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The EAPO:
Icarus' Wings or Medusa's Gaze

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1. Introduction

A subtle action or a blunt blow? If you were the EU legislator, what would you choose in order to facilitate cross-border debt recovery in an age where debtors 'are able to move their assets in a blink of an eye into other accounts unknown to their creditors in another Member State[1], temporarily or permanently hindering creditors' efforts to find value? Would you design a fragile pair of wings just like the ones Icarus had, hence some sort of soft harmonization instrument, or would you draw up a more intrusive petrifying Medusa-like one, inclining more towards unification? What margin of national autonomy would you establish?

Time traveling to the past, 'the idea of establishing a European attachment procedure arose at the end of the 1990s' when the European Commission 'proposed to confine reflection [on a possible intervention in enforcement law] initially to the problem of banking seizures'.[2] Public debate was further enhanced in 2006 due to the Commission's Green Paper, but it wasn't until 2009 that the talks turned into action, namely into a real priority of the EU for the 2010-2014 timeframe, hence being included in the Stockholm Programme of December 2009.[3] Having this in view, it goes without saying that the EAPO as it unfolds today is the outcome of closely linked steps and represents a highly expected legislative measure.[4]

Established by means of EAPO , the European Account Preservation Order[5] represents 'a European uniform procedure which enables creditors to protect the future enforcement of their claims by preventing their debtor from withdrawing or transferring funds held in bank accounts'.[6] Alongside the Commission Implementing Regulation (EU) 2016/1823[7] that lays down the necessary forms for the above-mentioned procedure, the EAPO is applicable from 18th January 2017[8] and appears to be an additional measure aimed at strengthening the field of EU civil procedure law, especially in the context of digitalization.[9] *Ratione*

[1] Further referred to as 'MS'.
[2] G. Cuniberti and S. Migliorini, *The European Account Preservation Order Regulation: A Commentary* (2018), at 7.
[3] See Recital 4 of EAPO.
[4] See 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), OJ 2012 C 191/57. According to paragraphs 3.1 and 3.2, the proposal of regulation is qualified as 'formally flawless, carefully thought-out and [containing] limpid technical and legal texts', its only drawback being 'its tardy arrival'. Pursuant to paragraph 3.9, it is also stated that an initiative regarding the transparency of debtors' assets is equally necessary.
[5] Further referred to as 'EAPO', 'PO' or 'Order'.
[6] G.Cuniberti and S. Migliorini, *supra* note 2, at 3.
[7] Commission Implementing Regulation (EU) 2016/1823 of 10 October 2016 establishing the forms referred to in Regulation (EU) No 655/2014 of the European Parliament and of the Council establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters, OJ 2016 L 283/1.
[8] Pursuant to article 54 of EAPO, 'it shall apply from 18 January 2017, with the exception of Article 50, which shall apply from 18 July 2016'.
[9] See Proposal for a Regulation of the European Parliament and of the Council on the digitalization of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation, COM (2021) 759 final.

materiae, it shall apply only in 'pecuniary claims in civil and commercial matters'[10] related to 'cross-border cases' in the autonomous meaning established in article 3, thus implying a lack of identity between the state in which the accounts are maintained on one hand and either the state of the court seized or the state of domicile of the creditor on the other hand, having regard to the 26 EU MS in which it is applicable.

Bearing these ideas in mind, our paper aims to raise awareness first and foremost regarding the EAPO, as being a complex yet insufficiently promoted EU instrument. For this purpose, we are to shed light on the advantages of this mechanism (**2**), on some practical difficulties that legal professionals may encounter while applying the procedure (**3**) as well as on some implementation solutions by MS (**4**). Lastly, we aim to argue that the EAPO procedure consists in a fine blend of EU and national rules, thus representing a clear expression of the autonomy principle (**5**) as enshrined in the case law of the Court of Justice of the European Union.[11]

Given the EAPO's date of entry into force, we have unsurprisingly noticed that both national and CJEU's case law is scarce in this matter. Yet practical difficulties do not cease to emerge. Thus, we aim to put forth some answers while at the same time to enhance the legal debate with newly identified emerging questions.

2. A Spotlight on the EAPO – A Promising EU Tool?

A. Why another European instrument?

Based on Article 67 (4) and 81 (2) of the Treaty on the Functioning of the European Union, the EAPO may be qualified as an 'optional instrument in EU private law'[12] aimed at achieving the 'Europeanisation' of civil procedure rules across MS, yet in a different less intrusive manner as compared to traditional methods, such as harmonization and unification, thus being qualified as a 'soft form of harmonization'.[13] Having regard to the entire EU legal framework, it must be underlined that '[the EAPO] is only the third uniform procedure established … after the European Order for Payment and the Small Claims Procedure'[14]. Hence, it can be concluded that the EAPO is an alternative procedure which only enriches the domestic legal means at the

[10] According to Art. (2), EAPO shall not apply to: (a) rights in property arising out of a matrimonial relationship or out of a relationship deemed by the law applicable to such relationship to have comparable effects to marriage; (b) wills and succession, including maintenance obligations arising by reason of death; (c) claims against a debtor in relation to whom bankruptcy proceedings, proceedings for the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions, or analogous proceedings have been opened; (d) social security; (e) arbitration.

[11] Hereinafter 'CJEU'.

[12] R. Mańko, *Europeanisation of civil procedure: towards common minimum standards?* (EPRS in-depth analysis; No. PE 559.499), European Parliamentary Research Service (2015), at 16, 19. According to the author, "an 'optional instrument' is an EU legislative act, usually in the form of a regulation, which creates a parallel and optional EU-wide legal regime for a given legal issue … [which] does not replace national regimes, but coexists alongside them".

[13] See R. Mańko, *supra* note 12, at 16. The cited author states that 'harmonization requires that a majority of Member States agree on a certain level of harmonization ('minimum' or 'maximum') which can be politically difficult, for example if conflicting interests of various groups (e.g. consumers and businesses) are at stake' while 'unification requires Member States to give up their existing legal rules and apply a uniform EU regulation instead, which can also be difficult to accept, not only because a common set of rules must be reached, but also because of concerns to preserve national legal culture'.

[14] G. Cuniberti and S. Migliorini, *supra* note 2, at 3.

disposal of the creditor.

On the one hand, the main reason that justifies the EAPO becomes clearer in the context of cross-border disputes which invariably might imply heterogeneous conditions of national equivalent procedures, which can represent a deterring factor for creditors engaged in transnational disputes.[15] Indeed, taking into account the 'different levels of efficiency' of claims enforcement measures as well as the effects therein on competition between companies across the EU, 'the legislation on the enforcement of payment procedures is often considered the "Achilles heel" of the European Civil Judicial Area'.[16]The elevated costs, alongside the difficult implementation of precautionary measures, emphasize the need for a uniform procedure in the EU .

On the other hand, the EAPO appears to be the legal framework that fulfills the requirements stemming from the Luxembourg Court's case law. In *Denilauler*[17] CJEU introduced a limitation on the enforcement of *ex parte* precautionary measures issued in another MS, therefore diminishing the efficiency of such instruments on a EU level. While enforcement of these measures is not *de plano* excluded but rather restricted, it has been argued that 'this major violation of the right to be heard of the debtor is necessary to ensure that POs serve their purpose'[18], one that requires sufficient and effective remedies to balance the position of the litigants. It is regarded that the newly established procedure facilitates effective and rapid preservation of debtor's account-held assets, hence being a 'powerful weapon against stubborn or fraudulent debtors'[19].

