

Debt recovery made faster, cheaper and more efficient? EAPOs and their implementation in Austria

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Introduction

On January 18 2017 new almost EU-wide rules entered into force to support businesses – in particular, small and medium-sized businesses – in the recovery of debt from debtors in other EU countries. EU Regulation 655/2014(1) established a new European Account Preservation Order (EAPO) procedure for creditors by providing common rules regarding jurisdiction and the procedure and conditions for freezing funds held by debtors in bank accounts located in the European Union, except in the United Kingdom and Denmark. Austria has amended its Enforcement Code(2) in order to provide the necessary framework for the procedures set out in the EU regulation. This update sheds light on the Austrian particularities of the Mareva injunction-style instrument.

EAPO procedure

According to the European Commission, late payment and non-payment of debt, as well as the fragmentation of national rules on the enforcement of debt, are obstacles in the EU Single Market.(3)

The EAPO procedure now allows for a single order to freeze a debtor's accounts made by a court of one member state to apply in all member states (except the United Kingdom and Denmark) where the debtor has bank accounts. The single order will be made on standard forms in order to keep legal and translation costs low. Further, to ensure that bank accounts are frozen quickly, EAPOs must be issued within 10 days, provided that all necessary evidence is available. To avoid funds being moved or squandered, the debtor will not be informed of the issuance of the EAPO in advance. As a rule, the jurisdiction to issue an EAPO will rest with the courts of the member states that have already rendered judgments in this regard or that have jurisdiction to rule on the substance of the matter. In business-to-consumer scenarios, jurisdiction lies with the courts of the consumer's domicile.

In addition to this speedy procedure, no judicial decision on the claim to be secured is required for an EAPO to be issued. In short, the court must issue an EAPO if the creditor can provide satisfactory evidence that without this measure there is a real risk that enforcement will be impeded or made substantially more difficult. If the creditor has not yet obtained a judgment, it must evidence that it is likely to succeed on the substance of the claim.

Whether a judgment has been obtained is relevant to one of the most fundamental aspects of the EAPO procedure: the possibility of filing a request to obtain account information. If a judgment or enforcement title is available and a creditor has reason to believe that the debtor holds an account with a bank in any member state, it need not explicitly name the banks (eg, by providing an international bank account number or bank identifier code). Instead, the court where the creditor



applied for the EAPO may request that the applicable authority in the relevant member state obtain the information required to identify the debtor's bank accounts.

Finally, whether a court judgment has been obtained is also relevant with respect to the obligation to provide security. As a rule, security must be provided if no judgment is available. If creditor has already obtained a judgment, the court may – at its discretion – require security to be provided by the creditor, if it considers this necessary and appropriate in the circumstances.

EAPOs and Enforcement Code

Issuance and enforcement of EAPO

Unless an enforcement procedure has already been initiated with respect to a specific judgment (in such case, the enforcement court has jurisdiction), jurisdiction to issue an EAPO within Austria is centralised with the Inner City of Vienna District Court (BG Innere Stadt).(4)

Further, the BG Innere Stadt has jurisdiction to enforce EAPOs that have been issued in other member states – that is, service the EAPO to the relevant banks and arrange for service of the documents to the creditor. On the other hand, the debtor may defend itself by making oral applications or remedies before the court of its residence.

Obtaining bank account information

If the creditor requests information on an Austrian account when applying for an EAPO, the procedure is more complicated. In accordance with Article 14 of the EU regulation,(5) the 'information authority' within the meaning of Articles 14(4) and 4(13) is the district court of the debtor's domicile. This means that the court deciding on the EAPO must directly liaise with the local court, rather than the BG Innere Stadt, which has jurisdiction only if the debtor has no regular residence within Austria.

The Austrian legislature decided not to allow the courts access to the new account register (for further information see "[Banking secrecy – made of glass for tax reasons?](#)"). In order to obtain information on bank accounts, the district court must apply a procedure similar to the well-known asset statement procedure, which is commonly applied in standard judicial enforcement procedures. Essentially, the district court issues an order to the debtor:

- instructing it to give information about its bank accounts; the debtor is thus obliged to submit a completed register regarding its assets or declare such assets through a bailiff; and
- prohibiting the withdrawal or transfer of funds held in such accounts up to the amount to be preserved; in addition, this order must include instructions to the debtor to terminate any direct debit authorisations and standing orders that could jeopardise this obligation to preserve the balance in the accounts.

