

The boundaries of the insolvency exclusion under the EAPO Regulation: A recent judgment from Slovakia

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 an analysis of some aspects of a judgment concerning the EAPO Regulation rendered by the District Court of Žilina (Okresný súd Žilina), Slovakia.

Can insolvency practitioners apply for a European Account Preservation Order (“EAPO”) against insolvent debtors to freeze their bank accounts? The District Court of Žilina (*Okresný súd Žilina*) in Slovakia confronted this issue in an EAPO application it received on January 2022. The EAPO Regulation expressly excludes the use of the EAPO Regulation for “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” (Art. 2(2)(c) EAPO Regulation). This is the same exclusion that can be found in Art. 1(2)(b) the Brussels I bis Regulation. Recital 8 of the EAPO Regulation reiterates that the Regulation “should not apply to claims against a debtor in insolvency proceedings” remarking that the EAPO “can be issued against the debtor once insolvency proceedings as defined in Council Regulation (EC) No 1346/2000 (now Regulation No 2015/848)”. At the same time, Recital 18 states that that exclusion should not prevent the use of an EAPO “to secure the recovery of detrimental payments made by such a debtor to third parties”.

In the instant Slovakian case, an insolvency practitioner requested an EAPO application against an insolvent debtor. The objective was to integrate the funds recovered through the EAPO into the insolvency estate. The insolvency practitioner applied for the EAPO once no assets were found in Slovakia. The EAPO application included a request to investigate the debtors’ bank accounts in Austria. One of the creditors suspected the debtor “had misappropriated funds

and stashed them in offshore accounts”. The District Court of Žilina (*Okresný súd Žilina*) considered that, since the EAPO was requested against the debtor, such a request fell within the insolvency exclusion. Thus, the EAPO Regulation was not applicable. This court embraced the most literal sense of the insolvency exclusion. However, from a teleological perspective, the insolvency exclusion aims at preventing individual creditors from using the EAPO to undermine an insolvency estate during bankruptcy proceedings. In this case, the EAPO was used in favour of the insolvency estate. Had the EAPO been successful, it would have served to increase it.

The present case serves as an example to show that the boundaries of the EAPO insolvency exclusion are blurred. Perhaps, in the future, a similar case might reach the CJEU and help cast further light on the EAPO’s insolvency exclusion.