

Provisional Account Preservation Measures in European Civil Procedure Law

A comparison between Brussels Ia and the Regulation on the European Account Preservation Order from an Austrian and a Slovenian perspective

Philipp Anzenberger^{*}, University of Graz
Tjaša Ivanc^{**}, University of Maribor

Abstract: *With the Regulations 1215/2012 (Brussels Ia Regulation) and 655/2014 (EAPO Regulation), the European legislator has created two new and very distinct instruments to facilitate cross-border debt recovery in civil and commercial matters. While the Brussels Ia Regulation provides for an easier recognition and enforcement of national interim measures in other EU Member States, the EAPO Regulation creates a single provisional and protective measure enabling creditors to prevent the transfer or withdrawal of the debtors' assets from any bank account located in the EU.*

This paper provides a comparative analysis of these European legal instruments by evaluating the rules on preconditions, legal remedies and the different effects of national interim measures that shall be recognised and enforced within the Brussels Ia regime and the new EAPO.

Keywords: *European Account Preservation; Brussels Ia Regulation; cross-border debt recovery; provisional and protective measures; recognition and enforcement of interim measures; effects of a European Account Preservation Order*

I. Introduction

One of the major issues regarding the European internal market is the **lack of payment discipline**. Studies show that 98 % of enterprises face payment delays from their customers.¹ While European civil procedure law entails effective instruments to produce internationally enforceable **titles in the substance of the matter**, until very recently there were no satisfactory solutions for the issuing of internationally enforceable **provisional measures**.² Yet, provisional measures

* Philipp Anzenberger is an assistant professor at the Institute of Civil Procedure and Insolvency Law, University of Graz.

** Tjaša Ivanc is an assistant professor for Civil Procedure Law at the Faculty of Law, University of Maribor.

1 Euler Hermes, *Credit insurance supports companies' profitable growth – An independent research study of 2000 businesses in 10 European economies* (2006), <http://www.fecma.eu/media/text/UKStudyBrochureCreditIn-surance.pdf> (last visited Mar. 13, 2017).

2 Friedrich L. Cranshaw, *Der europäische Beschluss zur vorläufigen Kontenpfändung*, 22 DEUTSCHE ZEITSCHRIFT FÜR WIRTSCHAFTS- UND INSOLVENZRECHT 399, 399–400 (2012); Bettina Nunner-Krautgasser, *Der geplante Rechtsakt zur europäischen Kontenpfändung*, in DIE ANERKENNUNG IM INTERNATIONALEN ZIVILPROZESSRECHT – EUROPÄISCHES VOLLSTRECKUNGSRECHT 125, 126–130 (Burkhard Hess ed., 2014); JULIA RIEBOLD, DIE EUROPÄISCHE KONTENPFÄNDUNG 395 (2014); also cf. Tanja

represent an **indispensable tool** for **preventing the transfer or withdrawal of funds** held by the debtor (especially in a bank account). Without such measures, the subsequent enforcement of the creditor's claim against the debtor in many cases becomes substantially more difficult – even more so if the debtors' funds are located in a different Member State.³

In recent years, however, the European legislator has taken important steps to **overcome these shortcomings**. The **recast of the Brussels I Regulation**⁴ (now called Brussels Ia Regulation;⁵ applicable since 10 January 2015) not only enlarges the bandwidth of enforceable **national interim measures** (even *ex parte* measures can now be enforced under certain circumstances)⁶ but also facilitates the actual enforcement by abolishing the exequatur procedure.⁷ On the other hand, the entirely new **European Account Preservation Order Regulation**⁸ establishes a genuine European procedure for creating provisional measures enabling the creditor to obtain a European account preservation order and preventing the withdrawal or transfer of funds held by the debtor in a bank account in a Member State.⁹ This new Regulation became effective on 18 January 2017 (Art. 54 EAPO Regulation).¹⁰

This paper provides a comparative analysis of these two new and rather distinct instruments for European creditors. Thereby it evaluates the rules on **preconditions, legal remedies** and the **different effects** of national interim measures that shall be recognised and enforced within the Brussels Ia regime and the new EAPO. The paper mainly seeks to answer the following questions:

- a) How do the two Regulations differ in scope regarding provisional account preservation measures?
- b) To what extent do the new Regulations provide a **surprise effect** concerning the preservation of bank accounts?
- c) What are the differences in **effect** between a European Account Preservation Order and an interim measure to be enforced according to the Brussels Ia Regulation?

Domej, *Internationale Zwangsvollstreckung zwischen Territorialitätsprinzip, Gläubigerinteressen und Schuldnerschutz*, in DIE ANERKENNUNG IM INTERNATIONALEN ZIVILPROZESSRECHT – EUROPÄISCHES VOLLSTRECKUNGSRECHT 109, 110–115 (Burkhard Hess ed., 2014); Claudia Reith, *Wissenswertes zur Europäischen Kontenpfändungsverordnung*, 2016 ECOLX 780, 780.

3 Nils Harbeck, *Ein Entwurf! Zum Vorschlag einer Europäischen Verordnung zur vorläufigen Kontenpfändung in grenzüberschreitenden Verfahren*, 15 ZEITSCHRIFT FÜR DAS GESAMTE INSOLVENZRECHT 805, 805 (2012); Hubertus Schumacher & Barbara Köllensperger, *Die „Europäische Kontenpfändung“ und der Schutz des Unternehmens – Gibt es noch Anpassungsbedarf am Weg zum „fair trial“?* 136 JURISTISCHE BLÄTTER 413, 413 (2014).

4 Council Regulation 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1.

5 Regulation 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), 2012 O.J. (L 351) 1.

6 Reinhold Geimer, *Das Anerkennungsregime der neuen Brüssel I-Verordnung (EU) Nr 1215/2012*, in FESTSCHRIFT FÜR HELLWIG TORGLER 311, 328 (Hanns Fitz et al. eds., 2013).

