

# Anonymised version

Translation

C-198/24 – 1

Case C-198/24

## Request for a preliminary ruling

**Date lodged:**

12 March 2024

**Referring court:**

Landesgericht für Zivilrechtssachen Wien (Austria)

**Date of the decision to refer:**

8 March 2024

**Applicant:**

TQ

**Defendant:**

Mr Green Limited

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REPUBLIC OF AUSTRIA

**Landesgericht für Zivilrechtssachen Wien (Regional Court for Civil Matters, Vienna, Austria)**

The Landesgericht für Zivilrechtssachen Wien (Regional Court for Civil Matters, Vienna), as the appeal court ... in the enforcement matter relating to the applicant **TQ**, ... Vienna, represented by Dr Sven Rudolf Thorstensen, LL.M., Rechtsanwalt in Vienna, against the defendant **Mr Green Limited**, ... Malta, in respect of EUR 62 878.00 including interest and costs, hearing the appeal brought by the applicant against the order of the Bezirksgericht Innere Stadt Wien (Inner City District Court, Vienna, Austria) of 15 February 2024 (67 E 810/24f-2), hereby makes the following

**Order:**

1.) The following question is referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 TFEU:

Is Article 7(1) of Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters (OJ 2014 L 189, p. 59) to be interpreted as meaning that action taken by the debtor three years or more previously and/or obstacles to enforcement of the judgment in the Member State of the debtor are not to be taken into account?

... [stay of the proceedings]

**Grounds:**

1.):

By document of 13 February 2024, the applicant applied for the adoption of a European Account Preservation Order. In addition to an account held by the defendant in Malta, five other accounts in Sweden, Luxembourg and Ireland were cited. With regard to jeopardisation, he asserted that, following final and enforceable judgments, the defendant had moved assets by terminating the contract with the Austrian third-party debtor Dimoco Europe GmbH after enforcement had been authorised in January 2021 or previously in other enforcement proceedings. There was a risk that it would take similar steps in other countries and all assets would be transferred to Malta. An Act had recently been adopted in Malta prohibiting enforcement of Austrian judgments against gaming operators which have a Maltese licence by reason of breach of public policy ... .

By the contested order, the court of first instance rejected the application submitted by the applicant for the adoption of a European Account Preservation Order under Article 19 of Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 ('the EAPO Regulation') on the ground that it could not be inferred from the events in 2021 that enforcement would also be impeded or made substantially more difficult in 2024. No urgency was evident because the underlying instrument was from 2021 and the applicant had submitted the application only three years later.

While the court of first instance in Malta refused enforcement of Austrian judgments, it was unclear whether higher courts also ruled to that effect ... .

The applicant appealed against that order, claiming that the contested order should be altered such that the application for the adoption of a European Account Preservation Order is granted ... .

The subject matter of the appeal proceedings is, in summary, the question whether the conditions under Article 7(1) of the EAPO Regulation are satisfied. The applicant must allege and provide evidence that there is a real risk of enforcement being frustrated or made more difficult.

In the light of the submissions and the documents produced, the appeal court considers the following facts to be established, on which it bases its decision:

The defendant is a gaming undertaking established in Malta. It has a Maltese licence for online games of chance, but does not have a licence under the Austrian Glücksspielgesetz (Law on games of chance). The applicant, who resides in Austria, played online games of chance, operated by the defendant, in Austria and in the period from 3 January 2017 to 25 April 2019 suffered total losses of EUR 62 878.00, in respect of which he brought a claim in Austria. By judgment of the Landesgericht für Zivilrechtssachen Wien (Regional Court for Civil Matters, Vienna) of 2 December 2021, the applicant was awarded EUR 62 878.00 including interest and costs against the defendant from the claim for recovery of those losses. The appeal lodged by the defendant was dismissed by judgment of the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria) of 21 February 2022. Both judgments have been final and enforceable since (at least) 13 April 2022. The applicant's claim has not yet been paid. It cannot be established whether the applicant applied for enforcement of the recovery of that claim in Austria or in Malta.

Other players have in the past attempted to recover sums awarded to them by way of enforcement in Austria and have been successful. The defendant engaged Dimoco Europe GmbH, which is established in Austria, as a payment service provider with which the defendant had a credit balance and which, as a third-party debtor, paid claims against the defendant until the beginning of February 2021. The defendant terminated the contract with Dimoco Europe GmbH on an unspecified date before 16 February 2021 in order to prevent creditors from accessing assets. Subsequently, attempts at enforcement in Austria were unsuccessful as the defendant refused to make payment on the basis of Austrian decisions which upheld claims for recovery of losses suffered.

