First impressions from Kirchberg on the EAPO Regulation – Opinion of AG Szpunar in Case C-555/18

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I. Introduction

Less than three years after Regulation 655/2014 establishing a European Account Preservation Order ("the EAPO Regulation") entered into force, the Court of Justice of the European Union ("CJEU") released its first Opinion on this instrument. This regulation established a uniform provisional measure at the European level, which permits creditors the attachment of bank accounts in cross-border pecuniary claims. In many senses, the EAPO regulation represents a huge step forward, particularly in comparison to the *ex-ante* scenario regarding civil provisional measures in the Area of Freedom, Security and Justice. It is no accident that in the first line of the Opinion, AG Szpunar refers to the landmark case *Denilauler.* Besides the concrete assessment of the preliminary reference, he found a chance in this case to broadly analyse the EAPO Regulation as such, contextualizing it within the general framework of the Brussels system.

II. Facts of case

The main facts of this case were substantiated before the First Instance Court of Sofia (Bulgaria). Upon the request of a creditor, this court granted a national order for payment against two debtors. The order for payment was sent to the debtors' domicile as it appeared in the national population register. Since the notification was returned without an acknowledgment of receipt, the debtors were also informed by the posting of a public notice on the door of their "official" domicile. They did not respond to this notification either. In accordance with Bulgarian law, in such occasions, if the creditor does not initiate declaratory proceedings on the substance of the case to ascertain the existence of a debt, any order for payment would be annulled *o*. In the present case, before proceeding in that manner, the creditor requested an European Account Preservation Order ("EAPO") before the First Instance Court of Sofia, to freeze the debtors' bank accounts in Sweden. This court informed the creditor that he must initiate declaratory proceedings in order to avoid the nullification of the payment order. In the court's view, since the order for payment was not yet enforceable, it could not be considered an authentic instrument. Therefore, based on Article 5(1) of the EAPO, the creditor had to initiate the declaratory proceedings on which he would rely on when applying for the EAPO. Conversely, the President of Second Civil Section of the same court considered that the non-enforceable order for payment was an authentic instrument pursuant to Article 4(10), and thus there was no need for separate proceedings. These different understandings of the regulation led the First Instance Court of Sofia to refer the following questions to the CJEU:

1. *Is a payment order for a monetary claim under Article 410 of the Grazhdanski protsesualen kodeks (Bulgarian Civil Procedure Code; GPK) which has not yet acquired the force of res judicata an authentic instrument within the meaning of Article 4(10) of Regulation (EU) No 655/2014 1 of the European Parliament and of the Council*

of 15 May 2014?

2. *If a payment order under Article 410 GPK is not an authentic instrument, must separate proceedings in accordance with Article 5(a) of Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 be initiated by application outside the proceedings under Article 410 GPK?*

3. *If a payment order under Article 410 GPK is an authentic instrument, must the court issue its decision within the period laid down in Article 18(1) of Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 if a provision of national law states that periods are suspended during judicial vacations?*

III. "Fitting in" in the autonomous concept of authentic instrument

Firstly, AG Szpunar examined if the payment order fell within the autonomous concept of 'authentic instrument'. Article 4(10) of the EAPO Regulation establish three prerequisites that a document has to satisfy in order to be considered an authentic instrument: (1) it has to be an authentic instrument in a Member State; (2) the authenticity relates to the signature and the content of the instrument; (3) the authenticity has been established by a public authority or other authority empowered for that purpose.

The AG stated that, whereas the first and the third prerequisites were duly satisfied, the second condition, concerning the authenticity of the content, was not fulfilled. Under Bulgarian law, when creditors apply for a payment order, they do not have to provide the court with any documentary evidence, they simply indicate the basis of their claim and the amount due. Therefore, the judge who grants a preservation order is merely confirming the obligation to pay a debt, but without "authenticating" the content of that obligation. Consequently, in the AG's view, the order for

payment would not be an authentic instrument under the regulation. *Obiter dictum*, he considered the payment order to be a judgment under the EAPO Regulation (at para. 46).

IV. Enforceable or not enforceable, that is the question

Retaking and reformulating the original question, AG Szpunar proceeded to analyse if titles other than authentic instruments (e.g. judgments and court settlements), are enforceable for the purposes of the EAPO Regulation (at para. 59). This question is not superfluous. As AG Szpunar remarked, the EAPO Regulation establishes two different regimes: one for creditors without a title, and one for creditors with a title. Creditors who lack a title are subject to stricter conditions when they apply for an EAPO (at para. 53). They have to prove their likelihood of success on the substance of the claim (art. 7.2), and the provision of a security becomes mandatory, unless the court decides to dispense of this requirement if it finds it inappropriate in the particular circumstances of the case (art. 12.1). Furthermore, the court has ten days to render the decision on the EAPO application (art. 18.1), instead of the five working days when the creditor has a title (art. 18.2).