7 REINHOLD GEIMER, INTERNATIONALES ZIVILPROZESSRECHT ¶ 3174b–3174e (7th ed. 2015).

8 Regulation 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order Procedure to Facilitate Cross-Border Debt Recovery in Civil and Commercial Matters, 2014 O.J. (L 189) 59.

9 Tanja Domej, *Das Rechtsbehelfsverfahren bei der europäischen vorläufigen Kontenpfändung*, in FESTSCHRIFT FÜR DAPHNE-ARIANE SIMOTTA 129, 129 (Reinhold Geimer et al. eds., 2012); Nunner-Krautgasser, *supra* note 2, at 133; Reith, *supra* note 2, at 781.

10 The economic analysis of the EAPO Regulation shows that the introduction of this instrument will encourage the full use of the EU internal market, debtors' solvency, and recovery of debts. On the other hand, unjustified orders will create a number of harmful externalities to creditors, national authorities, and financial institutions; cf. Nicolas Kyriakides, *An Economic Analysis of the European Commission's Proposal for a European Account Preservation Order* (2013), available at http://www.virtusinterpress.org/IMG/pdf/10-22495_rgc3i4art5.pdf (last visited Aug. 14, 2017).

II. Recognition and Enforcement of Interim Measures according to Brussels Ia

A. Preconditions and Legal Remedies

1. Requirements for the Recognition and Enforcement of a Provisional Measure

The recognition and enforcement of judgments issued in other Member States is regulated in Chapter III of the Brussels Ia Regulation. For the purposes of Chapter III, the term judgment includes provisional, including protective, measures ordered by a court or tribunal which, by virtue of this Regulation, has jurisdiction as to the substance of the matter. However, it does not include provisional measures ordered by a court or tribunal without the defendant being summoned to appear, unless the judgment containing the measure is served on the defendant prior to enforcement (Art. 2 point a subpara. 2 Brussels Ia Regulation). This means that – contrary to previous case law¹¹ on Article 32 Brussels I Regulation – there is **no longer any absolute requirement for a contradictory proceeding**.¹² However, the suggested¹³ inclusion of provisional measures that were issued without prior service on the defendant (if the defendant has the right to subsequently challenge the measure under the national law of the Member State of origin) did not make it into the Brussels I recast.¹⁴ Instead, if the defendant was not summoned prior to the decision making, he or she at least has to be served with the decision prior to enforcement in a different Member State. This mechanism ensures the right to a fair hearing but comes at the cost of a far lower surprise effect of the provisional measure.¹⁵ According to Recital 33 of the Brussels Ia Regulation, however, this restriction does not preclude the recognition and enforcement of such measures under national law. Since the Brussels Ia Regulation now **explicitly regulates ex parte provisional measures** (Art. 2 point a subpara. 2 Brussels Ia Regulation; unlike previously Art. 32 Brussels I Regulation), some authors argue that more favourable¹⁶ bilateral treaties are no longer applicable.¹⁷ Others maintain that, on the basis of Recital 33 Brussels Ia Regulation, *ex parte* provisional measures can still be recognised and enforced according to domestic law.¹⁸

The jurisdiction regime of the Brussels Ia Regulation (as well as its precedents) applies only to **cross-border cases**.¹⁹ With regard to **recognition and enforcement**, Articles 36 and 39 Brussels Ia Regulation clearly state that a judgment given in a Member State shall be recognised and en-

11 Case C-125/79, *Denilauler v. Couchet Frères*, ECLI:EU:C:1980:130.

12 Burkhard Hess, in *EU-ZIVILPROZESSRECHT* Art. 2 EuGVVO ¶ 12–13 (Peter Schlosser & Burkhard Hess eds., 4th ed. 2015); Stefan Leible, in *1 EUROPÄISCHES ZIVILPROZESS- UND KOLLISIONSRECHT EUZPR/EUIPR* Art. 2 Brüssel Ia-VO ¶ 15 (Thomas Rauscher ed., 4th ed. 2016).

13 Cf. *Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial matters (Recast)*, COM (2010) 748 final (Dec. 14, 2010) Art. 2.

14 Tanja Domej, *Ein wackeliger Balanceakt – Die geplante Verordnung über die Europäische vorläufige Kontenpfändung*, 21 *ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT* 496, 516–517 (2013); Xandra Kramer, *Cross-Border Enforcement and the Brussels I-Bis Regulation: Towards A New Balance Between Mutual Trust and National Control over Fundamental Rights*, 60 *NETHERLANDS INTERNATIONAL LAW REVIEW* 343, 362 (2013).

15 Leible, *supra* note 12, at Art. 2 Brüssel Ia-VO ¶ 15.

16 Such treaties existed, for example, between Austria and Germany, Austria and Norway or Austria and Sweden.

17 Thomas Garber, *Einstweiliger Rechtsschutz nach der neuen EuGVVO*, 12 *ECOLEX* 1071, 1074 (2013); Georg Kodek, in *EUROPÄISCHES GERICHTSSTANDS- UND VOLLSTRECKUNGSRECHT – BRÜSSEL IA-VERORDNUNG (EUGVVO 2012) UND ÜBEREINKOMMEN VON LUGANO 2007* Art. 36 EuGVVO ¶ 20 (Dietmar Czernich et al. ed., 4th ed. 2015).

18 Martin Illmer, Arnaud Nuyts & Jonathan Fitchen, *Scope and Definitions*, in *THE BRUSSELS I-REGULATION RECAST* 55, 103–104 (Andrew Dickinson & Eva Lein eds., 2015).

