Opinion of the European Economic and Social Committee 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 — 2011/0204 (COD)

(2012/C 191/11)

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On 14 September 2011, the Council decided to consult the European Economic and Social Committee, under Article 304 of the Treaty on the Functioning of the European Union, 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) 41 final — 2011/0204 (COD).

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 17 April 2012.

At its 480th plenary session, held on 25 and 26 April 2012 (meeting of 26 April), the European Economic and Social Committee adopted the following opinion unanimously.

1. **Conclusions and recommendations**

1.1 The EESC welcomes the presentation of this proposal for a regulation, whose only fault has been its late arrival in relation to the 2006 Green Paper on the attachment of bank accounts.

1.2 The EESC considers that it should be accompanied by a simultaneous initiative – although it should logically have come first – on the transparency of debtors' accounts, as set out in the 2008 Green Paper on the transparency of debtors' assets.

1.3 The EESC is pleased that the Commission has succeeded in proposing, in an area of great technical difficulty, a legal regime that strikes a proper balance between the various interests at stake and a fair balance between the rights of the various parties concerned.

1.4 The EESC welcomes the fact that the Commission has taken on board a considerable part of the recommendations made by the EESC in its opinion on the above-mentioned green paper, including the extension of its scope beyond cash held in bank accounts to include other financial instruments, the issue of a European Account Preservation Order (EAPO) after obtaining an enforceable title, the wide-ranging definition of courts having jurisdiction, the non-inclusion of requests for any amounts other than those due and not repaid together with default interest, and recognised costs, and the clear definition of rules for contesting and opposing the measure and for admissible appeals, in order to guarantee the lawfulness of the procedure and safeguard the rights of claimants, defendants and third parties.

1.5 The clear adoption of an alternative or optional approach, the choice of a regulation as the EU instrument to best ensure the completion of the internal market, application of the measure only to cross-border situations and, lastly, the choice of an appropriate legal basis (Article 81(2) TFEU) – all advocated by the EESC – are particularly welcome. The EESC furthermore supports the adoption of a regime that is appropriate, straightforward and proportionate in cost/benefit terms, all of which are required by the cross-border nature of the mechanism and the means required of all those who may use or be confronted with it.

1.6 The EESC is moreover not entirely convinced with regard to the essential nature of the measure, especially given that it will not be adopted by the United Kingdom and given the fact that uncertainty about the total cost of the procedure as well as finding out the competent foreign court will remain barriers, certainly for small companies. Neither is the EESC entirely convinced with regard to the proposal's compliance with the principles of subsidiarity and proportionality, since the revision of the Brussels I Regulation envisages the abolition of exequatur and the estimates of the expected results contained in the impact assessment are still imprecise.

1.7 Lastly, the EESC considers that the content of some provisions needs to be reviewed and could be improved to make it clearer, less ambiguous and more purposeful, and also to correct some translation and printing errors. It urges the Commission to take note of its comments in this regard.

2. **Purpose and background of the proposal**

2.1 With the present proposal for a regulation, the Commission is following up on its 2006 Green Paper on the attachment of bank accounts ([1]). It proposes to introduce an alternative legal instrument to national procedures, the EAPO, into the EU legal system by means of a regulation. The purpose is to secure the speedy and inexpensive preservation of the bank accounts of debtors subject to pecuniary claims in civil and commercial matters, in order to prevent the withdrawal or transfer of funds held in bank accounts anywhere on EU territory, provided that any of the parties or assets involved are located in more than one Member State (cross-border implications as defined in Article 3) whatever the nature of the court or tribunal.

2.2 The regime has been set up on an optional basis (a 2nd regime generally known as the '28th regime') as an alternative to, and in parallel with, existing protective measures in the Member States, with the same nature and purpose.

2.3 The following are excluded from the proposed regime for varying reasons:

a) revenue, administrative and customs matters,

b) bankruptcy, winding-up of companies, composition and analogous proceedings,

c) social security,

d) arbitration,

e) bank accounts declared exempt from seizure by the legislation of the Member State where such accounts are located,

f) the settlement of securities designated in accordance with Article 10 of Directive 98/26/EC ([2]).

2.4 In contrast, it will apply to matters of matrimonial property regimes, successions, and the consequences of registered partnerships ([3]).

2.5 An EAPO may be applied for and decided at different points in time:

a) prior to the initiation of judicial proceedings for a decision or to enforce a decision against the defendant,

b) at any stage during judicial proceedings,

c) after obtaining a judgment against the defendant or any other enforceable title in the Member State of origin, but which is not yet enforceable in the Member State where the account is located,

d) after obtaining an enforceable title which is already enforceable in the Member State where the account is located.

2.6 The provisions of Section 1 (Articles 6 to 13) apply in the first three cases, Section 2 (Articles 14 and 15) to the fourth, while Section 3 (Articles 16 to 22) contains the provisions common to all situations.