Regarding this question, the European Commission suggested examining whether "enforceability" as a prerequisite for other titles is present under different European civil procedural instruments, particularly in regards to the European Enforcement Order Regulation ("EEO Regulation"), the Maintenance Regulation, and the Brussels I bis Regulation (at para. 51). AG Szpunar declined drawing any comparisons with other regulations due to the "provisional" nature of the EAPO Regulation. These other instruments are mainly focus on facilitating the enforcement of final decisions on the substance of a claim, thus, the concept of title would have a different understanding (at para. 51). On this basis, AG Szpunar considered it more appropriate to elaborate an "individualized" analysis of the EAPO Regulation and proceeded

with a literal, systemic, historical and teleological interpretation of this instrument:

- In the literal and systemic analysis, AG Szpunar found several provisions referring to the different types of title. In particular, he referred to Article 6 (jurisdiction); Article 7 (material prerequisites); Article 12 (security); Article 14 (information mechanism); and Article 18 (time-limits to render the decision on the EAPO application) (at paras. 55 – 59). None of these provisions, except Article 14(1), specify whether the title has to be enforceable or not. Article 14(1) is the sole provision which distinguishes between enforceable and non-enforceable titles. This provision contains the prerequisites that creditors have to satisfy if they want to request information on debtors' bank accounts. Creditors with a non-enforceable title can apply for bank account information, but under a stricter regime than those who have an enforceable title (at para. 64). AG Szpunar considered that this is an exception, in which creditors without an enforceable title are recognized. For the other cases, these creditors would be placed under the same status as creditors without any kind of title (at para. 66).
- The historical interpretation was based on the Commission Proposal of the EAPO Regulation (at paras. 74 -79). This text still operated under an *exequatur* Unlike the current version of the EAPO Regulation, it systematically distinguished between two different regimes, one applied to creditors without an enforceable title or a title enforceable in the Member State of origin; another applied to creditors whose titles were already declared enforceable in the Member State of enforcement. Within the first regime, there were also differences between creditors with an enforceable title and creditors without. Creditors with an enforceable title did not have to prove the *boni fumus iuris.* After

the Council reviewed the Commission Proposal, the *exequatur* was removed along with the distinction between enforceable title in the Member State of origin and in the Member State of enforcement. In AG Szpunar's view, both "enforceable" titles would then have been subsumed into the more generic term of "title", which did not expressly refer to the enforceability (at para. 79).

- Perhaps the strongest point of the AG's Opinion was the teleological argument. In AG Szpunar's view, including non-enforceable titles within the concept of title would impair the balance between the claimants' and defendants' rights (at para. 68). As stated above, creditors with a title do not have to prove the existence of the *boni fumus iuri*. This barrier is also a prevention against fraudulent requests of an EAPO. An enlargement of the concept of title would facilitate access to the EAPO, undermining one of the protections against abusive behaviour.

Based on the above reasoning, AG Szpunar concluded that any title for the purposes of the EAPO has to be enforceable.

V. Beyond the preliminary reference: casting light on the EAPO Regulation

The preliminary reference made by the Bulgarian court is a good example of the problems that might arise out of the intersection between domestic procedural law and the uniform procedural rules of the EAPO Regulation. Indeed, observing the questions, they implicitly require a certain analysis (and interpretation) of the domestic procedural system, an inquiry that is not for the CJEU to carry out. This might also be one the reasons why AG Szpunar opted for a more general interpretation of the EAPO Regulation, especially in the second part of the Opinion. It is in this more general overview where we can find the most interesting insights of his analysis. There are three relevant points that I would like to highlight:

- The first one is the distinction made between the EAPO Regulation and other civil procedural instruments based on its provisional nature. Indeed, this is the very first uniform provisional measure at European level, whereas the other instruments to which AG Szpunar referred are mainly focused on the recognition and enforcement decisions of the merits of a claim (with the exception of some jurisdictional rules on provisional measures). One might speculate that, eventually, the CJEU might adopt a different interpretation of the EAPO Regulation, taking into account elements that it shares with other civil procedural instruments.
- The second point is on the dividing line between the two regimes existing within the EAPO Regulation. The bulk of AG Szpunar's analysis focused on the distinction between the two different regimes implicitly reflected in the EAPO Regulation. This question is fundamental, not only for creditors who might have to satisfy different prerequisites when they apply for an EAPO, but also for the debtors. Neither the systemic nor the literal interpretation of the regulation seem conclusive. Only in the Spanish version is it mentioned that the authentic instruments have to be enforceable ("documento público con fuerza ejecutiva"). Nonetheless, it seems to have been erroneously transposed from the EEO Regulation. The historical interpretation could lead to different conclusions. The suppression of an express reference to the "enforceability" of the title in the final version of the EAPO Regulation could also be understood as the willingness of the European legislator to include non-enforceable titles. Thus, it seems that the only decisive interpretative tool was the teleological one, which leads to the third and final point.
- The last point relates to a pro-defendant interpretation of the EAPO Regulation. By restricting the most lenient regime to those creditors with an enforceable title, the

> regulation indirectly protects the defendant's position or at least, maintains the *status quo* between both parties. From the debtor's perspective, the EAPO Regulation could be perceived as too "aggressive". Some authors have labelled it as too "creditor-friendly" and this was one of the grounds raised by the United Kingdom when they refused to opt-in to the EAPO Regulation. Despite all the safeguards given to the debtor, this criticism does not come without reason. The regulation operates *inaudita altera parte*, so debtors can only contest the EAPO once it is already enforced. The *fumus boni iuris* discourages abusive and fraudulent behaviour. For that reason, a broad interpretation of "title", encompassing those that are non-enforceable, would allow more creditors to circumvent this prerequisite. In this respect, the AG's approach attempts to maintain the existing fragile equilibrium between both parties.

It is unlikely that in the final judgement the CJEU will reproduce AG Szpunar's extensive analysis of the EAPO Regulation. Nevertheless, this is a good starting point for an instrument that provokes plenty of inquiries and, for the time being, has seen little application by domestic courts. This will not be the last time that an Advocate General confronts a preliminary reference concerning the EAPO Regulation.