19 Ansgar Staudinger, in *1 EUROPÄISCHES ZIVILPROZESS- UND KOLLISIONSRECHT EUZPR/EUIPR* Einl Brüssel Ia-VO ¶ 19 (Thomas Rauscher ed., 4th ed. 2016); Georg Kodek, in *5/1 KOMMENTAR ZU DEN ZIVILPROZESSGESETZEN* Art. 1 EuGVVO ¶ 18 (Hans W. Fasching & Andreas Konecny eds., 2nd ed. 2008).

forced in the other Member States without any special procedure being required.²⁰ Recognition and enforcement do **not require any further cross-border relation**.²¹

One of the biggest changes introduced by the Brussels I recast was the **abolition of the exequatur procedure**.²² Thus, any judgment given in a Member State, which is enforceable in that Member State, shall be enforceable in the other Member States **without any declaration of enforceability** being required (Art. 39 Brussels Ia Regulation). Instead, for the purposes of **enforcement** in a Member State of a judgment given in another Member State ordering a **provisional measure**, the applicant only needs to provide the competent enforcement authority with the following (Art. 42 para. 2 Brussels Ia Regulation):

1. a **copy of the judgment** which satisfies the conditions necessary to establish its authenticity;
2. the **certificate issued pursuant to Art. 53**, containing a description of the measure and certifying that:
 - a. the court has **jurisdiction** as to the **substance of the matter**;
 - b. the judgment is **enforceable in the Member State of origin**; and
3. where the measure was ordered without the defendant being summoned to appear, proof of service of the judgment.

2. Legal Remedies

The national provisional measures that target the debtor's bank account can, of course, be contested with **national legal remedies** in the Member State of origin. Furthermore, **on the application of any interested party**, the recognition (Art. 45 para. 1 Brussels Ia Regulation) and the enforcement (Art. 46 Brussels Ia Regulation) of a judgment **shall be refused**:²³

- a. if such recognition is manifestly contrary to public policy ("**ordre public**") in the Member State addressed;
- b. where the judgment was given in default of appearance, if the **defendant was not served with the document which instituted the proceedings** or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;
- c. if the judgment is **irreconcilable with a judgment given between the same parties** in the Member State addressed;
- d. if the judgment is **irreconcilable with an earlier judgment given in another Member State** or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed; or
- e. if the **judgment conflicts** with:

²⁰ Heinrich Dörner, in ZIVILPROZESSORDNUNG Art 39 EuGVVO ¶ 1 (Ingo Saenger ed., 7th ed. 2017).

²¹ Kodek, *supra* note 19, at Art. 1 EuGVVO ¶ 18.

²² Barbara Köllensperger, *Die neue Brüssel Ia-Verordnung: Änderungen bei der Anerkennung und Vollstreckung*, in 4 EUROPÄISCHES ZIVILVERFAHRENSRECHT IN ÖSTERREICH – DIE NEUE BRÜSSEL IA-VERORDNUNG UND WEITERE REFORMEN 37, 50 (Bernhard König & Peter G. Mayr eds., 2015); Peter Mankowski, in 1 EUROPÄISCHES ZIVILPROZESS- UND KOLLISIONSRECHT EuZPR/EUIPR Vorbem zu Art. 39 ff Brüssel Ia-VO ¶ 15 (Thomas Rauscher ed., 4th ed. 2016).

²³ Cf. Kodek, *supra* note 17, at Art. 36 EuGVVO ¶ 6–66; Boris Schinkels, in ZPO KOMMENTAR Art. 45 EuGVO ¶ 1 et seq. (Hanns Prütting & Markus Gehrlein eds., 8th ed. 2016).

- i. Sections 3, 4 or 5 of Chapter II where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee was the defendant; or
- ii. Section 6²⁴ of Chapter II.

Such an **application** shall be submitted to the court which the Member State concerned has communicated to the Commission pursuant to Article 75 point a Brussels Ia Regulation (Art. 47 para. 1 and Art. 45 para. 4 Brussels Ia Regulation). In **Austria**, the competent court is the respective lower regional court (*Bezirksgericht*) that is competent for the enforcement of that very judgement.²⁵ **Slovenia** declared the district courts (*okrožna sodišča*) to be competent to decide on an application. The application is generally carried out according to national civil procedure law (Art. 47 para. 2 Brussels Ia Regulation); however, Art. 47 para. 3 and 4 Brussels Ia Regulation contain some special provisions regarding the documents that need to be provided as well as the (general) prohibition to require the applicant to have a postal address in the Member State addressed.

B. Implementation and Effects of the Interim Measure

1. Implementation and Effects according to Brussels Ia

It is well established²⁶ that a foreign judgment which has been recognised (according to Art. 36 Brussels Ia Regulation or the previously applicable provisions) "*must in principle have the same effects in the State in which enforcement is sought as it does in the State in which the judgment was given*".²⁷ Any other solution would imply that a judgment could have different effects in the Member State of origin and the Member State of enforcement, thereby obstructing the free movement of judgments.²⁸ The free circulation of judgments, however, is one of the primary goals of the Brussels Ia Regulation,²⁹ and the (spatial) **extension of the effects** of the recognised decision is unanimously considered the most appropriate instrument to reach this goal.³⁰ The limit for the extension is the **ordre public** of the Member State of recognition.³¹

The Brussels Ia Regulation does not contain any specific provisions on the **implementation** of a foreign interim measure. It therefore has to be carried out in accordance with national (enforcement) law. However, it is possible for it to contain a measure or an order **unknown in the law of the Member State addressed**. In this case that measure or order shall, to the extent possible, be adapted to a measure or an order known in the law of that Member State which has equivalent effects attached to it and which pursues similar aims and interests (Art. 54 para. 1 subpara. 1 Brus-

24 This section contains rules on exclusive jurisdiction.

25 Thomas Garber, in INTERNATIONALES ZIVILVERFAHRENSRECHT Art. 47 EuGVVO ¶ 1 (Alfred Burgstaller et al. eds., 2015); Kodek, *supra* note 17, at Art. 47 EuGVVO ¶ 1; Köllensperger, *supra* note 22, at 58.