Lastly, from an economic perspective, the EAPO further justifies its endorsement. In light of the prior assessment data gathered by the Commission and observed by the European Economic and Social Committee, it has been reported that cross-border debt has reached high levels yearly while the level of national preservation orders is unexpectedly low, i.e.11.6%. Moreover, optimistic prospects showed that the EAPO regulation could 'secure the recovery of EUR 373 to 600 million of additional bad debt per year' and 'produce estimated cost savings for companies engaged in cross-border trade of EUR 81.9 million to 149 million per year'[20]. Still, in order to assess the current impact of the EAPO in economic terms, the Commission report to be issued in accordance with article 53 of the Regulation is highly expected.

B. A Static View upon the EAPO: Substantial Insights for National Judges

The Regulation operates with two main hypotheses, namely the pre-judgement EAPO on the one hand

[15] Kyriakides, 'An Economic Analysis Of The European Commission's Proposal For A European Account', 3 *Risk governance & control: financial markets & institutions* (2013) 45, at 46.
[16] Monteiro, 'The Bank Account Preservation Procedure in the European Union Regulation (EU) No 655/2014 of the European Parliament and of the Council 15 of May 2014', 1 *EU Law Journal* (2015) 121, at 122.
[17] C 125/79, *Bernard Denilauler v SNC Couchet Frères*, ECLI:EU:C:1980:130.
[18] G. Cuniberti and S. Migliorini, *supra* note 2, at 34.
[19] Monteiro, *supra* note 16, at 128.
[20] See 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), OJ 2012 C 191/57, paragraph 2.11.

and the post-judgement EAPO on the other hand[21]. The essential distinction consists in whether the creditor applying for an EAPO already has a title – judgment, court settlement or other authentic instrument – comprising the obligation of payment that incurs to the debtor. It is for this reason that the EAPO has been qualified as having a dual nature, as an interim relief and an enforcement measure. [22]

In both cases, the fundamental requirement for the successful issuance of the account freezing order implies that the creditor provide particularly complex evidence in order to prove that 'his claim is in urgent need of judicial protection and … the enforcement ... may be impeded or made substantially more difficult'[23]. As outlined in the preamble, the urgency stems from the conduct of the debtor who generates *periculum in mora,* namely 'a real risk that, by the time the creditor is able to have the existing or a future judgment enforced, the debtor may have dissipated, concealed or destroyed his assets or have disposed of them under value, to an unusual extent or through unusual action'.[24]

In the pre-judgement situation, the creditor is additionally required to demonstrate *fumus boni iuris*, which implies evidence that he/she is likely to succeed in the procedure on the merits of his/her claim.[25] Regarding the limits of judicial discretion on this matter, it must be borne in mind the fact that the EAPO represents an expression of civil law tradition and without prejudice to national judges' capability and obligation of an *in concreto* assessment of the facts, since 'it seems that the rationale of granting an EAPO is to prevent intentional nefarious or unusual dissipation of the assets on behalf of the respondent'[26].

The preamble may prove useful in this respect as it provides a general rule of evaluating this matter of fact, i.e. the 'overall assessment of the risk'[27]. Without prejudice to domestic courts' margin of appreciation, the preamble puts forward a series of non-exhaustive criteria which may be taken into account by the court; in brief, these refer to 'the debtor's conduct in respect of the creditor's claim or in a previous dispute between the parties, to the debtor's credit history, to the nature of the debtor's assets and to any recent action taken by the debtor with regard to his assets'[28]. At the same time, it is highlighted that certain isolated stances of the creditor are not *per se* enough for the issuance of the order, since they are deemed as usual and not at all fraudulent[29].

[21] Art. 5 of EAPO.
[22] Pretelli, 'Provisional and Protective Measures in the European Civil Procedure of the Brussels I System', *Brussels Ibis Regulation, Short Studies in Private International Law* (2016) 97, at 108.
[23] See Recital 14 and article 7 paragraph 1 of EAPO.
[24] See Recital 14 of EAPO.
[25] Art. 7 of EAPO.
[26] N. Kyriakides, 'Judicial discretion and contempt power: two elements of equity that would benefit the EAPO and future EU-wide provisional and protective measures' (2018) (PhD thesis at University of Oxford/available at https://ora.ox.ac.uk/objects/uuid:91c8379a-252c-475c-995d-7d71dbb0d24f , at 99.
[27] See Recital 14 of EAPO.
[28] See Recital 14 of EAPO.
[29] That is the case when it comes to (i) withdrawals or expenditures covered by the normal conduct of the debtor's business or family life, (ii) the non-payment of the claim, (iii) contesting the claim, (iv) the plurality of creditors or (v) poor or deteriorating financial status of the debtor. It is only the combined effect of the above-mentioned circumstances that may be considered enough

On the effects of the EAPO, it must be noted that the procedure is *ex parte*,[30] so that it has a surprise effect on the debtor. In addition, the EAPO 'shall be recognized in the other MS without any special procedure being required and shall be enforceable in the other MS without the need for a declaration of enforceability'.[31] As far as its duration is concerned, no fixed time-limit is provided, yet there are three rather determinable final moments.[32]

Bearing in mind the intrusive *modus operandi* of the EAPO, the EU legislator has established several safeguards for the rights of the debtor: a specific time-frame for the applicant to bring forth proceedings,[33] submission of security[34] and a presumption of fault on the part of the creditor'.[35]

C. Procedural Implementation: Dynamics of the EAPO Mechanism

As far as the procedure is concerned, it can be qualified as written and expeditious.[36] This legislative option is justified by the lower costs of transmission of documents as compared to appearing before court. Consequently, this influences the evidentiary regime with notable benefits, such as the rapid management of the application and the protection of the debtor.

Regarding the competent court to issue an EAPO, the distinction pre-judgement as opposed to post-judgement EAPO remains applicable. While in the first situation jurisdiction lies with 'the courts of the MS which have jurisdiction to rule on the substance of the matter, in accordance with the relevant rules of jurisdiction applicable', in the latter it lies with 'the courts of the Member State[37] in which the judgment was issued or the court settlement was approved or concluded'.[38] Bearing in mind consumers' interests, a derogatory rule has been established for this particular case, which grants the competence to issue the Order to the courts of the debtor's domicile.

As far as the application itself is concerned, by far the most important aspect that the national court must verify is the 'number enabling the identification of the bank, such as the IBAN or BIC and/or the name

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by the national court in order to issue the EAPO, relying mainly on the documentary evidence submitted by the creditor. See G.Cuniberti and S.Migliorini, *supra* note 2, at 111.

[30] From the onset of its legislative procedure, it was made clear that the procedure should be *ex parte;* B. Hess, 'On making more efficient the enforcement of judicial decisions within the European Union: Transparency of a Debtor's Assets, Attachment of Bank Accounts, Provisional Enforcement and Protective Measures' JAI/A3/2002/02, p. 143; European Commission, 'Final Report – Impact Assessment on a Draft Legislative Proposal on the Attachment of Bank Accounts.' p. 113.

[31] Article 22 of the EAPO.

[32] According to Article 20 of EAPO, the three moments are: (i) revocation of the EAPO, (ii) termination of EAPO's enforcement, (iii) effective enforcement of the title obtained by the creditor for the concerned funds.

[33] Art. 10(1) EAPO.

[34] Art. 12 EAPO.

[35] Recital 19 of EAPO. Pursuant to Art. 13, a conflict-of-laws rule is also stipulated as far as the law applicable to creditor's liability is concerned, namely the law of the state of enforcement. In case there are several states of enforcement, the Regulation provides for an order of application: (i) the law of the Member State of enforcement in which the debtor is habitually resident and in default (ii) the law of the Member State of enforcement with which the case has the closest connection, according to the amount preserved.

