



**Comments on 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) 445 final – 25 July 2011)**

*The partners in the EJE project, which brings together the representative organisations of the profession of judicial officer in Germany, Belgium, Scotland, Hungary, Italy, Luxembourg, the Netherlands and Poland in order to improve the enforcement of court judgments in Europe, support the creation of a European procedure for the attachment of bank accounts.*

*The partners of the EJE project welcome the initiative of the European Commission which aims to establish a European bank account preservation order. They are also delighted at the recognition of the role of enforcement agents in the implementation of a European freezing order, since enforcement agents are the best guarantee of legal certainty, of the speed of the procedure and of the protection of the rights of the parties involved.*

*Indeed, at present, procedures for recovering debts from another country's jurisdiction are complex and expensive. A creditor wishing to attach sums deposited in a foreign bank account must then refer the matter to the judge in the country where the bank is located.*

*But there are disparities between Member States' national legislation. Obstacles for creditors are created by the differences in legal systems, varying procedural requirements and linguistic barriers, which all results in difficult access to the law and entails additional costs and delays in implementing the procedure, even though the main point of a procedure to attach bank accounts is that it be done quickly.*

*However, the attachment of a debtor's bank accounts should be an effective way for a creditor to recover sums of money due to him. At a time when, because of the free movement of people, companies, services and goods, debtors increasingly have bank accounts in different Member States and at a time when the development of technologies has enabled sums of money to be transferred very quickly from one Member State to another, the current system does not allow these funds transfers to be blocked just as quickly and at a low cost.*





*Given these obstacles, it seems to us that it is a necessity to create a European order for the attachment of bank accounts which would enable accounts in different Member States of the EU to be attached while still ensuring a high degree of protection of debtors, in particular through allowing the notification of the attachment at short notice.*

*However, a high level of protection of the rights of parties, in particular the debtor's right, should be ensured. A judicial officer's intervention – as the enforcement agent under the European procedure for the attachment of bank accounts - guarantees legal certainty and the protection of the debtor's rights. For the procedure's effectiveness to be enhanced and for the debtor to be fully protected, judicial officers/enforcement agents are the key agents to make the attachment of the property in the hands of the bank and to notify the debtor of the attachment. This protection is crucial, given that a European order for the attachment of bank accounts would be issued following ex parte proceedings. Notification of the debtor is the first of these guarantees. Only the judicial officer is able to ensure that the debtor is given adequate information.*

**However, the partners of the EJE project consider that some articles must be clarified and consequently wish to make the following comments.**

❖ ***Application for a EAPO – “the information on the account(s) in accordance with Article 16” (article 8. 2. c)***

In the application form, the claimant must provide “the information on the account(s) in accordance with Article 16.

The article 16 provides that : « *Unless the claimant requests that the competent authority obtain account information pursuant to Article 17, that claimant shall provide all information with regard to the defendant and the defendant's bank account or accounts necessary to enable the bank or banks to identify that defendant and his/her account(s), including the following:*

- (a) the full name of the defendant,*
- (b) the name of the bank with which the defendant holds one or several accounts to be preserved as well as the address of the bank's headquarters in the Member State where the account is located, and*

Contact : [eje@europe-eje.eu](mailto:eje@europe-eje.eu)

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(c) either

(i) the account number or numbers,

(ii) the defendant's full address,

(iii) where the defendant is a natural person, his date of birth or national identity or passport number, or

(iv) where the defendant is a legal person, the number of that legal person in the business register ».

This is information « necessary to enable the bank or banks to identify that defendant and his/her account(s) ».

In this regard, the EJE partners emphasize that the indication of an account number in the application form (§ 4.4. of the application form - Appendix I) should not have the effect of limiting the order to a single bank account as soon as this information is intended to "enable the bank to identify the defendant and his / her accounts." Thus, it must be expressly mentioned that the order must have effect on other accounts that are held by the debtor within the same bank. In this regard, article 28 provides the possibility of issuing an order for several accounts.

❖ ***Application for a EAPO – the “list of the evidence provided or offered to be provided by the claimant” (article 8. 2. h))***

The EJE partners underline the necessity of giving the judge some discretion regarding the level of evidence to be provided, in particular with regard to the circumstances invoked as the basis of the claim, those justifying issue of the order and the need to ensure a very quick procedure. We considered that the need for a quick procedure justifies in particular that the level of proof to be brought could be adopted to the circumstances of the cause.