On 12 June 2023, the Maltese Parliament adopted Act No XXI of 2023 to amend the Gaming Act. Under Article 56A of that Act ('the Maltese Act'), actions against gaming operators with a Maltese licence are prohibited and it is provided that the court must refuse recognition and/or enforcement in Malta of any foreign judgment and/or decision given upon such an action.

In similar cases, Austrian applicants have attempted to obtain enforcement in Malta of judgments delivered in their favour in cases relating to gaming. The Maltese court of first instance ('Civil Court First Hall') refuses to make reference to the Court of Justice of the European Union on the question whether the Maltese Act is contrary to EU law. It cannot be established whether those decisions are final. It cannot be established that enforcement of Austrian judgments delivered in cases relating to gaming is refused in Malta by final decisions.

Legal bases:

The relevant provisions of Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 ('the EAPO Regulation'), which is applicable in this case, read as follows:

Recital 14:

The conditions for issuing the Preservation Order should strike an appropriate balance between the interest of the creditor in obtaining an Order and the interest of the debtor in preventing abuse of the Order.

Consequently, when the creditor applies for a Preservation Order prior to obtaining a judgment, the court with which the application is lodged should have to be satisfied on the basis of the evidence submitted by the creditor that the creditor is likely to succeed on the substance of his claim against the debtor.

Furthermore, the creditor should be required in all situations, including when he has already obtained a judgment, to demonstrate to the satisfaction of the court that his claim is in urgent need of judicial protection and that, without the Order, the enforcement of the existing or a future judgment may be impeded or made substantially more difficult because there is 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.

The court should assess the evidence submitted by the creditor to support the existence of such a risk. This could relate, for instance, 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. In assessing the evidence, the court may consider that withdrawals from accounts and instances of expenditure by the debtor to sustain the normal course of his business or recurrent family expenses are not, in themselves, unusual. The mere non-payment or contesting of the claim or the mere fact that the debtor has more than one creditor should not, in themselves, be considered sufficient evidence to justify the issuing of an Order. Nor should the mere fact that the financial circumstances of the debtor are poor or deteriorating, in itself, constitute a sufficient ground for the issuing of an Order. However, the court may take these factors into account in the overall assessment of the existence of the risk.

Article 7:

Conditions for issuing a Preservation Order

1. The court shall issue the Preservation Order when the creditor has submitted sufficient evidence to satisfy the court that there is an urgent need for a protective measure in the form of a Preservation Order because there is a real risk that, without such a measure, the subsequent enforcement of the creditor's claim against the debtor will be impeded or made substantially more difficult.

2. Where the creditor has not yet obtained in a Member State a judgment, court settlement or authentic instrument requiring the debtor to pay the creditor's claim, the creditor shall also submit sufficient evidence to satisfy the court that he is likely to succeed on the substance of his claim against the debtor.

Article 22:

A Preservation Order issued in a Member State in accordance with this Regulation shall be recognised in the other Member States without any special procedure being required and shall be enforceable in the other Member States without the need for a declaration of enforceability.

Article 46(1):

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.

Article 48:

This Regulation is without prejudice to:

...

(b) Regulation (EU) No 1215/2012;

...

Austrian legal bases:

Paragraph 389 of the Exekutionsordnung (Enforcement Code, EO) provides:

‘Applications for interlocutory injunctions

389 (1) When submitting an application for an interlocutory injunction, the applicant shall indicate precisely the injunction sought by him or her, the period in respect of which it is applied for and the claim asserted by or already granted to him or her and give a detailed, truthful presentation of the facts justifying the application. If the necessary documentary evidence is not enclosed with the application, those facts and, in the absence of a judgment granting the claim, also the claim asserted by the applicant shall be demonstrated *prima facie* at the request of the court.

... ‘

Paragraph 422 of the Exekutionsordnung reads as follows:

‘Application of the provisions concerning interlocutory injunctions and scope

422 (1) Unless otherwise provided in this section or in Regulation (EU) No 655/2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters (European Account Preservation Order Regulation – EAPO Regulation), the provisions concerning interlocutory injunctions shall be applicable to a European Account Preservation Order.

...’

As far as can be seen, the Court of Justice of the European Union has given two decisions concerning the EAPO Regulation but has not yet ruled on the specific interpretation of Article 7(1) of that regulation.

In the decision of 7 November 2019, the Court held that a non-enforceable order for payment is not an authentic instrument within the meaning of Article 4(10) (C-555/18).

In the decision of 20 April 2023, the Court held that Article 7(2) must be interpreted as meaning that, where a judgment is not enforceable, the creditor must provide sufficient evidence of the existence of a legitimate claim (C-291/21).