26 For previously dominant theories cf. Leible, *supra* note 12, at Art. 36 Brüssel Ia-VO ¶ 4.

27 Case C-145/86, *Hoffmann/Krieg*, 1988, ECLI:EU:C:1988:61; Hess, *supra* note 12, at Art. 36 EuGVVO ¶ 2-3.

28 Leible, *supra* note 12, at Art. 36 Brüssel Ia-VO ¶ 4.

29 Cf. Recitals 1, 6, 27 and 33; Dörner, *supra* note 20, at Vorbem zu Art. 36-57 EuGVVO ¶ 1.

30 THOMAS GARBER, EINSTWEILIGER RECHTSSCHUTZ NACH DER EUGVVO – DIE INTERNATIONALE ZUSTÄNDIGKEIT FÜR DIE ERLASSUNG EINSTWEILIGER MAßNAHMEN UND DEREN ANERKENNUNG UND VOLLSTRECKUNG NACH DER EUGVVO 270 (2011); Leible, *supra* note 12, at Art. 36 Brüssel Ia-VO ¶ 4; Bettina Nunner-Krautgasser, *Die Anerkennung und Vollstreckung englischer freezing injunctions in Österreich*, 58 ÖSTERREICHISCHES BANKARCHIV 794, 797 (2010).

31 Leible, *supra* note 12, at Art. 36 Brüssel Ia-VO ¶ 4.

sels la Regulation).³² Yet, such an adaptation must not result in effects going beyond those provided for in the law of the Member State of origin (Art. 54 para. 1 subpara. 2 Brussels Ia Regulation).³³

2. Austrian Provisional Measures

In Austrian civil procedure law, interim measures (*Einstweilige Verfügungen*) are set forth in §§ 378–402 of the Austrian Enforcement Code (EO³⁴). § 379 EO provides for **restraining orders to secure monetary claims**; § 379 para. 3 subpara. 3 EO holds some special provisions for cases where **third-party debtors** (for example banks) are involved. Such a restraining order is enforced by issuing a so-called double order: the debtor is served a **freezing order**, whereas the third-party debtor is served an **order prohibiting payment** and any other action that might impede the successful enforcement of the affected claim.³⁵ The debtor as well as the third-party debtor **can, but do not need to be, heard** before the provisional measure is issued.³⁶ Yet, whoever was not heard before the provisional measure was issued is granted a special (but not suspensive) objection (*Widerspruch*) in order to ensure their right to be heard (§ 397 EO). The third-party prohibition has **no effect in rem**.³⁷ Hence, the creditor does not acquire a security right (with an *erga omnes* effect) regarding the affected claim. Nevertheless, according to § 385 para. 3 EO, the third-party debtor is **liable to pay damages** caused by the disregard of the prohibition.

3. Slovenian Provisional Measures

In Slovenia, an **interim order** may be issued before any judicial procedure, during the procedure, as well as after the procedure, until the enforcement is carried out. Unlike with respect to preliminary measures, the court is free to issue, on the proposal of the creditor, any kind of interim measure. Although the law explicitly identifies only a few possible types of interim injunctions, the court may issue any order proposed by the creditor which could achieve the purpose of such preservation (Art. 271 of the Civil Claim Act (ZIZ³⁸)). The interim measure instructs the bank to refuse payment from the debtor's account to the debtor or another person on the debtor's instructions of the sum of money on which the interim order has been placed (Art. 271 para. 1 point 4. ZIZ). The bank may freeze the amount of money ordered in the court decree or transfer the money to a special bank account.³⁹ If the bank violates the prohibition to dispose of the money, it may be held liable for damages.

In Slovenia, a court's decree of interim order – if issued in a civil or any other proceeding – has the **effect of an enforcement decree** (Art. 286 ZIZ); however, it can only interfere with the sphere of the debtor but not of third parties.⁴⁰ For example, the issuing of an interim measure

32 Cf. Dörner, *supra* note 20, at Art. 54 EuGVVO ¶ 1; Leible, *supra* note 12, at Art. 54 Brüssel Ia-VO ¶ 7.

33 Dörner, *supra* note 20, at Art. 54 EuGVVO ¶ 2.

34 "Exekutionsordnung".

35 Hansjörg Sailer, in EXEKUTIONSORDNUNG – KOMMENTAR § 379 EO ¶ 23 (Alfred Burgstaller & Astrid Deixler-Hübner eds., 2016).

36 MATTHIAS NEUMAYR & BETTINA NUNNER-KRAUTGASSER, EXEKUTIONSRECHT 304–305 (3rd ed. 2011); WALTER RECHBERGER & PAUL OBERHAMMER, EXEKUTIONSRECHT ¶ 521 (5th ed. 2009), 521.

37 Neumayr & Nunner-Krautgasser, *supra* note 35, at 293; Rechberger & Oberhammer, *supra* note 35, at ¶ 482; Sailer, *supra* note 34, at § 379 EO ¶ 24; also cf. Erich Kodek, in KOMMENTAR ZUR EXEKUTIONSORDNUNG § 379 EO ¶ 14 (Peter Angst & Paul Oberhammer eds. 2015).

38 "Zakon o izvršbi in zavarovanju".

39 NEŽA POGORELČNIK VOGRINC, ZAČASNE ODREDBE V CIVILNIH SODNIH POSTOPKIH 251 (2015).

40 VESNA RIJAVEC, CIVILNO IZVRŠILNO PRAVO 272 (2003).

does not lead to a registered charge on the subject of insurance. Therefore, an interim order prohibiting the disposal of the subject of preservation does not prevent legal interventions of other parties in the same subject (e.g. proceedings of enforcement). As a **consequence of the debtor's violation** of such an order, the creditor therefore may challenge detrimental dispositions only in accordance with law of obligations.⁴¹

III. The European Account Preservation Order

A. Preconditions, Procedural Aspects and Legal Remedies

1. Requirements for the Issuing of an EAPO

The European Account Preservation Order (EAPO) is a **genuine European interim measure** aiming at facilitating the recovery of cross-border claims for citizens, seeking to preserve funds and recover bad debts.⁴² It is available for pecuniary claims, if the case concerns a civil and commercial matter (Art. 2 para. 1 EAPO Regulation). **"Claims"** are defined as claims for payment of a specific amount of money that have fallen due or claims for payment of a determinable amount of money arising from a transaction or an event that has already occurred (Art. 4 para. 5 EAPO Regulation). Recital 12 explains that those claims include claims in "tort, delict and quasi-delict"; the Regulation therefore applies to most civil monetary claims.⁴³

The EAPO is only available in **cross-border cases** (Art. 2 para. 1 EAPO Regulation). A cross-border case is one in which the bank account or accounts to be preserved by the Preservation Order are maintained in a Member State other than:

- the Member State of the court seized with the application for the Preservation Order pursuant to Article 6 (Art. 3 para. 1 point a EAPO Regulation),
- or the Member State in which the creditor is domiciled (Art. 3 para. 1 point b EAPO Regulation).