❖ ***Security to be provided by the claimant (article 12)***

Article 12 provides that: « *Before issuing an EAPO, the court may require the provision of a security deposit or an equivalent assurance by the claimant to ensure compensation for any damage suffered by the defendant to the extent the claimant is liable to compensate such damage under national law* ».

The EJE partners support the unsystematic character of the security deposit resulting from the using of "may" (instead of "shall" which had been considered during the work leading to this proposal).





Indeed, the systematic requirement of a security amount which is proportionate to the damage which could be caused to the defendant would result in reducing the access of the creditor to justice and law, especially when the creditor is a consumer. The requirement for a security, which could be justified, should not have the effect of hindering individuals and consumers, holders of small and average claims, who would like to implement the European bank accounts preservation order. In addition, the requirement of a security must not conflict with another objective set by the regulation, namely the need for a quick procedure. Indeed, the requirement of a security should not result in the postponement of the issuing of the order. Yet, as far as the security would be of such an amount that it could not be a security deposit, the citizen would have no other choice than to use a bank security, which implies additional delays because of the various steps that have to be carried out with the bank (mostly, to obtain a bank security requires an extension of 48 hours).

This is particularly the reason why this article should be reviewed. As currently drafted, this article could be interpreted by default as follows: a security deposit should be required by the judge when, under national law, the applicant shall repair the damage suffered by the defendant. Even when the applicant may be required, under national law, to repair the damage suffered by the defendant, the judge should not, for the reasons stated above, require a security deposit, in a systematic way.

#### ❖ ***Request for obtaining account information (article 17)***

The partners of the EJE project welcome the recognition by the European institutions of the difficulty for the enforcement agents to access, in some situations, relevant information on a debtor's. Facilitating the access of the enforcement agent to this information offers guarantees of a better enforcement. Furthermore, facilitating the access to relevant information on debtor's assets answers to one of the objectives of the regulation which is the speed of the procedure: it is imperative to allow the enforcement agents easily access to relevant information so as to implement quickly the procedure while answering at best the legal requirements, required in particular in the article 16 (Information on the account).

In addition, this article provides the necessary guarantees: the competent authority will operate one of two methods for obtaining information under article 17 on the basis of the EAPO which has been transmitted by the court or issuing authority.

Contact : [eje@europe-eje.eu](mailto:eje@europe-eje.eu)

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However, the EJE partners would like to point out that :

- Article 17 provides that « The court or issuing authority shall issue the EAPO pursuant to Article 21 and transmit it to the competent authority in accordance with Article 24 ».

Article 24 is concerned with the « Service of the EAPO on the bank ». It doesn't deal with the transmission of the EAPO to the competent authority as such.

Thus, if the competent jurisdiction and the competent authority for enforcement are in different Member States, article 24 states that « The person or authority responsible for service in the Member State of origin shall transmit the EAPO directly to the competent authority of the Member State of enforcement ».

However, Where the EAPO was issued by a court or the issuing authority in the Member State of enforcement, the proposal provides only that « service on the bank shall be effected in accordance with the law of that Member State". There is no provision regarding the transmission of the EAPO to the competent authority which must be able to use appropriate means for obtaining the information under article 17. Accuracy must be made on this point.

- The application form and the request for obtaining account information

Article 17 provides that "Where the claimant does not dispose of all the account information required pursuant to Article 16, that claimant may request that the competent authority of the Member State of enforcement obtain the necessary information. Such request shall be made in the application for an EAPO ».

However, the application form in Annex I does not expressly require the applicant to make that request. Indeed, in point "4. Details of the defendant's bank account », the application form only informs the applicant that " *It is important to give as much information as possible about the defendant's bank account to save time and costs. If you cannot give more information than the one referred in section 4.1., the competent authority in the Member State(s) where the account is located can try to obtain additional information from the banks or existing public registers. This procedure will, however, take some time and you might be charged a fee for the information ».*

The form should show greater clarity in this regard and take note of Article 31 – Costs relating to competent authority which provides that the handling of a request for obtaining account information as referred to in Article 17 shall correspond to single fixed fees determined by the relevant Member State in advance.







### ❖ **Amount of the EAPO (article 18)**

Article 18 provides that :

1. *Where the EAPO was issued on the basis of a judgment, court settlement or authentic instrument enforceable in the Member State of origin, the claimant shall be able to secure the amount set out in the EAPO as well as any interest and costs specified therein.*
2. *In all other cases, the claimant shall be able to secure the amount of the claim as well as any interest which has accrued on the claim.*

The EJE partners question the nature and the form of the security that the applicant must provide for the amount of the claim and consider that clarification should be made on this point.