2.7 Chapter 3 enshrines the principle that exequatur is not required in absolute terms (Article 23) and lays down detailed rules on how EAPOs are to be effectively enforced, establishing the rights and duties of the various parties involved (banks, courts, competent national authorities, defendants, claimants, other competing creditors and other injured third parties).

2.8 Chapter 4 (Articles 34 to 40) governs remedies ranging from the reaction to a refusal to issue an EAPO (Article 22) to review of the EAPO in order to modify/limit its purpose, declaration of its termination, revocation or suspension, and, lastly, ordinary or extraordinary appeals: the parties retain in full the rights granted under the applicable national law regarding the availability of such appeals (Article 37). It also governs how security deposits or equivalent assurance, as a means of terminating enforcement of an EAPO, are to be provided.

2.9 Lastly, Chapter 5 lays down a number of general provisions for the proposed regime, establishing for instance that representation by a lawyer is not mandatory and specifying costs and time limits.

2.10 In addition, it lays down rules on the relationship with other EU or national legal instruments applicable by default, together with the obligations to be met by the Member States in order to ensure the effective and proper implementation of the instrument.

2.11 The prior impact assessment carried out by the Commission reveals in summary that:

a) Cross-border bad debt is estimated at between EUR 1.12 and 2 billion per year.

b) Cross-border maintenance claims can be estimated at EUR 268 million per year.

c) Cross-border bad business debts amount to some EUR 55 billion per year.

d) Only 11.6 % of companies have applied for a national preservation order to secure payment of a cross-border claim.

([1]) COM(2006) 618 final of 24.10.2006.
([2]) OJ L 166, 11.6.1998, p. 45.
([3]) Cf. Regulation (EU) 1259/2010 (OJ L 343, 29.12.2010, p. 10) (Rome III) (divorce and separation), Regulation (EC) 44/2001 (OJ L 12, 16.1.2001, p. 1) (civil and commercial matters), Regulation (EC) 2201/2003 (OJ L 338, 23.12.2003, p. 1) (matrimonial matters); and Proposal for a Regulation (COM(2011) 127 final of 16.3.2011 (registered partnerships) and Proposal for a Regulation (COM(2011) 126 final of 16.3.2011 (matrimonial property regimes); cf. EESC opinions: OJ C 325, 20.12.2006, p. 65 (rights of the child), OJ C 325, 20.12.2006, p. 71 (matrimonial matters), OJ C 44, 11.2.2011, p. 148 (matters of succession) and OJ C 376, 22.12.2011, p. 87 (property consequences of registered partnerships).

e) It is estimated that 34 000 bank attachments concerning cross-border debts are made per year, representing EUR 640 million.

According to the same assessment, the European preservation order may:

a) Secure the recovery of EUR 373 to 600 million of additional bad debt per year.

b) Produce estimated cost savings for companies engaged in cross-border trade of EUR 81.9 million to 149 million per year.

3. **General comments**

3.1 We have long been accustomed to formally flawless, carefully thought-out and limpid technical and legal texts from DG JUST, that have contributed to 'better law-making' and to legal certainty and security.

3.2 The present proposal is no exception and the EESC therefore welcomes its presentation, whose only fault is its tardy arrival.

3.3 The Commission has also succeeded in proposing, in an area of great technical difficulty, a legal regime that strikes a proper balance between the various interests at stake and a fair balance between the rights of the various parties concerned. These rights are painstakingly considered in the detailed and carefully-structured impact assessment accompanying the proposal, for which the EESC had long been calling.

3.4 The Commission has moreover taken on board a considerable part of the recommendations made by the EESC in its opinions on the above-mentioned green paper and on the Green Paper on the transparency of debtors' assets (COM(2008) 128 final) ([4]). This includes such aspects as the issue of an EAPO after obtaining an enforceable title (Section 2); the wide-ranging definition of courts having jurisdiction (Article 6); the non-inclusion of requests for any amounts other than those due and not repaid together with default interest, and recognised costs (such as lawyers' fees or other expenses); and the clear definition of rules for contesting and opposing the measure and for admissible appeals, in order to guarantee the lawfulness of the procedure and safeguard the rights of claimants, defendants and third parties.

3.5 The Commission has also largely heeded the recommendations that the European Parliament has recently adopted in this field ([5]) and which are also welcomed.

3.6 The clear adoption of an alternative or optional approach, as urged by the EESC, which leaves claimants entirely free to choose national law, is particularly positive. The same applies to the choice of a regulation as the EU instrument to best ensure the legislative harmonisation that is crucial to completing the internal market and greater uniformity of application in the Member States, in turn guaranteeing more legal certainty and security, as also advocated by the EESC; application of the measure only to cross-border situations; and, lastly, the choice of an appropriate legal basis (Article 81(2) TFEU).

3.7 It also welcomes the extension of scope beyond cash held in bank accounts to include other financial instruments ([6]), as previously suggested by the EESC.

