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NOTE

from :	the Presidency
to :	Coreper / Council

No. prev. doc. :	9397/13 JUSTCIV 118 CODEC 1032
No. Cion prop. :	13260/11 JUSTCIV 205 CODEC 1280

Subject :	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 [First reading] – Orientation debate on specific principles relating to the balance between the creditor's and the debtor's interests
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I. INTRODUCTION

1. By letter of 25 July 2011, the Commission transmitted to the Council a proposal for a Regulation creating a European Account Preservation Order to facilitate cross border debt recovery in civil and commercial matters. The proposal is based on Article 81(2) of the Treaty on the Functioning of the European Union and is thus subject to the ordinary legislative procedure.
2. In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Ireland has notified its wish to take part in the adoption and application of the proposed Regulation.

3. The United Kingdom has made no notification under Article 3 of the abovementioned Protocol on the position of the United Kingdom and Ireland and will therefore not take part in the adoption of the proposed Regulation.¹ It will however be able to accept the Regulation after its adoption in accordance with Article 4 of the said Protocol.
4. In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark does not take part in the adoption of the proposed Regulation and will not be bound by it or subject to its application.
5. The proposed Regulation will establish a new European procedure for the preservation of bank accounts in cross-border cases. It will create the possibility for a creditor to obtain a European Account Preservation Order ("Preservation Order" or "Order") which will block funds held by a debtor in a bank account in a Member State. This Order will prevent the removal of funds from the debtor's account, thereby ensuring that the attempts of the creditor to recover his debt cannot be frustrated.
6. The Working Party on Civil Law Matters (Account Preservation Order) has examined the proposed Regulation at a number of meetings since September 2011.
7. The Council (Justice and Home Affairs) held a first orientation debate on the proposed Regulation on 6 and 7 December 2012 and approved on that occasion a set of general guidelines for the future work², emphasising in particular the important objective that the proposed Regulation should strike an appropriate balance between the creditor's and the debtor's interests.

¹ See document 5173/12 JUSTCIV 5 CODEC 54 explaining the position of the United Kingdom.

² See document 16350/13 JUSTCIV 335 CODEC 2706.

8. Following on from those general guidelines the Presidency decided - once the Working Party had finalised the second examination of the whole text of the proposed Regulation in March 2013 - to focus subsequent discussions on a series of elements which are of particular relevance for striking the appropriate balance between the creditor's and the debtor's interests.
9. To that end, the Presidency submitted a package to the Working Party consisting of a number of Articles and some related recitals¹ concerning the following:
- the conditions for issuing a Preservation Order,
 - the *ex parte* nature of the proceedings,
 - the provision of security by the creditor,
 - the liability of the creditor,
 - the amounts exempt from preservation to protect the debtor, and
 - the remedies to be made available to the parties, in particular to the debtor.
10. Extensive discussions were held on these core issues and considerable progress has been made in the negotiations on the package. The text of the specific Articles and the draft recitals as they stand after the discussions in the Working Party at its meetings on 25 and 26 March, 16 and 17 April and on 2 May 2013 is set out in document 9395/13 JUSTCIV 117 CODEC 1030.
11. Given the interrelationship between the provisions of the package and other issues in the proposed Regulation yet to be resolved, the Presidency believes that it would be premature to submit to Council the text of the Articles and the related recitals which form part of the package. Further discussions at technical level are needed on the exact wording of the provisions and the exact relationship between them and other elements of the text and some horizontal issues, in particular the specific rules on service of documents and translation to be laid down in the proposed Regulation, need to be examined more closely.

¹ See documents 7443/13 JUSTCIV 62 CODEC 567, 8123/13 JUSTCIV 75 CODEC 722 and 8806/13 JUSTCIV 90 CODEC 883.

12. In order to pave the way for further progress to be made on the proposed Regulation, the Presidency is however convinced that it would greatly benefit the future negotiations if an endorsement were to be given at political level to some key principles which aim to ensure an appropriate balance between the creditor's and the debtor's interests.
13. The Presidency has therefore extracted some key principles from the discussions held on the relevant Articles and draft recitals with a view to submitting them to Coreper/Council for endorsement. These key principles are set out in the Annex to this note.
14. The principles were examined by Coreper at its meeting on 23 and 24 May 2013. In the light of that examination the Presidency has redrafted some points of the key principles.