Since only one of the above requirements needs to be met in order to constitute a cross-border case, the only "intra-European" constellation in which the Regulation does not apply is where the **creditor's domicile, the seized court and the bank account to be preserved** are situated in the same Member State.⁴⁴ However, the Austrian legislator created a special provision making the rules of the Regulation also applicable in cases where all of the above elements are located in Austria (cf. § 422 para. 3 EO).⁴⁵

The EAPO is available **before** the initiation of proceedings on the substance of the matter, **during** such proceedings until the judgment is adopted, **and even after** a judgment against the debtor

41 Vesna Rijavec, *Cross-border effects of provisional measures in civil and commercial matters*, in CROSS-BORDER CIVIL PROCEEDINGS IN THE EU 79, 91 (Vesna Rijavec & Tjaša Ivanc eds. 2012).

42 Reith, *supra* note 2, at 781. In 2004, Hess conducted a study analysing how the transparency of a debtor's assets, the attachment of bank accounts, provisional enforcement, and protective measures contributed to the enforcement of a judgment. In this study, Hess introduces the idea of a European Protective Order for cross-border garnishment of bank accounts which could supplement the legal protection of creditors provided by the Brussels Regulation. BURKHARD HESS, STUDY NO. JAI/A3/2002/02 ON MAKING MORE EFFICIENT THE ENFORCEMENT OF JUDICIAL DECISIONS WITHIN THE EUROPEAN UNION: TRANSPARENCY OF DEBTORS ASSETS – ATTACHMENT OF BANK ACCOUNTS – PROVISIONAL ENFORCEMENT AND PROTECTIVE MEASURES (2004), available at http://ec.europa.eu/civiljustice/publications/docs/enforcement_judicial_decisions_180204_en.pdf (last visited Mar. 13, 2017).

43 FRANZ MOHR, DIE VORLÄUFIGE KONTENPFÄNDUNG ¶ 18–43 (2014).

44 Mohr, *supra* note 43, at ¶ 48.

45 More extensively on this topic Nina Martin, *Die europäische und die österreichische vorläufige Kontenpfändung*, 3 JURISTISCHE AUSBILDUNG UND PRAXISVORBEREITUNG 163, 166–167 (2016/2017).

is obtained (Art. 5 EAPO Regulation). In order to apply for a Preservation Order, the creditor uses a standard form and provides the information requested in Art. 8 EAPO Regulation. The procedure is generally written and based on the information and evidence provided by the creditor (Art. 9 EAPO Regulation). The **debtor shall not be notified** of the application for a Preservation Order or be heard prior to the issuing of the Order (*ex parte* procedure; Art. 11 EAPO Regulation).

An EAPO may be issued when two conditions are present: first, an **urgent need for an EAPO**, because there is a **real risk** that, without such a measure, the subsequent enforcement of the creditor's claim against the debtor will be impeded or made substantially more difficult (Art. 7 para. 1 EAPO Regulation);⁴⁶ second, the creditor's **likeliness to succeed on the substance of his claim** against the debtor. However, the second requirement only needs to be fulfilled if the creditor has not yet obtained, in a Member State, a judgment, court settlement or authentic instrument requiring the debtor to pay the creditor's claim (Art. 7 para. 2 EAPO Regulation).

2. Procedural Aspects

Chapter 2 governs the entire procedure for issuing an EAPO; this paper, however, seeks to highlight only two procedural points that are of interest for our comparison. One is that the **debtor shall not be notified** of the application for a Preservation Order or be heard prior to the issuing of the Order (Art. 11 EAPO Regulation). This shall ensure the **surprise effect** of the Preservation Order, helping to make it a useful tool for a creditor trying to recover debts from a debtor in cross-border cases (Recital 15 EAPO Regulation).

Moreover, in accordance with the recent developments in European civil procedure law, the EAPO shall be **recognised** in other Member States without any special procedure being required and is **enforceable** without a declaration of enforceability (Art. 22 EAPO Regulation). In return for these benefits to the creditor, the EAPO Regulation includes a number of safeguards for the debtor, such as the obligation of a creditor to provide security (Art. 12 EAPO Regulation), a creditor's liability for damage (Art. 13 EAPO Regulation), and numerous remedies against the EAPO.

3. Legal Remedies

Art. 32–39 of the EAPO Regulation contain a rather **complex system of legal remedies**.⁴⁷ Some legal remedies are available to the **creditor only** (Art. 35 para. 4 EAPO Regulation); some apply **only to the debtor** in the Member State of origin (Art. 33 EAPO Regulation) or in the Member State of enforcement (Art. 34 EAPO Regulation), whereas some can be invoked by **both the debtor and the creditor** (Art. 35 para. 1 and 3 EAPO Regulation). The procedure for these remedies is laid down in Article 36 EAPO Regulation. Seeking to compare the Brussels Ia Regulation and the EAPO Regulation, the legal remedies **provided for the debtor in the Member State of enforcement** are highlighted below.

46 As the Regulation does not detail how "urgent need" and "real risk" should be proved by a creditor and measured by a court, there is a concern that different interpretations of these prerequisite standards will arise throughout the EU Member States; cf. Mirela Župan, *Cross-border recovery of maintenance taking account of the new European Account Preservation Order (EAPO)*, 16 ERA FORUM 163, 172 (2015).

47 For an overview cf. Cranshaw, *supra* note 2, at 409–410; Domej, *supra* note 9, at 130–132; Mohr, *supra* note 43, at ¶ 361–448.

