PROPOSAL FOR A REGULATION CREATION A EUROPEAN ACCOUNT PRESERVATION ORDER

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

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

► Consult the EJE position paper

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

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

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

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

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

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

The proceedings will be ex parte and without mandatory representation.

PRESENTATION

Co-financed by the European Union, the EJE project aims to improve the enforcement of court judgments in Europe by providing European citizens, court bailiffs and enforcement officers with the information needed to enforce court judgments in the territory of another member state. This project also intends to improve the mechanisms for cooperation and communication among judicial officers in Europe. In order to reach these objectives, the EJE project is equipped with a key instrument: the EJE web site - www.europe-eje.eu - which provides citizens and legal professionals with the information on the legal tools and procedures to be used when they want to enforce a judgment in the territory of another member state.

In this regard the EJE project publishes a newsletter which aims to inform European bailiffs and law officers and people interested in the progress made with this project., It also seeks to provide information about the latest developments in European legislation and case law that may be of interest to the profession as an essential player in constructing the European area of justice, freedom and security.

For further information about the EJE project

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

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

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

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

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

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

the requirement to notify the debtor immediately after the order is implemented with all documents which the creditor submitted to the court;

the possibility of the debtor to contest the order by applying for a review to the court of origin, the court of enforcement or - if the debtor is a consumer, employee or insured – to the court at his place of domicile;

the fact that amounts necessary to ensure the livelihood of the debtor and his family will be exempt from enforcement."

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

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

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

OTHER EUROPEAN NEWS

Poland takes over the Presidency of the Council of the European Union

On 1 July 2011, Poland took over the Presidency of the Council of the European Union. The Polish Minister for Justice took that opportunity to announce to the European Parliament that he wanted to make „justice in the service of growth" his priority. The programme of the Polish Presidency states that, as far as the area of „Justice" is concerned, it will focus its attention and efforts on the adoption of the proposal on inheritance *(proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession - COM(2009)154 final)* (as well as on the adoption of the proposal for a Regulation to recast the Brussels I Regulation *(proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast) - COM(2010 (748)).* Both texts are currently under negotiation at the Council and European Parliament. The programme also states that the Presidency will launch work on the proposal for a Regulation creating a European order preserving assets in bank accounts *(proposal for a Regulation of the European Parliament and of the Council creating a European Account Preservation Order - COM(2011) 445)*, with a view to improving the effectiveness of cross-border debt recovery in the European Union. Finally, the Polish Presidency has said that it wants to see the adoption of the proposal for a Directive to link business registers.

► COM (2009) 154
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0154:FIN:EN:PDF

► COM (2010) 748
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0748:FIN:EN:PDF

► COM (2011) 445
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0445:FIN:EN:PDF

The entry into force of the new European provisions applicable to maintenanceobligations

Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of judgments and cooperation in matters relating to maintenance obligations entered into force on 18 June 2011. This Regulation replaces, for proceedings committed to after this date in connection with maintenance obligations, the provisions of the so-called Brussels I Regulation, Council Regulation (EC) No 44/2001 on jurisdiction, recognition and enforcement of judgments in civil and commercial matters.

This Regulation proposes a series of measures for the effective recovery of maintenance in cross-border situations, with regard to maintenance obligations arising from family relationship or marriage.

Regarding the applicable law, the Regulation refers to the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations which, besides special rules, has a general rule applying the law of the State of the creditor's habitual residence.

Regarding the competent court, the Regulation sets out new criteria for jurisdiction. In general, the competent court shall be the court of the place where the defendant or creditor has his habitual residence or the court appointed if the claim for maintenance obligation is ancillary to a claim regarding the status of a person or parental responsibility (unless this jurisdiction is based on the nationality of the parties). The Regulation also includes specific jurisdiction criteria.

More precisely, with regard to recognition and enforcement of judgments, this Regulation makes a distinction depending on whether or not the judgment has been made in a Member State bound by the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations.