This procedure gets particularly complicated where the account to be frozen is located in Austria, but the holder's domicile or habitual residence is elsewhere. In such cases, the BG Innere Stadt must liaise with the relevant foreign court via international administrative assistance. Clearly, granting access to the account register could have reduced the procedural mumbo jumbo – for example, if an EAPO were issued against a German debtor (consumer) who is domiciled in Munich but has an account in Salzburg, the Munich court would have to send documents to the BG Innere Stadt, which in turn must ask the Munich court to obtain information on the Austrian bank accounts. Apart from these procedural issues, the asset statement procedure is a well-known instrument and provides for significant penalties (a fine up to €5,000 or criminal prosecution), ensuring that debtors will adhere to their obligations arising from an EAPO.(6)

Applicability of EU regulation to Austrian creditors

Most significantly, the Austrian legislature – based on the principle of equality provided for within Austrian constitutional laws(7) – extended the scope of the EAPO procedure to purely Austrian scenarios. Accordingly, an EAPO may be pursued if:

- the creditor's domicile is in Austria;
- the court with jurisdiction (according to Article 6 of the EU regulation) is located in Austria;
- and

- the bank account which will be seized is maintained in Austria.

The EU regulation has been applied to purely Austrian cases because it provides creditors with further privileges when obtaining information on existing bank accounts, compared with the Enforcement Code. Under the previously available procedural injunction, a debtor's bank accounts could not be seized without providing the name of the bank.

Freezing injunctions

While the EAPO procedure is similar to freezing injunctions⁽⁸⁾ (so-called 'Mareva' injunctions) provided for under English law, it is a more effective tool from an enforceability standpoint. In short, freezing injunctions are court orders directed at individuals. These orders oblige the subject either to initiate or refrain from an action. Freezing injunctions may also comprise assets held abroad (eg, funds in bank accounts). Under Article 32 of the recast EU Brussels Regulation, no special procedure is needed in the applicable member states for a freezing injunction to be enforceable, provided that the judgment does not violate public policy and the debtor has had the opportunity to be heard; the latter requirement impedes the surprise effect of the instrument. The EAPO procedure is advantageous, as there is no requirement to notify or hear the debtor. Further, where the debtor's bank information is sought, a prohibition on the withdrawal or transfer of funds is enforceable on service to the debtor.

Comment

The EU regulation provides a simple, effective and cost-efficient procedure for creditors to freeze bank accounts without dealing with national law. Further, the regulation does not replace Austrian provisions on injunctions in order to recover debts owed in civil and commercial matters, so creditors are free to opt between them.

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Endnotes

(1) EU Regulation 655/2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters.

(2) *Gesetz vom 27.05.1896 über das Exekutions- und Sicherungsverfahren (Exekutionsordnung, EO)* (BGBl I 2005/68).

(3) *Mohr, Die vorläufige Kontenpfändung - EuKoPfVO* (2014).

(4) *Bundesgesetz, mit dem die Exekutionsordnung, das Gerichtsgebührengesetz, das Gerichtliche Einbringungsgesetz und das Vollzugsgebührengesetz geändert werden (Exekutionsordnungs-Novelle 2016 – EO-Nov 2016)*.

(5)) See also explanatory remarks regarding the government bill of the amendment to the Enforcement Code (Number 1294 of the supplements to the stenographic protocol of the national council, 25th legislation period).

(6) Council Regulation (EC) [1206/2001](#) of May 28 2001 on cooperation between the courts of the member states in the taking of evidence in civil or commercial matters.

(7) Article 2 of the Basic Law on the General Rights of Nationals (*Staatsgrundgesetz, StGG*) and Article 7 of the Federal Constitutional Law (*Bundesverfassungsgesetz, B-VG*).

(8) *Nunner-Krautgasser, Die Anerkennung und Vollstreckung englischer freezing injunctions in Österreich* (ÖBA 2010, 794).

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