[36] As it other European procedures, more specifically, the European Payment Order or the European Small Claims Procedure.

[37] Also referred to as 'MS'.

[38] Article 6(2) and (3) of EAPO. Art. 6(4) states that regarding authentic instruments, jurisdiction lies with the courts designated for that purpose in the Member State in which that instrument was drawn up.

and address of the bank, with which the debtor holds one or more accounts to be preserved'.[39] Lacking such information, the court must take the alternative path, namely to verify whether the creditor filed a request for obtaining account information and, in the affirmative, to assess the corresponding arguments of the creditor that substantiate the alleged existence of debtor's accounts held with a specific bank in a Member State.[40] Only in this case can the court analyze the need to access the special procedure of requesting account information provided for by the Regulation.[41]

On the formal requirements of the application, EAPO reveals a rather balanced approach. Thus, an incomplete application does not lead to its instant rejection; only in case of failure of completion or rectification upon expiry, the application is to be rejected.[42] Another reason for rejection refers to the essential element of the application, that is the bank account of the debtor which is initially unavailable. If application of the procedure of requesting information proves to be unsuccessful, the court will issue the same solution of rejection[43]. Equally, obtaining a national equivalent order for the very same claim could also lead to a rejection of the application.

When examining the merits of the case, the court may reach the conclusion that the proof submitted by the creditor does not suffice. In this case, the order is to be issued only partially, i.e. in the amount justified in accordance with the evidence submitted by the creditor and determined pursuant to the law applicable to the claim[44]. Additionally, the issue of parallel applications might trigger a comparable solution, i.e. admission in full or in part, should the court deem it appropriate to issue an EAPO alongside the national equivalent order.

In light of the above-mentioned practical aspects, it is worth noting the manner in which the case law of the Luxembourg Court construed the obscurities of the EAPO Regulation.

Timidly, CJEU firstly referred to the EAPO in C-379/17, *Società Immobiliare Al Bosco Srl,* albeit only marginally. Even if this judgment clarifies the construction of certain provisions in Regulation (EC) no. 44/2011, it is worth analyzing it from the EAPO perspective as it highlights the principle of procedural autonomy in terms of enforcement norms[45]. In order to underpin this reasoning, the Court put forward 'a broader systemic perspective'[46], i.e. article 23 of EAPO Regulation that also prescribes the applicability of

[39] Article 8(2)(d) of EAPO.
[40] Article 8(2)(f) of EAPO.
[41] See *infra* 3.B.
[42] Article 17(3) of EAPO.
[43] Article 14(7) of EAPO.
[44] Article 17(4) of EAPO.
[45] C-379/17, *Società Immobiliare Al Bosco Srl,* (EU:C:2018:806), at para. 33. To be more precise, 'since the enforcement, in the strict sense, of a decision issued by a court of a Member State other than the Member State in which enforcement is sought, and which is enforceable in the latter Member State, has not been the subject of harmonization by the EU legislature, the procedural rules of the Member State in which enforcement is sought are to apply to matters relating to enforcement'
[46] C-379/17, *Società Immobiliare Al Bosco Srl,* (EU:C:2018:806), at para. 38. Having to decide upon the applicability of a peremptory time limit stipulated in national legislation for the enforcement of a judgment issued in another MS, the Court reached the conclusion that 'the procedural rules of the Member State in which enforcement is sought alone are applicable' , as seen in para. 36.

national enforcement legislation.

It is only in C-555/18, *K.H.K. v B.A.C. and E.E.K.* that the CJEU delivered its first judgment in the interpretation of the EAPO Regulation. The core question raised by the national court referred essentially to whether enforceability constitutes a prerequisite condition for the issuance of an EAPO on the basis of an 'authentic instrument'. While abandoning the literal interpretation of the provisions, the Court took into account the context of the provision and hence analyzed the *travaux préparatoires* of the Regulation which confirmed the requirement of enforceability as a mandatory condition of the title invoked by the creditor[47]. This condition applies in order to ensure 'an appropriate balance between the interests of the creditor and those of the debtor' who find themselves in objectively different circumstances: 'in the first situation, the creditor is required to establish only that the measure is needed as a matter of urgency on account of imminent risk, whereas in the second situation, he must also satisfy the court that he is likely to succeed on the substance of his claim'.[48] As it has already been noted, the aforementioned judgment 'constitutes a good example of the balances that the CJEU has to make in order to maintain the status quo between the defendant and the claimant'[49], thus distinguishing between two opposing perspectives: 'a pro-defendant approach regarding the first question, and a pro-claimant position on the one hand in its approach to the second and third questions'.

3. Practical Issues

A. Safeguarding the Debtors Rights in an ex parte *Procedure*

One practical issue that may arise concerns the area in which the PO may touch upon the fundamental rights of the debtor and how the courts can make sure its actions don't amount to violations of said rights.

Firstly, we must determine whether the procedure falls under the right to a fair trial of the Convention for the Protection of Human Rights and Fundamental Freedoms.[50]

Article 52(3) of the Charter of Fundamental Rights of the European Union[51] allows both the national judge and CJEU to refer to the ECHR as a reference when interpreting EU legal acts which might interfere with rights guaranteed by both instruments. Indeed, ECHR is the minimum standard of protection which should be taken into account when dealing with corresponding rights.[52]

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[47] C-555/18, *K.H.K. v B.A.C. and E.E.K.*(EU:C:2019:937), at para. 38, 43.

[48] C-555/18, supra *note 46*, at para. 38, 40. The last two interpretations therein are rather technical as they clarify the fact that "ongoing proceedings for an order for payment, such as those in the main proceedings, may be regarded as proceedings 'on the substance of the matter' within the meaning of that provision" while setting aside judicial vacations from the scope of the 'exceptional circumstances' that may justify an infringement of the time frames established by the Regulation.

[49] Carlos Santaló Goris, *The CJEU renders its first decision on the EAPO Regulation – Case C-555/18* (2019), available at: https://conflictoflaws.net/2019/the-cjeu-renders-its-first-decision-on-the-eapo-regulation-case-c-555-18/

[50] Further referred to as 'ECHR'.

[51] Further referred to as 'CFR'.

[52] C‑235/17, *Commission* v *Hungary (Usufruct over agricultural land)* (EU:C:2019:432), at para. 72. For more details on this matter, see Onișor, 'CJEU, the Charter and the ECHR. The Sunset of an Atypical Relationship?', 1 THEMIS (2021) 179, 192.

In *Avotiņš v. Latvia*[53], the European Court of Human Rights[54] considered, *inter alia*, the relation between the EU system of judicial cooperation in civil and commercial matters and the right to a fair trial. The question pertained to the enforcement of a final judgment in a different member state than the state of origin, in default of appearance of the defendant. Would an enforcement measure ruled without any notification of the defendant meet the criteria of legitimate interest and proportionality? Some authors seem to endorse this view.[55]

Following the change of jurisprudence in *Micaleff v. Malta,* Article 6 also applies to *interim* procedures if certain criteria are met[56]. Looking at Article 2 and Recital 12 from the Regulation we notice it applies to 'pecuniary claims in civil and commercial matters' including claims that arise 'from a transaction, (...) relating to tort, delict, or quasi-delict and civil claims for damages or restitution'. The first condition set out by the ECtHR, namely that the rights at stake should be civil, is without a doubt fulfilled.