When the debtor files an **application** to the competent court or enforcement authority in the Member State of enforcement, the enforcement of the EAPO shall be (Art. 34 EAPO Regulation):

- a. **limited** on the grounds that certain amounts held in the account should be exempt from seizure in accordance with Art. 31 para. 3 EAPO Regulation, or that amounts exempt from seizure have not, or not correctly, been taken into account in accordance with Art. 31 para. 2 EAPO Regulation (para. 1 point a).
- b. **terminated** on the grounds that:
 - i. the account preserved is **excluded from the scope** of the Regulation pursuant to Art. 2 para. 3 and 4 EAPO Regulation (para. 1 point b subpoint i);
 - ii. the **enforcement** of the enforcement title which the creditor was seeking to secure by means of the EAPO has been **refused** in the Member State of enforcement (para. 1 point b subpoint ii) or its enforceability has been **suspended** in the Member State of origin (para. 1 point b subpoint iii);
 - iii. Art. 33 para. 1 points b, c, d, e, f or g EAPO Regulation apply (in that case Art. 33 para. 3, 4 and 5 apply as well). Hence, **many** of the **grounds for a revocation or modification** of the EAPO **in the Member State of origin** (for example if there was a flaw in the service or translation of relevant documents; points b and c can also be raised as grounds for the termination of enforcement in the Member State of enforcement;⁴⁸
 - iv. it is manifestly **contrary to the public policy (*ordre public*)** of the Member State of enforcement (para. 2).

Either party has the **right to appeal** against the decision of the court (Art. 37 EAPO Regulation). Also, upon application by the debtor the competent court or authority of the Member State of enforcement **may terminate the enforcement** of the EAPO if the debtor **provides security** (or an alternative assurance in a form acceptable under the law of the Member State of enforcement) in the amount preserved in that Member State (Art. 38 para. 1 point b EAPO Regulation).

B. Implementation and Effects of the European Account Preservation Order

1. Implementation of the EAPO

The rules for the **implementation** of the EAPO are laid down in Art. 24 EAPO Regulation. According to Art. 24 para. 2, a bank that was served an EAPO shall ensure that the amounts specified in this order (with the exception of the amounts stated in Art. 31 EAPO-Regulation) are **preserved**. The bank can do so:

- by **ensuring** that that **amount is not transferred or withdrawn** from the account or accounts indicated in the order or identified pursuant to para. 4 (point a);⁴⁹ or
- where national law so provides, by **transferring** that amount to an **account dedicated for preservation purposes** (point b).

48 Martin Trenker, *Vorläufige Kontenpfändung: Überblick und ausgewählte Rechtsfragen*, in 4 EUROPÄISCHES ZIVILVERFAHRENSRECHT IN ÖSTERREICH – DIE NEUE BRÜSEL IA-VERORDNUNG UND WEITERE REFORMEN 129, 149 (Bernhard König & Peter G. Mayr eds., 2015).

49 Indeed, in practice, claimants regard bank accounts as priority targets for blocking debtors' assets. When this measure is in effect, it represents a delicate situation for the debtor whose funds in the bank account are important mainly for his or her daily living or business purposes. NICOLAS KYRIAKIDES, A EUROPEAN-WIDE PRESERVATION ORDER: HOW THE COMMON LAW PRACTICE CAN CONTRIBUTE (2014), available at https://www.harriskyriakides.law/assets/pdf_files/EAPO-EUArticle.pdf (last visited Aug. 14, 2017).

An **account according to point b** could be held by either the competent enforcement authority, the court, the bank with which the debtor holds his or her account or a bank designated as a coordinating entity for the preservation in a given case (Recital 26 EAPO Regulation). Austrian civil procedure law, however, does not provide for an account dedicated for preservation purposes; the Austrian bank therefore has to implement the EAPO according to Art. 24 para. 2 point a EAPO Regulation.⁵⁰ In Slovenia, a bank may transfer the amount to a special account for preservation purposes indicated in the EAPO.⁵¹

If the EAPO was implemented according to Art. 24 para. 2 point a EAPO Regulation, upon the **request** of the debtor, the **bank is authorised to release funds** preserved and **transfer them to the account of the creditor** for the purposes of paying the creditor's claim (Art. 24 para. 3 EAPO Regulation). However, in such a case three cumulative conditions need to be met:

1. such authorisation of the bank is specifically indicated in the order according to point j of Art. 19 para. 2 (point a of Art. 24 para. 3 EAPO Regulation);
2. the law of the Member State of enforcement allows for such release and transfer (point b of Art. 24 para. 3 EAPO Regulation); and
3. there are no competing orders with regard to the account concerned (point c of Art. 24 para. 3 EAPO Regulation).

Austrian civil procedure law entails no special provision reflecting Art. 24 para. 3 point b EAPO Regulation. However, there is **no rule opposing such a fund release**; it is therefore considered admissible if the creditor explicitly requests so in the application.⁵²

Subject to the provisions of Chapter 3 of the Regulation, the EAPO shall be **enforced in accordance with the procedures** applicable to the enforcement of equivalent national orders **in the Member State of enforcement** (Art. 23 para. 1 EAPO Regulation). This subsidiary application of national provisions reflects an attempt to **build on the methods and structures already in place** for the enforcement and implementation of equivalent national orders in the Member State of enforcement (Recital 23 EAPO Regulation). In **Austrian law**, the relevant provisions relating to the interim measures are laid down in §§ 378–402 EO.⁵³ In Slovenia, equivalent orders are interim measures under the Slovenian enforcement law (Art. 266–279 ZIZ).⁵⁴

2. Effects of the EAPO

Evidently, one of the main effects of the EAPO is that it permits the bank to act according to the EAPO, while also making it **liable** for failure to comply with its obligations under the EAPO Regulation. This liability, however, is governed by the national law of the Member State of enforcement (Art. 26 EAPO Regulation), thus the consequences for a disregard of the EAPO can vary amongst the Member States.

50 Mohr, *supra* note 43, at ¶ 301.

51 Pogorelčnik Vogrinc, *supra* note 39, at 251.

52 Mohr, *supra* note 43, at ¶ 314.

53 *Id.*, at ¶ 291.