II. CONCLUSION

15. Coreper / Council is invited to examine the key principles relating to the balance between the creditor's and the debtor's interests set out in the Annex to this note and to endorse them as a package.

KEY PRINCIPLES RELATING TO THE BALANCE BETWEEN THE CREDITOR'S AND THE DEBTOR'S INTERESTS

A. Conditions for issuing a Preservation Order

(a) in situations where the creditor has not yet obtained a title which is enforceable in the Member State of enforcement ("pre-judgment scenario")

1. There is general consensus that, in order to constitute a useful tool for creditors trying to recover their debts, the proposed Regulation should provide an efficient mechanism for obtaining a Preservation Order. The conditions for issuing an Order should therefore not be so burdensome for creditors that they will be deterred from using the new procedure. At the same time, given the significant impact a Preservation Order may have on the debtor, particularly in a pre-judgment scenario, appropriate safeguards should be in place to ensure that the debtor's rights are protected and that abuse of the Order is precluded.
2. In this context, the provision relating to the conditions for issuing a Preservation Order, and more specifically to the test concerning the risk required (point (b) of Article 7(1)), is a pivotal part of the proposed Regulation. However, this provision should be seen in conjunction with the solutions found for the other elements addressed in this note given that they all form part of one and the same package.

3. In the light of this, the Presidency suggests that in a pre-judgment scenario the creditor should be able to obtain a Preservation Order where he demonstrates to the satisfaction of the court that he is likely to succeed on the substance of his claim against the debtor and that his claim is in urgent need of judicial protection. Such urgent protection by way of a Preservation Order should be granted to the creditor where he demonstrates that there is a real risk that, without the Order, the enforcement of a future judgment obtained by the creditor may be impeded or made substantially more difficult.
4. The recitals will provide some guidance on the interpretation of these conditions by giving examples of aspects which should or should not be taken into account by the court in assessing the required risk.

(b) in situations where the creditor has already obtained an enforceable title ("post-judgment scenario")

5. In the light of the general consensus in the Working Party that a risk test similar to that provided for in the pre-judgment scenario should also apply in a post-judgment scenario, the Presidency suggests that the proposed Regulation should contain such an Article and that its content should be aligned with the risk test which is being proposed in the pre-judgment scenario.

B. Security and liability of the creditor

(a) Security

6. There is broad consensus that the proposed Regulation should provide sufficient safeguards against abuse of the Preservation Order and that one such important safeguard is the possibility to require the creditor to provide security to ensure that the debtor can be compensated at a later stage for any damage he may have suffered as a result of the Preservation Order in situations where the liability of the creditor is established.
7. In the light of this, the Presidency suggests that the provision of security under the proposed Regulation should be obligatory in those situations where the creditor requests a Preservation Order before having obtained a title on his claim. Dispensing with this requirement should only be possible on an exceptional basis where the provision of security is considered inappropriate, for example where the creditor's claim is a claim for maintenance or where the debt to be recovered is of such a size that the Order is unlikely to cause any damage to the debtor.
8. In cases where the creditor has already obtained an enforceable title it will be left to the discretion of the court to decide whether or not to require the provision of security.

(b) Liability

9. Following on from the general guidelines approved by the Council in December 2012, the Working Party considered specifically the imposition of liability on the creditor for any damage caused by a violation of his duties under the proposed Regulation as one element of debtor protection.
10. It has been clarified that there are no legal obstacles to the inclusion of such a rule in the proposed Regulation. Provisions of substantive law, such as a liability rule, can be inserted under the legal basis (Article 81(2) TFEU) when the legislator considers this necessary and useful in order to attain the aim of the proposed instrument.
11. The discussions in the Working Party have shown that the rules on liability resulting from unjustified account preservation orders differ widely in concept from one Member State to the other and that there are currently no common liability standards in the Member States applicable in such cases. Some Member States' laws provide for strict/objective liability while others apply general fault based liability rules.
12. It seems clear therefore that a mere reference to the national rules of liability would not be sufficient to create a level playing field for debtors and creditors in all Member States. The inclusion of a rule on the creditor's liability in the proposed Regulation is essential if this aim is to be attained and such a provision is thus of crucial importance in terms of striking the right balance between the creditor's and the debtor's interests.

13. Against that background, the Presidency suggests that the Council approves the incorporation of a liability rule in the proposed Regulation, the details of which will have to be worked out at technical level bearing in mind the different liability concepts in the Member States.