### ❖ **Service of the EAPO on the bank and Service of the EAPO on the defendant (articles 24 and 25)**

The implementation of the EAPO and the service of the order on the debtor by the hand of a judicial officer – enforcement authority - is the best guarantee of the protection of the rights of the debtor. Only the judicial officer is able to ensure adequate information of the debtor.

However, the EJE partners invite the European institutions to provide additional information :

- Time limit in which the EAPO shall be served on the bank :

Article 24 paragraph 3 subparagraph c) provides that "*The competent authority shall serve the EAPO on the bank or banks specified therein. The competent authority shall take all necessary steps to effect service of the order within 3 working days of receipt at the latest*". This article does not reflect the situation in which the competent authority receive an EAPO which would require obtaining additional information in accordance with the procedure laid down in Article 17.

- Time limit in which the EAPO shall be served on the defendant:

Article 25 paragraph 1 of the proposal is as follows: "*The defendant shall be served with the EAPO and all documents submitted to the court or competent authority with a view to obtaining the order without undue delay after service on the bank has been effected pursuant*

Contact : [eje@europe-eje.eu](mailto:eje@europe-eje.eu)

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*to Article 24 and the bank has issued the declaration pursuant to Article 27”.*

The project partners EJE consider the notion of "undue delay" cannot provide legal security required by the implementation of a EAPO. A specified period, which could be 8 days from the date of service of the EAPO, should be stated.

❖ **Implementation of the EAPO (article 26)**

Article 26 paragraph 1 provides that *«A bank served with a EAPO shall implement it immediately upon receipt by ensuring that the amount specified therein is not transferred, disposed of or withdrawn from the account or accounts designated in the order or identified by the bank as being held by the defendant »*. The EJE partners are questioning the scope in time of the order and the possibility to grant the competent authority to serve again the EAPO within the period of its validity.

❖ **Declaration by the bank (article 27)**

The bank shall inform the competent authority and the claimant whether and to what extent funds in the defendant's account have been preserved within 3 working days following receipt of the EAPO. The EJE partners question the basis of this three-day period regarding the principle of immediate implementation of the EAPO.

❖ **Preservation of several accounts (article 28)**

Article 28 provides that :

*« 1. Where the EAPO covers several accounts held by the defendant with one and the same bank, the bank shall implement it only up to the amount specified therein.*

*2. Where one or more EAPOs or equivalent protective orders under national law have been issued covering several accounts held by the defendant with different banks, whether in the same or in different Member States, the claimant shall have a duty to effect the release of any amount specified therein which exceeds the amount stipulated in the EAPO. Such release shall be effected within 48 hours following the receipt of the first bank's declaration pursuant to Article 27 showing such excess. The release shall be effected through the competent authority of the respective Member State of enforcement ».*

The EJE partners are questioning the process of such a release to be effected by the applicant through the competent authority, especially considering that different competent authorities would be involved when the accounts are located on different Member States.





❖ **Costs (articles 30 / 31 / 42)**

Regarding the costs relating to the banks, the EJE partners welcome the obligation on Member States to determine a single fixed fees. It is important that this information is made available on the European Judicial Atlas in Civil matters. . Moreover, the practice carried out by banking establishments of levying these charges on the part of the bank account immune from attachment, even though such an attachment would be ineffectual due to the immunity of the sum in the account from attachment, must be prohibited.

Regarding the costs relating to competent authority, the EJE partners welcome the determination of single fixed fees in the enforcement of the EAPO or the handling of a request for obtaining account information as referred to in Article 17(4).

Regarding the costs of proceeding, which shall be borne by the unsuccessful party (article 42), the EJE partners consider that must be expressly included in this provision the costs relating to the banks and to the competent authority but also the costs of cross-border service of documents (in accordance with Regulation (EC) No. 1393/2007) and translation costs.

❖ **Right to provide alternative security (article 38)**

Article 38 provides that « *The competent authority of the Member State of enforcement shall terminate the enforcement of the EAPO if the defendant provides to that competent authority a security deposit of the amount specified in accordance with paragraph 2, or equivalent assurance, including bank guarantee, as an alternative means to safeguard the rights of the claimant* » (The EAPO shall specify the amount of the security necessary to terminate enforcement of the order).

The EJE partners consider that there should be a second alternative to ensure that the debtor can instruct the bank to release the sum by the mean of a standard form that would be delivered to the debtor with the order and could be return to the bank within a specified period through the competent authority.