3.8 The EESC remains, however, unconvinced with regard to the essential nature of the measure and its compliance with the principle of subsidiarity.

3.8.1 Firstly, and evidently, because the Commission itself recognises that the same result could be achieved by other means.

3.8.2 Secondly, because it may now be assumed that the Brussels I Regulation will be revised along the lines urged by the Commission and supported by the EESC, the crucial issue of exequatur is settled.

3.8.3 Lastly, because there is no sign in the well-constructed impact assessment, referred to above, that the increased costs incurred by introducing a new judicial procedure into the law of all the Member States have been fully analysed and properly assessed in all the aspects relating to implementation, information to businesses and consumers, training of judges, lawyers and other legal professionals, and public officials, particularly from the legal administration. Then there are the increased operating costs of judicial bodies arising from having to deal with a range of forms in the 23 EU languages, which cannot therefore be compared, in cost-benefit terms, with the estimated savings for businesses or the expected amount from the additional recovery of debts which, moreover, range from EUR 373 to 600 million. Besides, the uncertainty about the total cost of the procedure as well as finding out the competent court will remain barriers. This might adversely affect companies, in particular small businesses.

3.9 Moreover, the EESC continues to believe, as does the EP, that the present initiative should in any case be accompanied – or even, as would be logical, preceded – by another concerning the transparency of debtors' assets. It still does not understand why the Commission is moving ahead primarily (or exclusively) with this proposal and not the other.

([4]) EESC opinions: OJ C 10, 15.1.2008, p. 2; and OJ C 175, 28.7.2009, p. 73.

([5]) Own-initiative report A-7 0147/2011 14.4.2011, rapporteur: Arlene McCarthy, EP Resolution of 10 May 2011 (TA(2011) 0193).

([6]) As defined in Article 4(1) point (17) of Directive 2004/39/EC and Section C of Annex I (OJ L 145, 30.4.2004, p. 1).

3.10 Lastly, the EESC must express its regret not only at Denmark's stance of not adopting the instrument, in keeping with its well-known declaration of principle, but in particular at the announced decision by the United Kingdom not to adopt it either. This is of course the very Member State which has no comparable legal instrument. One of the main concerns raised during the discussion of the green paper was this very loophole in the British legal systems.

4. **Specific comments**

4.1 *Article 2(2)(c)*

The exclusion of arbitration must be clarified in order not to jeopardise the position of the arbitration tribunals that, in a number of Member States, make decisions that are enforceable titles on the same footing as the judgments of ordinary courts.

4.2 *Articles 2(3) and 32*

No accounts are exempt from seizure: amounts corresponding to income or earnings may be exempt.

4.3 *Articles 4(1) and 29*

Due to the sensitive nature of the situation, expressions such as 'account … in the name of a third part on behalf of the defendant' and 'accounts … held by the defendant on behalf of a third party' must be better defined and made clearer so as to avoid any doubts about their scope which might be damaging to the rights of third parties.

4.4 *Article 7(1)(a)*

The wording is not the same in all language versions *[translator's note: some language versions, including the Portuguese, read '… the claim against the defendant iswell founded', while others, including the English, read 'the claim against the defendant appears to bewell-founded']*.

4.5 *Article 8(2)(f)*

[Does not apply to the English version: the rapporteur points out that the reference to Article ***7****(1)(b) is wrongly indicated in the Portuguese version as Article* ***17****(1)(b)]*.

4.6 *Article 13*

Under a regime of the type the proposal seeks to set up, it should not be left to the Member States to decide different time periods as otherwise uniformity cannot be guaranteed and uncertainty will result.

4.7 *Article 20(1)*

'Those courts … may cooperate' should be replaced with 'must cooperate'.

4.8 *Article 25(1)*

The expression 'without undue delay' is dangerously vague: it should be replaced by a set minimum deadline, such as 'on the next working day'.

4.9 *Article 27(3)*

The option of using secured electronic means of communication should be extended to all instruments, including relations between courts, under the Commission's *e-Justice* programme, to speed up procedures.

4.10 *Article 41*

The following should be added at the end of the article: 'except in cases where the national law of the competent court stipulates that provision of a lawyer is mandatory'.

4.11 *Article 44*

This provision could be interpreted in different ways and give rise to uncertainty in proceedings. It should be deleted.

4.12 *Definition of time limits*

Time limits are defined differently in several articles. They refer sometimes to 'calendar days' (Article 21), sometimes to 'working days' (Article 24(3)(c), Article 27), or just to 'days' (Article 35(4)). The definition of time limits should made uniform in the interests of certainty.

4.13 *Annexes and Article 47*

The content of the annexes, and in particular the languages in which they must be used, together with the need for translation in order to ensure they are properly understood, must be better assessed and tested in advance. The same applies to additional evidence and oral testimony (Article 11).

Brussels, 26 April 2012.

The President
of the European Economic and Social Committee
Staffan NILSSON