54 There is a new amendment of enforcement law (amendment ZIZ-L) in the legislative procedure which explicitly states that for the procedure according to the EAPO Regulation, the provisions on interim measures shall be applied.

Additionally, an EAPO can have an effect on other creditors: Art. 32 EAPO Regulation states that an EAPO **shall have the same rank, if any, as an equivalent national order in the Member State of enforcement** (Art. 32 EAPO Regulation).⁵⁵ Pursuant to Recital 28 of the Regulation, if under national law certain enforcement measures have **priority over preservation measures**, the same priority should be given to them in relation to preservation orders. Furthermore, Recital 28 states that **if there are national in personam orders**, those orders should be considered as the “equivalent national order” for the purpose of this Regulation. Art. 32 EAPO Regulation therefore ensures that the EAPO fits into the national system of provisional measures and enforcement law by determining what other national (or even foreign, such as the interim measures that fall within the Brussels Ia regime) provisional measures, enforcement acts or even contractual obligations have priority over the EAPO. As a result, the EAPO has a very similar effect for the **debtor** and the **bank** in every Member State, whereas the effect (the rank) for **third persons** largely depends on the rank of the instruments provided by national law. For the purpose of transparency, the Member States shall communicate to the Commission whether any ranking is conferred on equivalent national orders under national law (Art. 50 para. 1 point k EAPO Regulation).

There was a debate in **Austrian literature** on whether an “equivalent national order” should be understood as an interim measure (*Einstweilige Verfügung* under § 379 EO) or a security enforcement (*Exekution zur Sicherstellung* under §§ 370–377 EO).⁵⁶ The distinction is particularly important in this case, because an interim measure does not have an *in rem* effect, whereas a security enforcement creates an actual lien (granting an *in rem* effect), giving it priority over subsequent enforcement acts from other creditors. The Austrian legislature reacted by creating an explicit provision in § 422 EO which stipulates that the **rules on interim measures shall generally be applicable** where the EAPO Regulation contains no deviating provisions (§ 422 para. 1 EO). However, where the EAPO is issued **after** the creditor has obtained a judgment, court settlement or authentic instrument, the service on the bank **shall create an executive lien** (§ 422 para. 2 EO).

In **Slovenia**, the legislature appears to follow the Austrian example. Under the proposed amendment of the Slovenian enforcement law, the rules on interim measures will apply unless the EAPO Regulation or national provisions, in the chapter that implements the regulation, provide otherwise. Where the EAPO is **issued after the creditor has obtained a court decision** or the decision of another authority which is not yet enforceable, the rules on the preliminary measure (*predhodna odredba*) will be applicable. A court may specify attachment of a sum of money to the debtor’s account at the bank (Art. 260 para. 1 point 4 ZIZ). Also, as a precautionary measure, the ZIZ allows securing by establishing a lien on the collateral object.⁵⁷ If the EAPO is issued **before the creditor has obtained a court decision** (Art. 267 ZIZ), the provisions on the interim measure (*začasna odredba*) shall be applicable. However, the interim measure does not give basis for the establishment of a lien or the right to a priority for the creditor. A court’s decree blocking funds can **only interfere with the sphere of the debtor**. As soon as it comes into effect, the bank cannot legally fulfil any obligations to the debtor (Art. 271 para. 1 point 4 ZIZ) and

55 In the Proposal for a Regulation Creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters this regulation was proposed with slightly different text, i.e. “The EAPO confers the same rank as an instrument with equivalent effect under the law of the Member State **where the bank account is located**”.

56 Mohr, *supra* note 43, at ¶ 311–312; Trenker, *supra* note 48, at 151–152.

57 Vesna Rijavec, *Začasne odredbe v arbitražnem postopku*, 1 SLOVENSKA ARBITRAŽNA PRAKSA 9, 12 (2012), available at http://www.sloarbitration.eu/Portals/0/Prispevki/revijSA_2012_01_Rijavec.pdf (last visited Mar. 13, 2017).

can be held liable for paying compensation to the creditor. The preserved amount remains frozen until the bank receives the decision on its termination. Until then, the amount preserved is secured either by freezing the debtor's account or transferring this amount to a special account. However, the effect of freezing the debtor's account **does not necessarily provide complete protection** for the creditor. The funds may be transferred in an enforcement procedure where another creditor requires repayment of the claim from the debtor's assets. The issuing of an interim order to freeze the debtor's account does not, therefore, result in the formation of a lien on the subject of the insurance. If the conditions for the preliminary measure are met, the creditor may not apply for interim measures. However, the preliminary measure must achieve the same purpose in securing the claim as the interim measure (Art. 269 ZIZ). The preliminary measure according to the Slovenian law may be compared with the Austrian *Exekution zur Sicherstellung*, which means that the EAPO will have priority over subsequent enforcement acts from other creditors.

IV. Comparison of the Legal Instruments – Discussion

The following section seeks to highlight some of the **most important differences** between the Brussels Ia Regulation and the EAPO Regulation regarding effective account preservation in other European Member States. Evidently, the key distinction is that the Brussels Ia Regulation only regulates the **recognition and enforcement** of national (for our purpose: preliminary) titles, whereas the EAPO Regulation creates a **genuine European interim measure**. However, there are also several other, slightly more subtle divergences between these two instruments that are worth noting.