A decision made in a Member State bound by the Hague Protocol of 2007 shall be recognised and enforced in another Member State without it being possible to oppose its recognition and without a declaration of its enforceability being necessary. The exequatur procedure shall be totally abolished.

If the judgment has been made in a Member State not bound by the Hague Protocol of 2007 (as is the case for the United Kingdom and Denmark), in order to be enforced it must be declared enforceable in the Member State of enforcement. The procedure is close to that specified in the Brussels I Regulation. In order to do this, any interested party may submit an application for a declaration of enforceability to the court or competent authority of the Member State of enforcement. Once the formalities of the application have been completed, or at the latest 30 days after their completion, the decision shall be declared enforceable, without any check on the reasons for refusing recognition. Only on an appeal by either party against the decision on the declaration of enforceability will the court be invited to examine the reasons for refusal listed in the Regulation:

- if such recognition is manifestly contrary to public policy in the Member State in which recognition and enforcement are sought;
- where the decision was made in the absence of the defendant, who was not informed of the proceedings in good time;
- if it is incompatible with a judgment given in a dispute between the same parties in the Member State in which recognition and enforcement are sought;
- if it is incompatible with an earlier judgment given in another Member State or in a third country in a dispute between the same parties for the same causes.

Where a judgment is enforced in a Member State other than the Member State in which it was made, enforcement shall be governed by the law of that Member State. At the enforcement stage, the reasons for refusal or suspension shall be those included in the Regulation.

Finally, the Regulation takes care to specify that the recovery of expenses incurred in the application of the Regulation shall not take precedence over the recovery of the maintenance claim.

► Consulting the Regulation:
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:007:0001:0079:EN:PDF

The Regulation also specifies that cooperation will be established between Central Authorities to facilitate the enforcement of judgments in maintenance obligation matters.

Each Member State has been invited to appoint a Central Authority, which will have the task of assisting the parties involved to establish and recover a maintenance claim. The Central Authorities shall carry out general and specific duties. In terms of their general duties, they shall cooperate with each other and promote cooperation between the competent authorities in the application of this Regulation and the resolution of the problems that arise. In terms of their specific duties, the Central Authorities shall supply assistance to the parties regarding the claims specified in the Regulation, particularly by transmitting and receiving these claims and introducing procedures to establish or amend the maintenance obligation or the enforcement of a judgment in the matter. At the request of the creditor and his Central Authority, the Central Authority of the debtor's Member State must, for example, help the creditor to find the debtor, find information on his income, facilitate the service of the documents involved (without prejudice to Regulation (EC) No 1393/2007) and even facilitate the enforcement and payment of the maintenance.

Letter of formal notice sent by the European Commission to 9 Member States for failure to communicate the transposition measures of the Directive on mediation in civil and commercial matters

On 22 July 2011, the European Commission sent letters of formal notice to nine Member States of the European Union (the Czech Republic, Spain, France, Cyprus, Luxembourg, the Netherlands, Finland, Slovakia and the United Kingdom) inviting them to transpose Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters, which should have been transposed by Member States before 21 May 2011.

The European Commission emphasises that mediation is an important alternative to going to court in cross-border disputes and can help parties find an amicable settlement. It saves time and resources. According to a study funded by the European Union, the time wasted by not using mediation is estimated at an average of between 331 and 446 extra days, plus extra legal costs of between €12 471 and € 13 738 per case.

In this context, Directive 2008/52/EC, which was adopted on 23 April 2008 and entered into force on 21 May 2011, applies when two parties involved in a cross-border dispute voluntarily agree to settle their dispute by using an independent mediator. The rules laid down encourage the Member States to ensure quality control, to establish codes of conduct and to offer training to mediators in order to supervise the effectiveness of the system of mediation established. The Member States must also ensure that agreements resulting from mediation can be implemented.