The second criterion put forward by the Court is met if the 'interim measure can be considered effectively to determine the civil right or obligation at stake'.[57] As the court cannot rule on the substance of the matter, only on the conditions for issuing a PO, this condition seems to not be met. However, keeping in mind the purpose of the PO - securing claims that have fallen due - and its duration - until the order is revoked, enforced or terminated - we can conclude it effectively determines the success of the enforcement, as it is so closely tied with it. Thus, we consider all the criteria met and Article 6 applicable to the procedure surrounding the EAPO.

Having established this, we will shift our focus to one of the essential elements of the procedure, namely it being an *ex parte* one. This represents a major violation of the right to be heard, but one that is justified[58] on the grounds that the effectiveness of the measure depends upon a rapid decision-making and the unforeseeability from the perspective of the debtor. The remedies set forth involve informing debtors at the earliest possibility and allowing them to challenge the PO as soon as it is implemented.

Article 28 of the Regulation requires that service of the PO on the debtor must be initiated within 3 days of the implementation of the PO[59] and states that rules applicable to service depend on the domicile of the addressee. Cases in which the debtor is domiciled in the Member State of origin or in a third State shouldn't raise issues for the national court, as it is called upon to apply its national rules. In cases in which the debtor is domiciled in a different Member State, the service of documents is governed by the special rules

[53] ECtHR, *Avotiņš v. Latvia*, Appl. no. 17502/07, Judgment of 23 May 2007.
[54] Further referred to as 'ECtHR'.
[55] Biagioni, 'Avotinš v. Latvia. The Uneasy Balance Between Mutual Recognition of Judgments and Protection of Fundamental Rights', 1 European Papers (2016) 579
[56] ECtHR, *Micallef v. Malta*, Appl. no. 17056/06, Judgment of 15 October 2009, para. 83-86. See also ECtHR, *Maniscalco v. Italy*, Appl. no. 19440/10, Decision of 2 December 2014, para. 32.
[57] ECtHR, *Micallef v. Malta*, Appl. no. 17056/06, Judgment of 15 October 2009, para. 85.
[58] *Ibid.*, para. 86.
[59] It must be also mentioned that the bank has the possibility of informing their client earlier, as Article 25 (4) allows them.

set forth by the regulation in Article 29.

It must be noted that there is no obligation to resort to means required under the European Service Regulation, as Article 48 (a) excludes its application, but it can be used as a means to supplement Article 29[60].

In these types of cases, EAPO allows for the transmission of documents 'by any appropriate means', the only requirement being that the content of the documents transmitted be true and faithful and easily legible.[61] From the requirement, the Courts must understand that they have to choose a method which ensures that the document cannot be easily altered or lose information.

Another element that is equally as important as the actual transfer of documents, is their translation, seeing as the language used by the Court called to rule upon the matter will seldom be one that the debtor understands. Article 28 (5) provides that the PO and the application lodged to obtain it shall be transmitted to the debtor in an official language of the state of his domicile or in a language that he understands.

Here the Court should take extra steps to ensure that the documents in need of translation are clearly indicated[62] and the translation actually takes place before the service. We draw attention to this point because even though the creditor is obliged to provide a translation before the day of service to the debtor, no immediate sanction is attached to the failure to do so. In this scenario, the debtor can seek the revocation of the PO, but this will only be granted if the creditor fails to comply and provide an adequate translation within 14 days from the date in which the creditor was informed of the application for a remedy.[63]

This can result in the debtor having no indication as to why and who froze his accounts for an extended period of time.[64] A situation that can easily be prevented by a Court who acknowledges that - even though this is an *ex parte* procedure meant to surprise the debtor - any period of time in which he is kept in the dark about the substance of the measure already taken is a severe limitation on his right to a remedy.

Another aspect that must be taken into consideration in mind by a Court called to rule upon the PO is that the freezing of a bank account is usually considered a measure of control of the use of property[65] under Article 1 of Protocol 1 of the ECHR and Article 7 of CFR. Seeing that the EAPO is contained in a European Regulation that serves a legitimate public interest, the first conditions set forth by the ECtHR[66] regarding a lawful interference with the right to peaceful enjoyment of one's property are met and will not be discussed

[60] G. Cuniberti and S. Migliorini, *supra* note 2, at 262.
[61] Recital 24 of the Preamble.
[62] Art. 19(3) (d).
[63] Art. 33 (4).
[64] Art. 25 (1) accepts that in exceptional circumstances it is not possible for the bank or entity to issue the declaration in three working days, it has a maximum of eight days to send the declaration. From that moment, Art. 28 states that service to the debtor shall be initiated by the end of the third working day following the day of receipt of the declaration pursuant to Article 25. As we can see, this can add up to 11 days, notwithstanding the actual time the documents need to travel from one country to another.
[65] ECtHR, *Raimondo v. Italy*, Appl. no. 12954/87, Judgment of 22 February 1994. See also ECtHR, *Maniscalco v. Italy*, Appl. no. 19440/10, Decision of 2 December 2014, para. 53-55; for conservatory seizures regarding real estate, see *mutatis mutandis*, ECtHR, *JGK Statyba Ltd and Guselnikovas v. Lithuania*, Appl. no. 3330/12, Judgement of 5 November 2013, para. 114, 144.
[66] The jurisprudence of ECHR must be taken into account pursuant to Article 52(3) of the Charter in interpreting Article 17 thereof, as the minimum threshold of protection, as mentioned before.

further. The final test that the ECtHR employs is the one regarding the proportionality of the measure and is usually tailored to the type of interference.

As the Regulation only provides one measure[67] - freezing of bank accounts -, its issuance does not involve the substance of the rights, remedies for it are in place, only procedural factors can be thought up to result in an unlawful interference. Therefore, to make sure that the PO is a proportional measure the national Courts must make sure that the freezing measure doesn't stay into place longer than it needs to and the debtor can understand the remedies available to him in the national legislation.

B. Accessing the information mechanism

The information mechanism provided by Article 14 of the Regulation has been regarded as one of the main reasons why some creditors might find the procedure attractive compared to other national solutions.

Traditionally, national procedures regarding enforcement law depend on the information supplied directly by the debtor, the creditor or, as a subsidiary option[68], by a third party. In the case of the debtor, this derives from the obligation[69] to disclose all of his assets at the start of the enforcement procedures.

The EAPO took a big leap forward through Article 14 by giving the creditor the right to request information directly, notwithstanding the fact there isn't an actual enforcement procedure underway. Nevertheless, as we set out to prove, this right is not untethered, as no account information is automatically given under any circumstances.

The request of information under Article 14 is available only in post-judgement POs under the condition that the creditor who envisages an enforceable title[70] shows that he has reasons to believe 'that the debtor holds one or more accounts with a bank in a specific Member State'. Disclosure of the information thus obtained is to concern only the requesting court and in exceptional situations the debtor's bank; the creditor is by no means informed while the debtor's notification is postponed for 30 days so that the effectiveness of the EAPO is not endangered[71]. Yet, this general approach is perfectible due to the 'lack of an adequate design of the information mechanism for cross-border dialogue'[72] and equally due to the 'lack of adequate national

[67] One element of the fair balance test used by the court is whether other, less intrusive measures existed and if the authorities had access to them. ECtHR, *James and Others v. United Kingdom,* Appl. no. 8793/79, Judgment of 21 February 1986.
[68] § 802l Zivilprozessordnung (German Civil Procedure Code).
[69] § 802c of Zivilprozessordnung (German Civil Procedure Code), art. 647 Cod Procedura Civila (Romanian Civil Procedure Code), § 47 Exekutionsordnung (The Austrian Execution Act).
[70] A creditor who lacks an enforceable title must further prove an 'urgent need for account information because there is a risk that without such information, the subsequent enforcement of the creditor's claim against the debtor is likely to be jeopardized and that this could consequently lead to a substantial deterioration of the creditor's financial situation.', according to Art. 14 of EAPO .
[71] Recital 21 and Art. 14(8) of EAPO.
[72] Santaló Goris, 'Searching for Debtors' Bank Accounts Across the European Union: The EAPO Regulation Information Mechanism' 5 *MPILux Research Paper Series* (2021) 2, at 11. According to the author, 'this provision [article 14 of EAPO] is silent on the content of the request for information submitted by the court of origin; or the answer to be provided by the information authority. Neither is there a standard form for the courts to submit the request.'

implementation'[73].

