



**COUNCIL OF
THE EUROPEAN UNION**

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NOTE

from : **Presidency**

to : **Council**

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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

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 Working Party on Civil Law Matters (Account Preservation Order) has examined the proposed Regulation at a number of meetings since September 2011. The Cyprus Presidency put the work on this file at the top of its agenda and the proposed Regulation has therefore been discussed intensively at very regular intervals in the second half of 2012.
6. The Presidency is convinced that the proposed Regulation has the potential of boosting economic growth by facilitating cross-border debt recovery. The mechanism which it puts in place will be of great benefit to creditors throughout the European Union, be they ordinary citizens or businesses.
7. Good progress has been made in the Working Party on Civil Law Matters (Account Preservation Order) on in particular Chapters I, II and III, but the interlinked nature of the various Chapters of the proposed Regulation does not allow any final position to be taken at this stage. The Presidency is however of the opinion that the time has come to ask the Council to have an orientation debate and to set some general guidelines for the future work.

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

II. SUGGESTED GENERAL GUIDELINES FOR THE FUTURE WORK

A. A European procedure for the preservation of bank accounts

8. The proposed Regulation will establish a new European procedure for the preservation of bank accounts in cross-border cases. This new procedure will make it possible for a creditor to obtain a European Account Preservation Order ("Preservation Order" or "Order") which will block funds held by the debtor in a bank account in a Member State. The Order will be available to the creditor shortly before he initiates judicial proceedings on the substance of his claim or at any stage during such proceedings. It will also be available to him before he initiates proceedings to enforce a judgment or other enforceable title (court settlement or authentic instrument) already obtained against the debtor. The Order will prevent the debtor from removing funds from his bank account and thus from frustrating the endeavours of the creditor to recover his debt.
9. The discussions in the Working Party on Civil Law Matters (Account Preservation Order) have shown a general endorsement of the idea of a European procedure for a European Account Preservation Order which covers both the procedure for obtaining the Order and the procedure for enforcing it. However, further discussions at technical level are still needed in order to work out the exact details of the procedure, the conditions for issuing the Preservation Order, and other particulars.
10. The Presidency suggests that the Council confirm the political objective of creating a new European procedure leading to the issue of a European Account Preservation Order.

B. The cross-border nature of the proposed Regulation

11. Given its legal basis, the proposed Regulation will apply to cross-border cases and will not affect national procedures aiming at securing debt recovery. In order to make this limitation of the scope of the proposed Regulation explicit, the Commission proposal contains a specific Article defining what constitutes a cross-border case.

12. The discussions so far in the Working Party on Civil Law Matters (Account Preservation Order) have shown wide support for limiting the proposed Regulation to cross-border cases and also for listing clearly in an Article the elements which will determine when a case is to be considered a cross-border case. There is, for instance, general agreement that a cross-border case is present when the court issuing the Preservation Order is located in one Member State and the bank account targeted by the Order is located in another Member State. However, further discussion at technical level is needed for determining which other elements it would be appropriate to include in the specific Article defining cross-border cases.
13. The Presidency suggests that the Council confirm that the proposed Regulation will apply only to cross-border cases and that a specific Article will provide a clear definition of such cases.

C. The "surprise effect" of the Preservation Order

14. To maximise the effect of the Preservation Order, the proceedings leading to its issue should be conducted in such a way that the debtor is not given the chance to remove funds from his accounts before the Order is implemented (the "surprise effect").
15. The discussions so far in the Working Party on Civil Law Matters (Account Preservation Order) have shown wide support for the idea that the Preservation Order should be issued in conditions that will ensure the "surprise effect". However, further reflection and discussion is needed on whether the court should have discretion to hear the debtor, in appropriate yet exceptional cases, and if so, how to avoid that such a hearing will jeopardise the effectiveness of the Order.
16. The Presidency suggests that the Council confirm that the "surprise effect" is an important element for ensuring that the Preservation Order will be a useful tool for creditors trying to recover debts from debtors in cross-border cases. At the same time, the proposed Regulation should however provide adequate protection for the debtor (see part D below).

D. The appropriate balance between the interests of the creditor and the interests of the debtor

17. The proposed Regulation should strike an appropriate balance between the interests of the creditor and the interest of the debtor, for example, by requiring the creditor to meet certain conditions before obtaining a Preservation Order and by making appropriate remedies available to the debtor who wants to contest the Preservation Order.
18. The discussions so far in the Working Party on Civil Law Matters (Account Preservation Order) have shown that the Member States subscribe to the need to provide additional protection for the debtor to that initially proposed by the Commission, so as to strike the appropriate balance between the interests of the creditor and the interests of the debtor. In an effort to contribute to such a balance, the Presidency has presented several new ideas to the Working Party.
19. The Presidency suggests that the Council confirm as an important objective for the future work that the proposed Regulation must strike the appropriate balance between the interests of the creditor and the interests of the debtor and that it confirm that the following elements of debtor protection should be added in the proposed Regulation:
 - (a) The application for a Preservation Order should contain an affirmation that the information provided by the creditor is true and complete, as well as a reminder that any deliberate false statements or omissions may lead to legal consequences under the law applicable.
 - (b) In principle, only a court should be empowered to issue a Preservation Order.
 - (c) The Preservation Order should be revoked without any intervention being required on the part of the debtor if the creditor fails to initiate proceedings on the substance of the matter within the time-limit specified in the proposed Regulation. Further discussions are needed to define the functioning of this mechanism (including the issue of time limits).

20. Moreover, the Presidency suggests that the Council confirm that at least the following elements of debtor protection which have been suggested by the Presidency be explored further:
- (a) The creditor should be liable to the debtor for any damage caused by any violation by him of his duties under the proposed Regulation, under circumstances and standards to be agreed later by the Member States.
 - (b) When the creditor applies for a Preservation Order before initiating proceedings on the substance of his claim, he should, in principle, have to provide some kind of security to ensure adequate compensation to the debtor for damage caused by any violation by the creditor of his duties under the proposed Regulation. The court should have discretion to dispense with this requirement in situations where the provision of such security would be inappropriate or unnecessary.

III. CONCLUSION

21. The Council is invited to approve the guidelines set out in part II as general guidelines for the future work on the proposed Regulation.