On the procedural level, from the receipt of the letter of formal notice, which is the first stage in an infringement procedure, the Member States involved have two months to reply to the Commission's request for information. If the Commission is not satisfied with the information and concludes that the Member State in question is failing to fulfil its obligations under EU law, the Commission may then send a formal request to comply with EU law (a „Reasoned Opinion"), calling on the Member State to inform the Commission of the measures taken to comply within a specified period, usually two months. If a Member State fails to ensure compliance with EU law, the Commission may then decide to refer the Member State to the Court of Justice of the EU.

► Consulting the Directive :
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF

Progress on the European consumer rights front

Following an agreement between the European Commission, the European Parliament and the Council of the European Union, on 23 June 2011 the European Parliament adopted the Directive on consumer rights that the European Commission proposed in October 2008. This text will be submitted to the Council for formal approval during the month of September, prior to being published in the Official Journal of the European Union this autumn.

To recap, the Directive aims to create a sound balance between consumers' interest in stronger rights and businesses' interest in taking full advantage of the EU's Single Market. The new Directive includes many improvements for consumers. It will abolish hidden internet charges and fees. Price transparency will be improved through prior information of the total cost of the product or service and any additional fees. Pre-ticked boxes on websites will be banned. The period for withdrawing a sale contract will be increased from the current period of 7 days to 14 days and refund rights will be improved to include delivery costs. Credit card Surcharges and telephone hotlines will be abolished. For businesses, the European institutions believe that common rules applied to them under the Directive will enable them to trade more easily all over Europe. These rules include a single set of core rules for distance contracts (sales by phone, post or internet) and off-premises contracts (sales away from a company's premises, such as in the street or the doorstep) in the European Union, creating a level playing field and reducing transaction costs for cross-border traders, especially for sales by internet.

These new provisions must be transposed into national law before the end of 2013.

News on legal professions in Europe

► Launch of the European law institute

On 1 June 2011, the European law institute was inaugurated in Paris. This initiative was welcomed by the European Commission. Established for the study of European Union law and with the ambition of becoming a testing-ground for legal harmonisation and the enhancement of a common legal culture in Europe, the institute, which brings together universities and law practitioners, will support research, promote common positions throughout the Member States in various areas of the law and enable consensus to be built prior to the negotiation of common legal instruments. The aims and conditions for becoming a member of the institute are available on the European law institute website: http:// www.europeanlawinstitute.eu

► Conditions for access to the profession of notary

After the European Commission had taken action against 6 Member States (Belgium, France, Luxembourg, Austria, Germany, Greece and Portugal) for failure to comply with obligations, on 24 May 2011 the Court of Justice of the European Union ruled on the question of a nationality requirement for access to the profession of notary. The Commission contested the fact that, in the above mentioned Member States, access to the profession of notary is reserved for nationals. According to the Commission, this constituted discrimination on the basis of nationality and is prohibited by the Treaty. Therefore, it asked the Court whether notaries' activities are connected with the exercise of official authority in the meaning of the Treaty, insofar as the latter specifies that activities which, even occasionally, have a connection with the exercise of official authority are exempt from the application of the provisions regarding freedom of establishment and may be reserved for nationals.

In view of the case-law according to which only those activities which have a direct and specific connection with the exercise of official authority can fall under this provision, the Court states that, although the task of the notary is principally the authentication of legal transactions and the authenticated instrument enjoys enhanced probative value and is at the same time rendered enforceable, only instruments or agreements into which the parties have freely entered can be authenticated. The notary's intervention thus presupposes the prior existence of an agreement or consensus of the parties. Furthermore, the Court states that the notary cannot unilaterally modify the agreement he is called upon to authenticate without first obtaining the parties' consent. The Court concludes that the activity of authentication by notaries does not have a direct and specific connection with the exercise of official authority.