As we can see, the Regulation places the burden of proof on the creditor who applied for the EAPO, but it remains silent on the standard of proof required of him. From the vague wording of Article 14(1) - *the creditor has reasons to believe* - and Article 14(2) - *creditor shall substantiate why he believes* -, no conclusions can be drawn on the type of evidence the creditor must put forth. Indeed, any creditor, regardless whether his title is enforceable or not[74], has to provide the court with 'all relevant information available to him'[75] on the existence of bank accounts in a certain country. Should national courts require the creditor to provide sufficient evidence on the existence of accounts?[76] Or should they be more lenient and accept mere indications?[77]

If the standard of proof is too high, creditors lacking evidence would see their efforts rendered useless by the simple fact that they won't have anything to freeze. On the other hand, if the standard is too low, it may open up the possibility for so-called *fishing expeditions.* Looking at the jurisprudence of the ECtHR, we can see 'that information retrieved from banking documents undoubtedly amounts to personal data concerning an individual, irrespective of it being sensitive information or not'[78], so it undoubtedly falls under the protection of Article 8 of the ECHR. From this view-point, a lenient approach in giving away information could amount to a breach of the right to private life, by failing to meet the final criteria of the Three Data Protection 'tests'[79], namely it being necessary for the protection of the rights and freedoms of others. Also, the more lenient approach, as stated above, could pave the way for abusing the information mechanism, which comes in contradiction with the approach envisaged by Recital 17 from the Preamble[80].

In the limited case law surrounding EAPO, we found that courts already applied this standard of proof. For example, a Dutch Court rejected[81] a request for information on the grounds that, the mere circumstances that the debtor was doing business with companies located in other states, was insufficient to substantiate the

[73] Santaló Goris, *supra* note 71, at 12. The author emphasizes that 'due to the number of references to the national laws of the Member States, some sort of national legislative implementation could be expected ... As a result, certain Member States were less prepared than others to ensure adequate functioning of the information mechanism'. Similarly, it is noted that 'national implementation also encompasses preparing domestic authorities to deal with the EAPO. The lack of awareness about the EAPO can also lead to disruptions in its application.'

[74] According to Art. 14(1) thesis 2 EAPO, a creditor who lacks an enforceable title has additionally to submit sufficient evidence to satisfy the court that there is an urgent need for account information because there is a risk that, without such information, the subsequent enforcement of the creditor's claim against the debtor is likely to be jeopardized.

[75] Art. 14 (2) EAPO.

[76] For instance, a Spanish court found its request for information in Germany rejected, because the German information authority considered that information provided was insufficient to justify that the debtor could have bank accounts in Germany, see Santaló Goris, *supra* note 71, at 11

[77] For example: the fact that the debtor regularly accepts payments in a certain currency; he worked in another MS, he holds properties in a certain country; owns or regularly drives cars, owns airplanes, utility vehicles, boats registered in that state; the business website of a company is registered to servers in a certain country; fluently speaks a certain language.

[78] ECtHR, *M.N and others v. San Marino*, Appl. no. 28005/12, Judgment of 7 July 2015, para. 51.

[79] Article 8 (2) ECHR.

[80] 'This Regulation should provide for specific safeguards in order to prevent abuse of the Order and to protect the debtor's rights.'

[81] District Court Rotterdam 4 April 2018, ECLI:NL:RBROT:2018:3235 as seen in Krans, Ribbers, 'The European Account Preservation Order in Dutch Practice', in M. Deguchi (ed.), *Effective Enforcement of Creditors' Rights* (2022) 121, at 132.

presumption that he held a bank account there[82].

As it stands, it looks that the argument in favor of the high standard of proof can be construed not only from the wording of the Regulation, but also from the jurisprudence of the ECHR and the national courts.

On the other hand, we must keep in mind that the information mechanism was put in place by the Regulation 'in order to overcome existing practical difficulties in obtaining information'. By setting a high standard of proof in the way of obtaining information, we risk depriving applicants of this mechanism, leaving them stranded in the same place they were to begin with. Such an interpretation cannot be supported, as it comes against the principle of *effet utile*, which aims at always interpreting EU norms with a view to effectively achieving the intent of legislation.[83]

C. Remedies and right to appeal

Chapter 4 of the Regulation mainly deals with the remedies available to the debtor who, on a certain day, surprisingly, finds that he can no longer use his bank accounts. The order has been issued without him being priorly notified or heard.[84] Some authors suggest that the expeditious *ex parte* procedure makes the OP an efficient tool not necessary to block debtors' accounts, but mainly to force a debtor, who otherwise would refuse to cooperate, to appear in trial.[85]

However, the exact nature of the remedies available under the Regulation might be subject to debate. In a matter concerning the competence to solve an application of the debtor based on Article 33 of the Regulation, some Romanian courts asked the question if the remedy is to be provided by the court that issued the order or the court above it. At that moment, Romania did not adopt any implementation legislation.[86] As such, given the lack of legal guidance, The High Court of Cassation and Justice of Romania, vested with a national conflict of competence ruled in favor of the court above the one that issued the order[87].

In doing so, the Court made the following reasoning: the Regulation provides only for the international competence of the court of the Member state of origin or of enforcement, the national competence is to be decided by *lex fori*, the closest figure to an account preservation order in *lex fori* provides only for a hierarchical remedy, therefore the court that issued the order is not competent to solve an application under Article 33 of the Regulation, which provides for an ordinary appeal under the national law of each state.

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[82] It was noted that all case law in Netherlands surrounding this issue are rejected attempts to obtain information, on the grounds that the creditor failed to substantiate why he believes that the debtor holds one or more accounts with a bank in the specific Member State. Onțanu, 'The Netherlands' in J. Von Hein and T. Kruger (eds), *Informed Choices in Cross-Border Enforcement: The European State of the Art and Future Perspectives* (2021) 303

[83] Katalin Gombos, *EU Law viewed through the eyes of a national judge* (2021), available at https://ec.europa.eu/dgs/legal_service/seminars/20140703_gombos_speech_en.pdf. Dimitris Liakopoulos, 'Character of effet utile and interpretation of EU law through CJEU jurisprudence', 13 *Cadernos de Dereito Actual* (2020) 32.

[84] Article 11 EAPO.

[85] Monteiro, '*supra* note 16, at 128.

[86] Implementation legislation was adopted only in 2019, through Government Ordinance No. 75/2019 which modified Article I^8 of Government Ordinance No. 119/2006 on necessary measures for the implementation of some EU Regulations (Romania).

[87] High Court of Cassation and Justice of Romania, First Civil Chamber, Decision no. 3730, 24 October 2018.

This solution is different in other domestic judicial systems. For instance, in France, the competence to revoke the order or to limit or terminate its enforcement lies with the enforcement judge at the Regional Court *i.e.* the same level of courts as the ones that issued the order. Such different approaches among Member States would be acceptable if we were to conclude that the nature of the remedy against the order or against is a 'procedural issues not specifically dealt with in this Regulation'[88], thus falling within the procedural autonomy. There are several arguments pleading against this.