C. Surprise effect - *ex parte* proceedings

14. The discussions in the Working Party have shown general endorsement of the “surprise effect” as an essential element in ensuring that the Preservation Order will be a useful tool for creditors trying to recover debts.
15. Given the various elements which it is suggested to include in the proposed Regulation to protect the debtor, in particular the obligatory provision of security as a rule (see point B (a)), the liability of the creditor (see point B (b)) and the remedies available to the debtor as soon as he is made aware of the preservation of his account(s) (see point E (a)), the Presidency suggests that, under the proposed Regulation, a Preservation Order will be issued in *ex parte* proceedings, that is without the debtor being informed about the application or being heard before the issuing of the Order. However, it still needs to be determined at technical level whether a hearing of the debtor might be allowed in exceptional circumstances.

D. Amounts exempt from preservation

16. There is general support for the principle that amounts which are exempt from seizure under existing national preservation measures should be exempt from preservation under the proposed Regulation.
17. In the light of this, the Presidency suggests that it will be the law of the Member State of enforcement which governs the exemption under the proposed Regulation. Given that the Member States have different procedural systems with regard to exemption, the proposed Regulation will provide that the relevant amount will either be exempted *ex officio* before the Order is implemented or be exempted at the request of the debtor after the implementation of the Order.
18. The Presidency further suggests that it will be clarified in the proposed Regulation that, in cases where the Preservation Order concerns accounts in several Member States and thus has the potential to result in multiple exemptions being applied, the creditor will be provided with an appropriate remedy. In such situations the competent court (or enforcement authority) of the Member State of enforcement concerned will be given discretion to adjust, at the request of the creditor, the exemption applied in *its* territory. Thus, the court can take into account exemptions applied in other Member States, but it would not be able to modify those exemptions.

E. Remedies and appeal

(a) Remedies

19. An efficient system of remedies constitutes an important element of the package which is aimed at ensuring an appropriate balance between the creditor's and the debtor's interests. Since the debtor is not heard before the issue of a Preservation Order (see point C above - *ex parte* proceedings), it is of crucial importance - in order to vindicate the rights of the defence - that the debtor is given the possibility to apply for a remedy against the Preservation Order immediately after his account or accounts have been blocked.
20. The vast majority of remedy proceedings will be contentious/contradictory proceedings in which both parties will be given the opportunity to present their case.
21. The Presidency suggests that the proposed Regulation will provide remedies for challenging the Preservation Order as such in the Member State of origin and remedies that target (only) the enforcement of the Order in the Member State of enforcement.

22. The Presidency further suggests that remedies should be available, at least in the following situations:
- where the requirements for the issue of the Order were not met;
 - where the creditor did not initiate proceedings on the substance within the set time limit;
 - where amounts exceeding the amount of the Order have been preserved;
 - where amounts which should have been exempted from preservation have not been so;
 - where the claim has been dismissed in proceedings on the substance of the matter;
 - where the judgment on the substance of the matter has been set aside;
 - where the circumstances on the basis of which the Order was issued have changed;
 - where the claim has been paid in full or in part or a settlement has been reached between the parties; and
 - where the Order or the accompanying documents were not served or translated in accordance with the specific rules on service of documents and translation set out in the proposed Regulation, subject to the outcome of the discussions on those specific rules.
23. With regard to some of the grounds, such as the dismissal of the claim in proceedings on the substance or the payment of the claim, the debtor should be given the choice between requesting the revocation of the entire Order or contesting the continuation of its enforcement only. The former option could be in the particular interest of the debtor where the Order concerns several accounts in different Member States whereas the latter option could be more in his interest if only one account is affected by the Order and he does not want to go to another Member State to apply for a remedy.
24. It still remains to be determined at technical level whether the proposed Regulation should contain a possibility to cure a lack of service or of translation of the Preservation Order or the accompanying documents in order to ensure the effectiveness of the rules regarding service and translation of documents. This issue should be addressed in the overall context of the discussions on the specific rules on service of documents and translation to be laid down in the proposed Regulation.

(b) Appeal

25. Based on the broad consensus in the Working Party the Presidency suggests that the proposed Regulation will give both the debtor and the creditor a right to appeal against any decision given on a remedy and that the deadline for such an appeal will be left to national law.
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