The Court adds that the fact that notaries act in the general interest of ensuring the legality and legal certainty of transactions between individuals is not in itself sufficient for this activity to be regarded as having a direct and specific connection with the exercise of official authority. Regarding the probative value of notarised deeds, the Court states that this is the result of Member States' evidence systems and therefore has no direct impact on the qualification of the activity. Regarding enforceability, the Court states that, in this case also, enforceability depends on the wishes of the parties who appear before a notary in order to give the deed the power of being enforceable.

The Court then examines the other activities entrusted to notaries in the Member States in question, such as involvement in the attachment of immovable property or in connection with the law on successions. Similarly, the Court considers that these activities do not involve the exercise of official authority, to the extent that they are performed under the supervision of a court or in accordance with the client's wishes.

The Court thereby concludes that notarial activities are not connected with the exercise of official authority within the meaning of the Treaty and that, as a consequence, the nationality requirement under these States' legislation to access the profession of notary constitutes discrimination on grounds of nationality prohibited by the Treaty.

Finally, the Court states that, within the geographical limits of their office, notaries practise their profession in conditions of competition, which, according to the Court, is not characteristic of the exercise of official authority. Along the same lines, the Court adds that notaries in the Member States in question are directly and personally liable to their clients for loss arising from any default in the exercise of their activities, whereas for public authorities, liability for default is assumed by the State.

► Legal expenses insurance and choice of lawyer

On 26 May 2011, the Court of Justice of the European Union ruled on the interpretation to be given to one of the provisions of Directive 87/334/EC on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance.

The Court ruled as part of a dispute between an Austrian insurance company and one of its insured persons concerning, in particular, the validity of a clause included in the general conditions applicable to legal expenses insurance that entitles the insurer to limit the benefits under that cover to reimbursement of the amount normally claimed by a lawyer established in the place of the court before which proceedings coming within the scope of that cover have been brought.

To recap, Article 4(1) of the Directive states that „Any contract of legal expenses insurance shall expressly recognise that: (a) where recourse is had to a lawyer or other person appropriately qualified according to national law in order to defend, represent or serve the interests of the insured person in any inquiry or proceedings, that insured person shall be free to choose such lawyer or other person; (b) the insured person shall be free to choose a lawyer or, if he so prefers and to the extent that national law so permits, any other appropriately qualified person, to serve his interests whenever a conflict of interests arises." The interest of persons having legal expenses cover means that the insured person should be free to choose a lawyer or other person appropriately qualified according to national law in any inquiry or proceedings. National legislation cannot therefore restrict that freedom of choice only to lawyers who have their chambers at the place of the court or administrative authority before which the proceedings at first instance are to be conducted, or only to lawyers who undertake to invoice their costs and fees in the same way as such lawyers would do.

Accordingly, the Court states that the scope of the cover in respect of costs relating to the involvement of a representative, which is at issue in the main proceedings, is not the subject of an express rule in that directive. Consequently, freedom of choice does not mean that Member States are obliged to require insurers, in all circumstances, to cover in full the costs incurred in connection with the defence of an insured person, irrespective of the place where the person professionally entitled to represent that person is established in relation to the court or administrative authority with jurisdiction to deal with a dispute, on condition that that freedom is not rendered meaningless. That would be the case if the restriction imposed on the payment of those costs were to render de facto impossible a reasonable choice of representative by the insured person. In any event, it is for the national courts, if an action is brought before them in this regard, to determine whether or not there is any such restriction.

The Court concludes that Article 4(1) of Council Directive 87/344/EEC must be interpreted as not precluding a national provision under which it may be agreed that a person covered by legal expenses insurance may select, in order to have his interests represented in administrative or judicial proceedings, only persons professionally authorised to represent parties who have their chambers at the place of the court or administrative authority having jurisdiction at first instance, on condition that, in order not to render meaningless the insured person's freedom to choose the person instructed to represent him, that restriction relates only to the extent of the cover by the legal insurance provider in respect of costs linked to the involvement of a representative and that the reimbursement actually provided by that insurer is sufficient, this being a matter for the referring court to determine.