First, Article 33 of the Regulation uses a term peculiar to a form of sanctioning originating precisely from the body that issues the measure. Revocation, compared to annulment or cassation, does not generally mean a hierarchical control of a measure. Moreover, apart from the first reason of revocation (i.e. the conditions or requirements set out in this Regulation were not met), the others, under Article 33 (1) letters (b) to (g) concern motives which may appear only after the order has been issued.

Second, Article 35 (2) of the Regulation, containing a third set of remedies available, states that 'the court that issued the PO may also, where the law of the MS of origin so permits, of its own motion modify or revoke the Order due to changed circumstances.' It may be argued that Articles 33 to 35 (1) of the Regulation refers to remedies to be sought from the court that issued or that enforces the order available upon application, either by debtor or creditor, while Article 35(2) concerns remedies which might be activated *ex officio* by the issuing court.

Third, it is Article 37 of the Regulation that actually grants a true right of appeal, to be provided by a higher court than the one that issued the order. To interpret otherwise would be to create a three-level jurisdiction procedure for an order on provisional measure. Indeed, that is the case now in some Member states.

Therefore, Article 33 only regulates a specific remedy for the debtor who is to appear before the court that issued the order and to present his arguments. Only if he is dissatisfied with the solution rendered after the Court has heard him can he apply to appeal at a higher court.

Generally, in most continental jurisdictions, an application for appeal prevents the enforcement of a ruling. The Regulation does not mention if such an effect is to be granted to an application under Articles 33 to 37. Is the order enforceable immediately after it has been issued or only after an application for remedy or appeal has been rejected?

Given the provisional nature of the measure, its urgency and the purpose it serves, one must conclude that the application for remedy or appeal has no effect on the enforceability of the order. The account would remain attached even during these proceedings.

[88] Article 46 (1) EAPO.

4. Member States' Approach

Being the last to come to the party of second generation EU regulations on uniform procedures, EAPO raised challenges not only to the judiciary, but also to national legislators, as it relies heavily on national procedure.[89] As the judiciary of each member state was struggling to apply traditional institutions of national procedural law to a newcommer, some national Parliaments, pursuant to Article 50 of the Regulation, came up with new rules that would make EAPO fit in.

This observation might come as a surprise. After all, a regulation is not a directive, there is no need for supporting national legislation. From the substantial point of view, a EU citizen would expect to base his claim only on the provisions of a Regulation, without the need to refer to some other implementation law adopted in his state. From a procedural perspective, the national norm that establishes a general procedural rule related to e.g. jurisdiction, remedies, should be deemed applicable based on the principle of procedural autonomy. However, supporting national legislation could be proven useful as it might lead to a uniform application of the Regulation in that MS. Supporting national laws 'may operate as "door openers", guiding the legal practice to the applicable EU instrument in the case at hand'.[90]

A. Legal Approaches

There are three main patterns of implementation of EAPO, depending on the autonomy of existing national procedures and the mechanism established by EAPO: (1) separate implementation law, extending all or some provisions of EAPO to domestic cases; (2) separate implementation law, no extension to domestic cases; (3) no implementing legislation, courts use analogy to similar domestic procedures.[91]

A typical example for the first approach is Belgium. When embedding the EAPO Regulation,[92] the legislator has chosen to extend the procedure to internal Belgian cases as well.[93] Such an extension of the scope of application implies that at this moment, any Belgian applicant, regardless whether his case is a cross-border one or not, has a full option between the existing national procedure, and the EAPO procedure. This approach makes it easier to conceive an even bolder step: having EAPO refer to executive seizures also.

Another example is France.[94] Initially there was no formal embedding of the EAPO Regulation within the French legal system. Indeed, the existing Frech procedure of *saisie conservatoire* is relatively similar to

[89] The general provision in Article 46(1) EAPO Regulation establishes that 'all procedural issues not specifically dealt with in this Regulation shall be governed by the law of the Member State in which the procedure takes place. Some of the specific references to domestic law are related to the enforcement of EAPO (e.g. Art. 23(1) EAPO), the liability of the banks (e.g. Art. 26 EAPO).

[90] Hess, 'Towards a More Coherent EU Framework for the Cross-Border Enforcement of Civil Claims . Informed Choices in Cross-Border Enforcement of Civil Claims' in J. Von Hein and T. Kruger (eds), *Informed Choices in Cross-Border Enforcement: The European State of the Art and Future Perspectives* (2021) 389, at 390

[91] Hess, *supra* note 30, at 391.

[92] Act of 18 June 2018, Belgian Official Journal 02.07.2018 ('Wet houdende diverse bepalingen inzake burgerlijk recht en bepalingen met het oog op de bevordering van alternatieve vormen van geschillenoplossing').

[93] Overbeeke, 'Belgium', in J. Von Hein and T. Kruger (eds), *Informed Choices in Cross-Border Enforcement: The European State of the Art and Future Perspectives* (2021) 163, at 164.

[94] Eeckhout, Santaló Goris, 'France' in J. Von Hein and T. Kruger (eds), *Informed Choices in Cross-Border Enforcement: The European State of the Art and Future Perspectives* (2021) 191.

the conditions from EAPO. Most notably, the already disputed[95] condition of 'real risk' and 'urgency' used in the EAPO Regulation may be perceived as equivalent to the 'threat' to the recovery of the debt from the French legislation.[96] However, there was one essential difference: creditors without an enforceable title who apply for a French domestic preservation order could not be given information from French tax authorities on the bank accounts of their debtors; conversely, creditors without an enforceable title who apply for an EAPO would be granted such a benefit.[97] In a decision rendered 28 January 2021[98], the Paris Court of Appeals found that such a difference of treatment between creditors with and without access to the EAPO Regulation 'constitutes an unjustified breach of equality and discrimination between creditors'[99]. 11 months later, the French legislator transposed this decision into French law.

The fact that similar EU procedures are not generally available or, although available, they are not as effective as the national law, raises the concern of reverse discrimination.[100] In the absence of an express provision in the national implementation legislation, it would be difficult to imagine how a national judge could correct such consequences.

Regarding the second approach, some MS perceived as unfeasible or unrealistic to extend the EAPO to domestic cases. This seems the neutral way of approaching things. Germany or Luxembourg, for instance, passed different laws that regulate those aspects of the Regulation which are left to the discretion of national law. A national judge will refer mostly to the Regulation and only subsidiarily, for some instrumental norms, to a specially designed implementation act.

An example for the third approach was the situation in Romania up until 2019. A lack of any implementation legislation might be particularly detrimental to establishing a uniform and predictable procedure. However, neither did EAPO impose on the countries the obligations to alter their existing institutions, nor did it ask to adopt complex implementation mechanisms. Indeed, the EU designed a quasi-complete Regulation, requiring MS just to fill in some small gaps.

B. Institutional Approaches

At the institutional level there seem to be two patterns: concentration and specialization as opposed to spreading competences amongst different types and levels of national authorities.

