

European Account Preservation Order

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The Council agreed on a general approach on the draft regulation creating a European Account Preservation Order to facilitate cross border debt recovery in civil and commercial matters. This general approach will constitute the basis for negotiations with the European Parliament in order to agree the final text of the regulation.

The remaining recitals will be subject to further discussions at technical level. They should, inter alia, clarify the following issues:

Subject-matter:

- A creditor should be able to obtain a protective measure in the form of a Preservation Order preventing the transfer or withdrawal of funds held by his debtor in a bank account maintained in a Member State if he is facing the risk that, without such a measure, the subsequent enforcement of his claim against the debtor will be impeded or made substantially more difficult.
- The preservation of funds held in the debtors account should entail that not only the debtor himself, but also persons authorised by him to make payments through this account, e.g. by way of a standing order or through direct debit or the use of a credit card, are prevented from using the funds.
- The procedure established by this Regulation 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.

Scope:

- This Regulation should cover all civil and commercial matters apart from certain well-defined matters. Notably, this Regulation should not apply to claims against a debtor in insolvency proceedings.
- The exclusion should allow an insolvency administrator seeking to recover detrimental payments made by the debtor to third parties to use the Preservation Order to secure such recovery.

Cross-border cases:

- This Regulation should apply to cross-border cases only and should define what constitutes a cross-border case in this particular context.
- For example, a cross-border case should be considered to exist when the court dealing with the application for the Preservation Order is located in one Member State and the bank account targeted by the Preservation Order is maintained in another Member State.

Claims:

- The Preservation Order should be available for securing claims that have already fallen due. It should also be available for claims that are not yet due as long as such claims arise from a transaction or an event that has already occurred and their amount can be determined.

Geographical scope:

- The procedure for obtaining a European Account Preservation Order provided for in this Regulation should therefore be available only to creditors who are domiciled in a Member State bound by this Regulation.

Jurisdiction:

- In order to ensure a close link between the proceedings for the Preservation Order and the proceedings on the substance of the matter, international jurisdiction to issue the Order should lie with the courts of the Member State whose courts have jurisdiction on the substance of the matter.

Conditions for issuing a Preservation Order:

- When the creditor applies for a Preservation Order prior to obtaining a judgment, the court with which the application is lodged should have to be satisfied on the basis of the evidence submitted by the creditor that the creditor is likely to succeed on the substance of his claim against the debtor.
- The creditor should in all situations, also when having already obtained a judgment, demonstrate to the satisfaction of the court that his claim is in urgent need of judicial protection and that, without the Order, the enforcement of the existing or a future judgment may be impeded or made substantially more difficult.
- The court should assess the evidence submitted by the creditor to support the existence of such a risk.

Application for a Preservation Order:

- A recital could explain that the creditor should be able to request that the Preservation Order be issued in the amount of the principal claim or in a lower amount.

Ex parte procedure:

- The debtor shall not be notified of the application for a Preservation Order or be heard prior to the issuing of the Order. If, on the basis of the evidence and information provided by the creditor or, if applicable, by his witness(es), the court is not satisfied that the preservation of the account or accounts is justified it should not issue the Order.

Security to be provided by the creditor:

- This Regulation should provide sufficient safeguards against abuse of the 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.
- The Regulation should, as a minimum standard, provide for the liability of the creditor for any damage caused to the debtor by the Preservation Order due to a fault on the creditor's part and provide for a harmonised rule on the burden of proof as regards specific grounds for liability listed in the Regulation.

Request for obtaining account information:

- The recitals could give examples of situations which would give reasons to believe that a debtor holds an account in a specific Member State, e.g. that the debtor works or exercises a professional activity in that Member States or has property there.

Enforcement of the Preservation Order:

- A recital could clarify that the right of the creditor to appeal pursuant to this Article shall be without prejudice to the possibility of the creditor to make, on the basis of new facts or new evidence, a new application for a Preservation Order.

Implementation of the Preservation Order:

- A recital could explain that the implementation of the Preservation Order could be done by either blocking the preserved amount in the debtor's account or by transferring this amount to an account dedicated for preservation purposes, which could be an account held by the competent enforcement authority, the court or the primary bank.

Forms:

- In order to standardise and speed up the procedures, it is suggested to insert an additional form for requesting the release of over-preserved amounts.
- This Regulation should ensure that the preservation of the debtor's account does not affect amounts which are exempt from seizure under the law of the Member State of enforcement.