The grounds of both decisions contained the identical statement that Article 7 seeks to strike an appropriate balance between the interests of the creditor and those of the debtor in so far as it lays down different conditions for the issue of a preservation order depending on whether the creditor has or has not already obtained, in a Member State, an instrument requiring the debtor to pay the claim. In particular, 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 or she must also satisfy the court that he or she is likely to succeed on the substance of his or her claim (C-555/18, paragraph 40; C-291/21, paragraph 50).

On 25 May 2023, the Oberster Gerichtshof (Supreme Court, Austria) ruled in a similar case (3 Ob 219/22k) with essentially the same arguments (except as regards the Maltese Act) that the conditions under Article 7(1) of the EAPO Regulation are satisfied if conduct by the debtor which is intended to prejudice creditors and to prevent creditors from accessing assets is established. In that case there were only a few months between the defendant’s termination of the contractual relationship with Dimoco Europe GmbH and the application made to the court, and the Maltese Act had not yet been adopted.

According to the wording of Article 7(1) of the EAPO Regulation, two conditions must be satisfied. First, there must be an urgent need for preservation and, second, there must be a risk that without preservation enforcement will be impeded or made substantially more difficult. Consequently, not only must there be (prejudicial) action by the debtor, but that action must also be close in time to the submission of the application (‘... recent action ...’ (recital 14)).

The termination of the contract with the Austrian payment service provider, which was intended to prejudice creditors, is action taken by the defendant in order to impede or make substantially more difficult the subsequent enforcement of the contested claim.

In the present case, just over three years passed between the action taken by the [defendant] (the termination of the contract) and the application to the court of first instance. The longer the period, the less urgent the application appears. The fact that under Article 18 of the EAPO Regulation the application must be decided within days suggests that a period of several years should not be taken into consideration. The period of three years or longer militates against the urgency of preservation. In the view of the appeal court, the termination of the contract can no longer be considered 'recent action' within the meaning of recital 14 of the EAPO Regulation and further action by the defendant has not been alleged by the applicant. The non-payment of the claim does not constitute action within the meaning of recital 14 and does not justify a longer period. In the absence of urgency, preservation could not be approved.

It is uncertain to what extent consideration should be given to the Maltese Act. The appeal court recognises that the issue of the Maltese Act being contrary to EU law and its removal can be resolved in a universally binding manner only by way of infringement proceedings. As long as the Maltese Act is in force and is applied by Maltese courts, it must be examined what effects it has on the proceedings in question.

The EAPO Regulation, under Article 48 thereof, is without prejudice to Regulation No 1215/2012 (Regulation No 1215/2012). While, in essence, only an enforceable instrument (judgment, settlement) is necessary under Regulation No 1215/2012 and enforcement – even going beyond attachment of bank accounts – is effected only in the State of enforcement, under the EAPO Regulation there must be evidence of a risk for the purposes of Article 7(1). In the view of the appeal court, it can be concluded, in the light of the different bases of claim and effects, that the applicant has a choice of regulation on the basis of which to proceed (see recital 6 '... an additional and optional means'). It need not be examined here whether enforcement of an instrument (judgment, settlement) is successful or may be successful (forecast) under Regulation No 1215/2012. It is not therefore detrimental to approval of preservation if, as in this case, enforcement has not previously been sought under Regulation No 1215/2012. It is immaterial for the purposes of preservation under Article 7(1) of [the EAPO Regulation] that the State of enforcement (under Regulation No 1215/2012) refuses enforcement. It is not necessary in this regard to examine the Maltese Act in these proceedings. Aside from this, there is not yet a final decision of a Maltese court concerning definitive refusal of enforcement under Regulation No 1215/2012.

However, on the basis of its wording, the Maltese Act infringes Article 22 of the EAPO Regulation and, for that reason, the attachment of the Maltese account

applied for, and thus enforcement of the claim in Malta, is impeded or made substantially more difficult.

According to the wording of Article 7(1) of the EAPO Regulation, the risk to enforcement is not only restricted to action taken by the debtor, but can also arise from the conduct of third parties. In this regard the Maltese Act would have to be considered as an obstacle to enforcement. Recital 14 of the EAPO Regulation seeks a balance of interests between the creditor and the debtor and, in connection with evidence of a risk, refers to conduct attributable to the debtor, while there is no mention of action taken by third parties. Neither the creditor nor the debtor influences the Maltese Act, which is why, in the view of the appeal court, it does not appear to be justified to take into account the conduct of the Maltese legislature. The Maltese Act neither prevents preservation, in particular of accounts in the other Member States, nor justifies the approval of preservation as an obstacle to attachment of the Maltese account.

The court therefore requests that the Court of Justice of the European Union give an interpretation of the conditions under Article 7(1) of the EAPO Regulation.

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