Czech national law is an example of the first. In 2021, an implementation law was adopted which

[95] Wiedemann, 'The European Account Preservation Order', in J. Von Hein and T. Kruger (eds), *Informed Choices in Cross-Border Enforcement: The European State of the Art and Future Perspectives* (2021) 103, at 122.
[96] Art. L. 511.1 Code des procédures civiles d'exécution.
[97] Santaló Goris, *A Reform of French Law Inspired by an Inaccurate Interpretation of the EAPO Regulation?*, 22 January 2022, available at https://conflictoflaws.net/2022/a-reform-of-french-law-inspired-by-an-inaccurate-interpretation-of-the-eapo-regulation/.
[98] Cour d'appel de Paris, Pôle 1 – chambre 10, 28 janvier 2021, n° 19/21727.
[99] Santaló Goris, *supa* note 97.
[100] Villata, D' Alessandro, Sandrini, Molinaro, Giugliano, 'France' in J. Von Hein and T. Kruger (eds), *Informed Choices in Cross-Border Enforcement: The European State of the Art and Future Perspectives* (2021) 247, at 254.

establishes the competence for one single court to rule on all the applications for EAPO.[101] One must acknowledge that such an approach enhances a uniform and coherent application of a complex and technical Regulation such as EAPO at the national level. Some authors[102] observe that concentration and specialization is also consistent with CJEU's standing on this from *Sanders*: 'a centralization of jurisdiction ... promotes the development of specific expertise ... while ensuring the proper administration of justice and serving the interests of the parties to the dispute'.[103]

However, given the yet too small number of EAPOs issued in Member States, one can ask if such a specialization of courts would actually make the procedure more attractive. After all, most of the issues so far seem to have arisen from different interpretations coming from different Member States, rather than from divergent interpretations at the national level. E.g. a uniform standard of *periculum in mora* would hardly be established by a specialized national court only.

5. Procedural Autonomy: Mysterious Concept or Evolving EU Civil Procedure Principle?

A. In Search of Emerging Autonomy

By far one of the most legally intriguing particularities of the EAPO consists of the vast evidence it provides in support of the EU procedural autonomy principle.[104] Indeed, this technique of referring to *lex fori* is not new, since other optional instruments also embrace this approach[105] without prejudice to their obvious EU-level cooperation purpose. However, as it has already been emphasized, the 'delicate interplay between national and European law' may impede its unitary application across the EU and hence trigger difficulties in its application.[106]

Enshrined for the first time in two landmark rulings delivered in 1976, i.e. *Rewe* and *Comet,*[107] the principle of procedural autonomy underlines the 'necessary coexistence of procedural autonomy with the requirements and principles related, more specifically, to the rules governing the relations between national law and EU law'.[108] On this occasion CJUE emphasized the limits of procedural autonomy, also known as

[101] Santaló Goris, *A Centralized Court for the EAPO Regulation in the Czech Republic?*, 5 February 2021, available at https://conflictoflaws.net/2021/a-centralized-court-for-the-eapo-regulation-in-the-czech-republic/ .
[102] *Ibid*.
[103] C-400/13, *Sanders and Huber*, (EU:C:2014:2461), para. 45.
[104] When attentively reading Article 46 of the EAPO Regulation, one may notice the subtle contours of procedural autonomy as it is established that 'all procedural issues not specifically deals with in this Regulation shall be governed by the law of the Member State in which the procedure takes place'.
[105] See R. Mańko, *supra* note 12, at 19.
[106] Župan, 'Cross-border recovery of maintenance taking account of the new European Account Preservation Order (EAPO)', 16 *ERA Forum Journal of the Academy of European Law* (2015) 163, at 176. The author advances the following example: 'the same banks with branches situated in different Member States would not be able to adopt uniform patterns of EAPO application, but would have to develop practices for distinctive Member States'.
[107] C 33-76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*, EU:C:1976:188; C 45-76 *Comet BV v Produktschap voor Siergewassen*, EU:C:1976:191.
[108] D.-U. Galetta, *Procedural Autonomy of EU Member States: Paradise Lost? A Study on the "Functionalized Procedural Competence" of EU Member States* (2010), at 8.

'Rewe criteria', namely equivalence and effectiveness.[109]

Technically speaking, it must be noted that 'the principle of national procedural autonomy comes with a prefatory condition and two closing qualifications'.[110] This means that the absence of specific[111] EU norms leads to the application of rules pertaining to the national legal system, yet provided that national procedural rules not be 'less favorable than those relating to similar actions of a domestic nature', and that MS procedural rules not render the enjoyment of Community rights 'practically impossible' or, as later established, 'excessively difficult'.[112] The main purpose of this pretorian creation is to ensure the plenary and equal enjoyment of rights guaranteed by EU law in all MS.[113]

This initial construction has been further developed and reached its second phase, i.e. the 'functionalization' phase which began by means of *van Schijndel*.[114] Built upon the effectiveness criterion, this approach implies "the idea of a duty of the national court ... to 'functionalize' the means already made available in its domestic law to allow the achievement of the goal of effectiveness of the EU law".[115]

The preceding considerations mainly impose a complex task for national judicial practitioners, that is to verify on a case-by-case basis whether the national procedural rules may be applied in accordance with the imperative confines of equivalence and effectiveness. In other words, a passive attitude from the national judges no longer has a legal ground. As such, they are required not only to refuse the application of domestic provisions that fail the *Rewe* test, but they are actually called to fulfill the positive obligation of functionalizing national provisions so that effective exercise of rights is ensured; not following this algorithm may trigger state's liability.[116]

B. EAPO Judicial Procedure through the Lens of Autonomy Principle

On the one hand, the most obvious and easily identifiable such provisions refer to the practical unfolding of the judicial procedure of issuing a PO; in brief, these provisions set a coordinated standard for the administration of this public service.

Firstly, in terms of court fees or other fees charged by authorities, the rule thereby imposed implies as a reference criterion the equivalent national order.[117] For instance, in Romania, application for an EAPO shall

[109] It has been observed that this judgment 'cannot be understood as supporting any hard autonomy, at least not in the sense of complete freedom from Union control'. See Halberstam, 'Understanding National Remedies and the Principle of National Procedural Autonomy: A Constitutional Approach', *23 Cambridge Yearbook of European Legal Studies* (2021) 128, at 132.
[110] Halberstam, *supra* note 105, at 130-132.
[111] C-518/17, *Stefan Rudigier*, EU:C:2018:757, para. 60; C-102/16, *Vaditrans BVBA v Belgische Staat*, EU:C:2017:1012, para. 55.
[112] C 199/82, *Amministrazione delle Finanze dello Stato v SpA San Giorgio*, EU:C:1983:318, para. 14.
[113] Cadiet, 'L'autonomie procédurale dans la jurisprudence de la Cour de justice de l'Union européenne – Réflexions naïves d'un Huron au Palais du Kirchberg', 22 *Studies of the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law: The 50th Anniversary of the European Law of Civil Procedure'* (2020) 203, at 210.
[114] Joined Cases C-430/93 and C-431/93, *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten*, EU:C:1995:441.
[115] D.-U. Galetta, *supra* note 104, at 50.
[116] Cadiet, *supra* note 109, at 215.
[117] See Art. 42 and 44 of EAPO.

be subject to a court fee consisting of a fixed sum which is equal to the amount applicable to national precautionary measures.[118] Other EU states apply a fixed sum (Malta), a variable sum in relation to the amount of the claim (Greece) or a combination of both (Czech Republic, Italy).[119]

Secondly, regarding the service of documents, the general rule states that it is once again domestic law to be applied, regardless of whether the debtor domiciles in the state of origin or in another member state;[120] it is only in the case when the debtor domiciles in a third country that international provisions applicable in the state of origin will be applied.[121] The same idea is further highlighted on various occasions throughout the Regulation,[122] at times in a more nuanced manner in connection to procedures applicable to 'equivalent national orders'.[123] For example, in Romania and other EU states participating in the concerned forms of cooperation service will be performed in accordance with Regulation no. 1393/2007[124] while in relation to parties domiciled in third countries service will be performed according to particular treaties between the concerned states.

