The CJEU renders its first decision on the EAPO Regulation – Case C-555/18

Carlos Santaló Goris, Researcher at the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law, and Ph.D. candidate at the University of Luxembourg, offers a summary and an analysis of the CJEU Case C-555/18, K.H.K. v. B.A.C., E.E.K.

Introduction

On 7 November 2019, the CJEU released the very first decision on Regulation 655/2014 establishing a European Account Preservation Order ("EAPO Regulation"). From the perspective of European civil procedure, this instrument is threefold innovative. It is the first uniform provisional measure; it is also the very first *ex parte* piece of European civil procedure (and reverses the *Denilauer* doctrine); and the first one which, though indirectly, tackles civil enforcement of judicial decisions at European level. This preliminary reference made by a Bulgarian court gave the CJEU the opportunity to clarify certain aspects of the EAPO Regulation.

Facts of the case

The main facts of the case were substantiated before the District Court of Sofia.

A creditor requested a Bulgarian payment order to recover certain debts. Simultaneously the creditor decided to request an EAPO in order to attach the defendants' bank accounts in Sweden.

The payment order could not be served on the debtor because his domicile was unknown. In such cases, Bulgarian law prescribes that the debtor must initiate procedures on the substance of the case. If the creditor does not go ahead with such proceedings, the court would repeal/withdraw the payment order. The District Court of Sofia informed the creditor about this, urging the initiation of the proceedings. At the same time, the District Court of Sofia referred to the President of the District Court of Sofia for the commencement of separate

proceedings. The President of the District Court of Sofia considered that, for the purposes of the EAPO Regulation, it was not necessary to initiate secondary proceedings. On the president's view, the payment order, albeit unenforceable, constituted an authentic instrument in the sense of the EAPO Regulation. The District Court of Sofia considered that the payment order had to enforceable to be considered an authentic instrument.

As a result of these opposing views the District Court of Sofia decided to refer the following questions to the CJEU:

- *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 of the European Parliament and of the Council of 15 May 2014?*
- *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?*
- *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?*

The enforceability of the payment order

The answer to the first question constituted the core of the judgment's reasoning. The Court examined if the "enforceability" was a precondition for the payment order to be considered an authentic instrument. As the Court rightly pointed out, the EAPO Regulation does not clearly state if the acts in question (judgments, court settlements, and authentic instruments) have to be enforceable (para. 39). In order to answer this question, the CJEU followed the reasoning of AG Szpunar in his Opinion which is based on a teleological, systemic and historical interpretation of the EAPO Regulation (para. 41). In its teleological analysis, the Court stated that a broad understanding of the concept of title could undermine

the balance between the claimants' and the defendants' interests (para. 40). Creditors with a title do not have to prove, for instance, the likelihood of success on the substance of the claim (*fumus boni iuris*). Consequently, including creditors with a non-enforceable title in the more lenient regime would allow a larger number of creditors to more "easily" access an EAPO; ultimately favouring the claimant's position (para. 40). Concerning the systemic analysis, the CJEU referred to Article 14(1) of the EAPO Regulation. This provision is the only one in the EAPO Regulation which acknowledges certain rights to creditors with a non-enforceable title. In the Court's view, this was just an exception. For the rest of the cases, in which there is no such distinction between creditors with and without enforceable titles, only the former would be considered to fit the concept of title. Lastly, the historical analysis was based on the Commission Proposal of the EAPO Regulation. Unlike in the final text of the regulation, the proposal made a clear and explicit differentiation between the regimes applicable to creditors with an enforceable title, and those without one. Creditors without an enforceable title were subject to further prerequisites (e.g. satisfaction of the *fumus boni iuris*). A reading of the final text in the light of these *travaux préparatoires* might suggest, on the Court's view, that the current differentiation between creditors is also based on the enforceability of title. On this basis, the CJEU concluded that the title necessarily had to be enforceable, in order for an act to be considered an authentic instrument.

Autonomous definition of "substance of the claim"

In the second question, the Bulgarian court asked if, in the event that the payment order were not an authentic instrument, it would be necessary to initiate separate proceedings on the substance of the claim. Preservation orders can be requested before, during, or after proceedings on the substance of the claim. Those creditors who request a preservation order *ante demandam* have a deadline of "30 days of the date on which [they] lodged the application or within 14 days of the date of the issue of the Order, whichever date is the later" (Article 10(1)) in which to initiate proceedings on the substance of the matter. It is not clear what should be understood by "proceedings on the substance of the claim". Recital 13 of the EAPO Regulation, though not a binding provision, states that this term covers "any proceedings aimed at obtaining an enforceable title". In the present case, the creditor obtained a payment order. Nevertheless, such order did not become enforceable because it could not be personally notified to the debtor.

The only option left to the creditor was to initiate separate proceedings to pursue the claim. In the event that the creditor did not initiate the proceedings, the payment order would be set aside by the court. In the present case, it was not clear whether the first proceedings by which the creditor obtained a payment order, or the secondary proceedings necessary to maintain the payment order were the proceedings on the substance of the matter. The CJEU relied on the "flexible" interpretation contained in Recital 13. The Court considered the "initial" proceedings in which the creditor obtained a payment order to be proceedings on the substance of the claim. Therefore, for the purposes of the EAPO Regulation, it was not necessary to initiate secondary proceedings.