The first point of interest relates to the **different scopes** of the two regulations. As far as **recognition and enforcement** go, both regulations – in their respective Chapter III – enable the free movement of provisional account preservation measures by generally granting enforceability to national measures (Art. 39 Brussels Ia Regulation) and to an EAPO (Art. 22 EAPO Regulation) without the need for a prior declaration of enforceability. As far as the **issuing of the actual provisional measure** is concerned, Chapter II of the Brussels Ia Regulation “only” contains rules on international (and in some parts territorial) jurisdiction, while Chapter 2 of the EAPO Regulation provides for an entire and genuine procedure on the issuing of a European Account Preservation Order. The divergent conceptions of what is to be regarded a **“cross-border case”**, the different **regimes of jurisdiction** as well as disparities in the **requirements for recognition and enforcement**, however, lead to a rather complex pattern of applicability of the two Regulations, as it shall be shown in the following example:

Example

A Slovenian creditor is suing an Austrian debtor at an Austrian court. He applies for an EAPO at this court according to Art. 6 EAPO Regulation. The requirement of a cross-border case is fulfilled if the creditor seeks to freeze a bank account in **Slovenia** (Art. 3 para. 1 point a EAPO Regulation) or in **Austria** (Art. 3 para. 1 point b EAPO Regulation) as well as in any other Member State (with the exception of the United Kingdom (Recital 50 EAPO Regulation) and Denmark (Recital 51 EAPO Regulation)). If the creditor seeks to freeze a bank account in **Austria**, he can also use the interim measures available in Austrian civil procedure law for this purpose (since the international jurisdiction for preliminary measures is automatically given when there is international

jurisdiction in the substance of the matter⁵⁸). A Slovenian interim measure (or an interim measure originating from another Member State), however, would not be recognised, since the issuing court did not have jurisdiction as to the substance of the matter (cf. Art. 2 point a sub-point 2 Brussels Ia Regulation). If the creditor wishes to freeze an account in **Slovenia**, he can – apart from an EAPO – also apply for an interim measure in a Slovenian court according to Slovenian law (Art. 35 Brussels Ia Regulation), or he can apply for an interim measure in Austria and enforce it in Slovenia if the requirements of Art. 42 para. 2 Brussels Ia Regulation are met.

While *ex parte* interim measures are now considered judgments according to Article 2 point 1 subpara. 2 Brussels Ia Regulation, they have to be **served on the defendant prior to the enforcement** of the measure,⁵⁹ thereby diminishing the effectiveness of the interim measure.⁶⁰ The EAPO, on the contrary, shall in any case be issued **without prior hearing** of the defendant (Art. 11 EAPO Regulation) in order to guarantee a surprise effect (Recital 15 EAPO Regulation). Therefore, if the creditor deems the surprise effect necessary to prevent the disappearance of the debtor's assets, the EAPO will in many cases constitute a **more efficient instrument** to reach this goal.⁶¹

Another important difference between the respective interim measures relates to their **implementation and effects**. The **implementation** of an EAPO is largely regulated in Chapter 3 of the EAPO Regulation; national law shall only apply subsidiarily (Art. 23 para. 1 EAPO Regulation). The implementation of an interim measure to be enforced according to the Brussels Ia Regulation, on the other hand, is governed purely by national law, as long as the latter guarantees that the measure has the same effects as in the Member State of origin. The **effects** of an EAPO are partly regulated in the EAPO Regulation; the rank of the EAPO, however, is determined by the rank of the closest national instrument in the **Member State of enforcement** (Art. 32 EAPO Regulation). In contrast, the effects of an interim measure to be enforced under the Brussels Ia Regulation are **mostly determined by the law of the Member State of origin**, although slight adaptations to the legal system of the Member State of enforcement are possible, if necessary (Art. 54 para. 1 Brussels Ia Regulation). This demonstrates that the appropriate choice of instruments can have a **significant impact** on the effects of the interim measure sought by the creditor. In practice, however, the debtor will often be less informed about the legal situation of the Member State of enforcement than about the one in the Member State of origin. This might make national interim measures appear more attractive than they actually are in comparison to an EAPO.

The last difference we seek to address relates to the respective **legal remedies in the Member State of enforcement**. According to both Regulations, the violation of the *ordre public* in the Member State of enforcement as well as irregularities in the serving on the debtor constitute grounds for a legal remedy. Moreover, the Brussels Ia Regulation contains only two additional grounds for refusal of recognition and enforcement: incompatibility with a previous judgment as well as the violation of special provisions on the jurisdiction (Art. 45 para. 1 Brussels Ia Regulation). The EAPO Regulation – as a compensation for the surprise effect of the EAPO – provides several more grounds for terminating, as well as for limiting, the account preservation (Art. 34 EAPO Regulation), including the majority of grounds for revoking it in the Member state of origin

58 Cf. Garber, *supra* note 30, at 73; Leible, *supra* note 12, at Art. 35 Brüssel Ia-VO ¶ 2.

59 Franz Mohr, *Neues im internationalen Exekutionsrecht – die Neufassung der EuGVVO (Brüssel-I VO)*, 2013 DER ÖSTERREICHISCHE RECHTSPFLEGER 32, 35.

60 Garber, *supra* note 17, at 1074.

61 Cf. Domej, *supra* note 14, at 516; Martin, *supra* note 45, at 167.

(Art. 34 para. 1 point b subpoint iv EAPO Regulation). Challenging a “foreign” interim measure (to be enforced according to the Brussels Ia Regulation) is thus **significantly more difficult** than contesting an EAPO in the Member State of enforcement.

V. Conclusion

The **efficiency** of legal interim measures for cross-border debt recovery⁶² in civil and commercial matters across Europe **was significantly increased** with the Brussels I recast and the EAPO Regulation. In particular, the new grounds for enforcing *ex parte* interim measures grant the creditor a certain **surprise effect** and thus provide a realistic chance to prevent the withdrawal or transfer of funds held by the debtor. The **effects** of an interim measure to be enforced within the Brussels Ia regime are mostly determined by the law of the Member State of origin, whereas the effects of an EAPO at least partly depend on the legal situation of the Member State of enforcement. The choice of the most suitable way to freeze the debtor’s bank accounts will therefore significantly vary from case to case.

62 There has been concern regarding cross-border recovery of debt collection shown in the professional environment; cf. Vesna Rijavec, Jorg Sladič & José Caramelo Gomes, *Introductory chapter, in SIMPLIFICATION OF DEBT COLLECTION IN THE EU 1, 1 et seq.* (Vesna Rijavec, Tjaša Ivanc & Tomaž Keresteš eds., 2014).