Thirdly, as far as evidence is concerned the EAPO Regulation does not define admissibility of evidence which pertains to national law, but rather establishes 'that national rules of evidence do not prevent the court from ruling on the PO application on a documentary basis'[125]. In this respect, the national court is empowered to apply its own procedural prescriptions in terms of evidence, namely '[to] use any other appropriate method of taking evidence available under its national law, such as an oral hearing of the creditor or of his witness(es) including through videoconference or other communication technology'.[126]

Lastly, regarding representation rules, autonomy is enshrined as far as the remedies are concerned. To be more precise, while for the issuance of EAPO legal representation is not necessary, when it comes to the remedies against the Order, the general rule is the optional regime; yet there is also the exceptional situation of mandatory representation which can be applied if stipulated by the national law, only with respect of *Rewe* criteria, i.e. 'such representation is mandatory irrespective of the nationality or domicile of the parties'.[127]

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[118] See Art. 11(1)b) of Government Emergency Ordinance no. 80/2013, Romanian Official Journal no. 392 of 29 June 2013.

[119] See national approaches according to article 50 of EAPO at: https://e-justice.europa.eu/379/EN/european_account_preservation_order .

[120] See Art. 28(1) and (2) of EAPO.

[121] Art. 28(4) of EAPO.

[122] See also Art. 38(3): The provision of the security in lieu of preservation shall be brought to the notice of the creditor in accordance with national law.

[123] See Art. 17(5): 'The decision on the application shall be brought to the notice of the creditor in accordance with the procedure provided for by the law of the Member State of origin for equivalent national orders'. In a similar manner, Art. 36(3) provides that: 'the decision on the application shall be issued after both parties have been given the opportunity to present their case, including by such appropriate means of communication technology as are available and accepted under the national law of each of the Member States involved'.

[124] Regulation (EC) No. 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000, OJ 2007 L 324/79.

[125] G. Cuniberti and S. Migliorini, *supra* note 2, at 135.

[126] Art. 9(2) of EAPO.

[127] Art. 41 of EAPO.

C. Substantial Matters under the Ambit of Autonomy Principle

On the other hand, a significant part of autonomy-related stipulations deals with the procedural particularities which are contemporary or subsequent to the issuance of the Order.

As regards the scope of the preservation order, the law of the state of origin dictates (i) which are the accounts immune from seizure, (ii) the amounts exempt from preservation as well as (iii) the possibility of preservation in the hypothesis of joint or nominee accounts.[128] For instance, regarding the amounts exempt from seizure, national approaches are quite varied.[129] In terms of liability rules, the creditor shall be held accountable in accordance with the national law of the state in which enforcement is sought.[130] Similarly, the liability of the bank shall also be governed by the law of the state of enforcement, in case of failure to comply with obligations prescribed by the EAPO Regulation.[131] Correlatively, rights of third parties to challenge the Order or its enforcement are governed by the law of the Member State of origin.[132]

Regarding the functioning of the order, autonomy is indeed transparent. That is to say, the submission of security imposed by the court as well as the rules governing the enforcement phase shall respect the law of the state of origin.[133] For instance, concerning the enforcement authorities, national approaches are different:[134] some states have vested bailiffs with this procedure (Romania, Greece), while others opted for courts (Czech Republic, Italy, Malta).

In other words, it can be arguably stated that the herein analyzed instrument encompasses several instances of applying domestic rules and thereby represents indeed an expression of Member States' autonomy. Therefore, the criteria developed by the EU Court of Justice must be the guiding line for the national courts managing a PO procedure.

6. Conclusions

Far from polarizing with either of the two myths invoked in the beginning of this research thesis, it may be concluded that the EAPO procedure is rather comparable to a gentle giant. Neither too forceful and

[128] See Art. 2(3), Art. 31 and Art. 30 of EAPO.

[129] In Romania, the civil procedure legislation permits enforcement against wages or other income paid regularly to the debtor as a means of subsistence, up to half of net monthly income in the case of amounts owed by way of maintenance obligation or child allowance and up to a third of net monthly income in the case of any other debts. Similarly, in Italy, the sums owed by private persons by way of wages, salaries or other payments related to the employment relationship, including those owed for redundancy, may be attached for maintenance payments to the extent authorized by the president of the court or by a judge delegated by them, but only up to a fifth of these or, exceptionally, in case of multiple seizures, up to half of them; the debtor must prove the applicability of an exemption case. In contrast, in Greece the civil procedure code provides that claims for maintenance, salaries, pensions, insurance benefits etc. are exempt from seizure without any application from the debtor. See national approaches according to article 50 of EAPO at: https://e-justice.europa.eu/379/EN/european_account_preservation_order .

[130] Art. 13(4) of EAPO. Provided that the accounts are preserved in more than one state, the law applicable to creditor's liability shall be the law of the state in which the creditor is habitually resident or, in default, the law of the state which has the closest connection to the case.

[131] Art. 26 of EAPO.

[132] Art. 39(1) and (2) of EAPO

[133] Art. 12(3) and 23(1) of EAPO.

[134] See national approaches according to Art. 50 of EAPO at: https://e-justice.europa.eu/379/EN/european_account_preservation_order .

brute, nor too fragile and powerless, the PO devised at the EU level appears to bring about quite noticeable advantages that would definitely improve transnational civil and commercial relations.

By analyzing the EAPO, there are several proposals that we advance.

We partly approve the critical view expressed in legal literature as to the deficiencies of the information mechanism in terms of transnational dialogue. In other words, we support a uniform method of applying this mechanism, namely a specific form to be used all across the EU. While a further advisable step would be to have a centralized information authority, this approach may not be feasible from a cost-advantage perspective. For this reason, we deem as advisable an initial amendment of the EAPO Regulation and subsequently the Commission Implementing Regulation insofar as it would comprise a distinct form for the information request so that disparate approaches concerning the content of the request and the response thereto would be definitely diminished.

We also endorse the proposal put forward by the European Economic and Social Committee in its 2012 Opinion on the adoption of the EAPO Regulation concerning the transparency of debtors' assets. To be more precise, we are of the view that a legislative initiative is truly recommended in order to mitigate reticence towards the practical usage of this procedure and to facilitate the unfolding of the procedure itself. Still, regard must be had in terms of data protection requirements in force at the moment. We deem as thorough the Green Paper[135] issued by the Commission as construed by the European Data Protection Supervisor[136] and thus we urge further steps to be taken in this direction. Measures such as the manual of national enforcement laws and practices, the increased access to information available in nationally-held registers, smoother information exchange between enforcement authorities, as wells as measures relating to the debtor's declaration concerning their assets are all possible suggestions to be further analyzed and included in a prospect piece of EU legislation.

We also propose that the procedure surrounding the service of documents to the debtor should be revised, with a closer attention being paid to enacting shorter timelines required for the transfer of information between authorities.

One thing is clear: the EAPO is a necessary tool. But will this giant find its deserved place among the heterogeneous and sometimes too narrow legal framework of MS? One cannot fit in if greeted with a cold shoulder. Only with proper guidance from national supporting legislation and a stronger dialogue between national judges and the Luxembourg Court will the EAPO truly fulfill its purpose.

[135] Green Paper presented by the Commission, Effective Enforcement Of Judgments In The European Union: The Transparency Of Debtors' Assets, COM(2008) 128 final.

[136] Opinion of the European Data Protection Supervisor on the Commission Green Paper on the Effective Enforcement of Judgements in the European Union: the Transparency of Debtors' Assets-COM (2008) 128 final, OJ 2009/C 20/01.