Time limit to render the decision on the EAPO application

Finally, the CJEU addressed whether a judicial vacation could be considered an "exceptional circumstance" (Article 45), justifying the delivery of the decision on the application of the EAPO outside the due time limit. The first issue concerned the way the question was formulated by the Bulgarian court. The court asks, in the event that the payment order be considered an authentic instrument, whether the time limit of Article 18(1) should be respected. If the payment order is an authentic instrument, the applicable time limit is the one under Article 18(2). This time limit is shorter (five days against the ten days of Article 18(1)), because the court that examines the EAPO applications does not have to evaluate the existence of the *fumus boni iuris* (Article 7(2)). Therefore, it is submitted that Article 18(2) should have been mentioned instead of Article 18(1) in the referring court's question. Furthermore, taking into account the way in which the question was asked, it would only have had to be answered by the Court in the event that the payment order had been considered an authentic instrument ("If a payment order under (…) is an authentic instrument"). This was not the case, and thus the CJEU was not "obliged" to reply to the question. Despite this, the Court decided to answer. The CJEU considered that judicial vacations were not "exceptional circumstances" in the sense of Article 45. In the Court's view, an interpretation to the contrary would have opposed the principle of celerity underpinning the EAPO Regulation (para. 55).

Conclusions

From a general perspective, this 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. One the hand, ensuring that the EAPO achieves its ultimate objectives in terms of efficiency, on the other, assuring the proper protection of the defendant. This search for an equilibrium between opposing interests also seems to be a general constant in other CJEU decisions concerning European uniform proceedings, especially those regarding the European Payment Order.

Observing the Court's reasoning in detail, we can clearly distinguish these two contrasting approaches. On the other hand, the Court adopts 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.

In the first question, the Court adopted a pro-defendant approach. As the CJEU rightly remarks, the wording employed was unclear in asserting whether the title has to be enforceable or not. Anecdotally, only the Spanish version of the EAPO Regulation mentions that the authentic instrument has to be enforceable. As I already mentioned in my commentary on the AG Opinion in this case, this might be a mistranslation extracted from the Spanish version of Regulation 805/2004 establishing a European Enforcement Order Regulation. From the defendant's perspective, the EAPO Regulation is relatively aggressive. Since the preservation order is granted *ex parte*, defendants can only react once it is already effective. This puts a lot of pressure on the defendants, especially if they are a business requiring liquidity that might prefer to pay than to apply for a remedy and await to the proceedings on the substance of the case. It is for that reason that it was necessary to establish certain "barriers" to impede potential abuses: the preliminary prerequisites (Article 7). In those cases in which the creditor has already an enforceable title, the EAPO is merely the prelude to an incipient enforcement. However, if there is not such a title, or if the title is not yet enforceable, in that it is for instance a payment order, then the issuance of a preservation order must be the object of further prerequisites, since it is not clear if the right that the creditor claims exists. It is for that reason that the prima facie examination of the application includes an evaluation of the likelihood of success on the substance of the claim, and the provision of a security, which might deter abusive claimants from applying for an EAPO. Opening the most lenient regime to those creditors with a non-enforceable title would tip the balance in favour of the creditors. We might think about how the decision affects creditors who have obtained a title (e.g. judicial decisions) that is not yet

enforceable. The existence of a title would serve as evidence of the likelihood of success on the substance of the claim. Regarding the security, judges could except creditors without a title from providing the security "attending to the circumstances of the case" (Article 12(2)). Having a non-enforceable title might be also one of those circumstances. Only, judges might require a later deadline to deliver the decision on the preservation order (Article 10(1)). Therefore, materially, the impact of the decision might not harm the status of creditors with unenforceable titles as much.

For the two remaining (and more technical) questions, the Court stands on the creditors' side. In the second question, the CJEU followed the guidance offered by the Preamble. In this particular case, Recital 13 entails a broad interpretation of "substance of the claim", encompassing summary proceedings. Despite the fact that the recitals of the Preamble are not binding, the Court relied on them. Behind this decision, we might find the CJEU's acknowledgement of the popularity of such proceedings at the domestic level, especially in debt recovery claims, including in regards to the European Payment Order. A decision to the contrary might have discouraged creditors from using the EAPO Regulation. Concerning the third question, the restrictive understanding of "exceptional circumstances" is not surprising. The CJEU usually tends to adopt a restrictive approach to any "exceptions" foreseen in European legislative provisions, which avoids giving domestic judges leeway to abuse them, which would ultimately undermine the objectives of the Regulation.

There are still many *non dites* aspects for which the CJEU might have something to say. Recent domestic case law on the EAPO Regulation is good proof of that. Nonetheless, domestic courts often prefer to find out themselves the solutions for such inquiries, adopting their own interpretive solutions, largely mirroring their national procedural traditions. Hopefully, in the coming future, a court might instead opt for a preliminary reference.