

C-291/21, *Starkinvest*. Can a European Account Preservation Order be employed to secure a penalty payment?

C-291/21, *Starkinvest*. ¿Puede emplearse una orden europea de retención de cuentas para garantizar una multa coercitiva?

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Resumen: In case C-291/21, *Starkinvest*, the CJEU examined whether a judgment establishing a penalty order was a valid enforceable title to apply for an EAPO intended to secure an amount due to because of a penalty payment. When applying for an EAPO, creditors have to prove the likelihood to success on the substance of their claim or *fumus boni iuris*, unless they have an enforceable title. The CJEU found that the judgment establishing the penalty order was not a valid title that would prevent the creditor from satisfying the *fumus boni iuris*. Nonetheless, at the same time, the CJEU confirmed that the EAPO could be used to secure claims arising from a penalty payment, even if there is not a specific provision addressing it as in the Brussels I bis Regulation.

Palabras clave: European Account Preservation Order; Brussels I bis Regulation; penalty payment; claim; judgment; *fumus boni iuris*

Abstract: En el asunto C-291/21, *Starkinvest*, el TJUE examinó si una sentencia que establecía una multa coercitiva era un título ejecutivo válido para solicitar una OERC destinada a garantizar el crédito resultante de dicha multa coercitiva. Al solicitar una OERC, los acreedores tienen probar que su pretensión frente al deudor tiene probabilidades de prosperar en cuanto al fondo o *fumus boni iuris*, a menos que dispongan de un título ejecutivo. El TJUE consideró que la sentencia que fijaba la multa coercitiva no era un título válido que impidiera al acreedor satisfacer el *fumus boni iuris*. No obstante, al mismo tiempo, el TJUE confirmó que la OERC podía utilizarse para garantizar los créditos derivados de la multa coercitiva, aunque no exista una disposición específica que lo contemple como en el Reglamento Bruselas I bis.

Keywords: Orden europea de retención de cuentas; Reglamento de Bruselas I bis; multa coercitiva; crédito; decisión judicial; *fumus boni iuris*

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I. Introduction

1. Regulation 655/2014 establishing the European Account Preservation Order introduced the first cross-border civil interim measure at EU level allowing the provisional attachment of the debtors' bank accounts.¹ On 20 April 2023, the Court of Justice ("CJ") rendered its second judgment concerning the EAPO Regulation.² C-291/21, *Starkinvest* presented the CJEU with the opportunity to explore whether a penalty payment can be secured by an EAPO. Penalty payments are a type of coercive sanction that intends to force defendants to comply with the obligations arising from judgment.³ Put simply, penalty payments are pecuniary fines that defendants might have to pay if they fail to comply with the obligation imposed by a judgment on the merits of the claim. Whether or not a penalty payment can be secured by an EAPO is something that the EAPO Regulation does not clarify.⁴

2. This article aims at offering an analysis of the judgment, focusing on the reasoning followed by the CJEU to answer the questions referred as well as the impact of the judgment on the interpretation of the EAPO Regulation.

II. One EAPO, two regimes

3. Before addressing the background and content of the judgment, it is useful to bear in mind one fundamental aspect of the EAPO proceeding, which is relevant for understanding the issue at stake in the case: the different regimes for creditors with an enforceable title and those without one.⁵ Article 5 of the EAPO Regulation states that creditors can apply for an EAPO either before having obtained an enforceable judgment, court settlement or authentic instrument⁶ or after having obtained one.⁷ That provision does not indicate what the differences are between applying for an EAPO at one stage or the other. Similar divergences are widespread and can be found in other provisions across the EAPO Regulation.⁸

4. The most significant divergences can be observed in the prerequisites creditors have to satisfy to obtain an EAPO. All creditors who apply for an EAPO have to submit "sufficient evidence to satisfy

¹ 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 L 189, 27.6.2014, p. 59–92 ("EAPO Regulation").

² CJEU, 20 April 2023, C-291/21, *Starkinvest*, ECLI:EU:C:2023:299.

³ E. VALLINES GARCÍA, "Article 55" in M. REQUEJO ISIDRO, *Brussels I Bis. A Commentary on Regulation (EU) No 1215/2012* (Edward Elgar), para. 55.05.

⁴ In this regard, *Van Calster* criticizes the fact that the EAPO Regulation does not expressly address the situation of penalty payments: G. VAN CALSTER, "Starkinvest. Szpunar AG on cross-border enforcement of orders for periodic penalty payments and the European account preservation order", *GAVC Law*, 2022, available at: <<https://gavclaw.com/2022/10/26/starkinvest-szpunar-ag-on-cross-border-enforcement-of-orders-for-periodic-penalty-payments-and-the-european-account-preservation-order/>> accessed on 15 July 2023.

⁵ I. ANTÓN JUÁREZ, "El concepto de resolución judicial a la luz del Reglamento UE n.o 655/2014 por el que se establece la orden europea de retención de cuentas: Sentencia del Tribunal de Justicia de la Unión Europea de 20 de abril de 2022, C.291/21", *La Ley Unión Europea*, 2023, p. 6.

⁶ Art. 5(a) EAPO Regulation. The EAPO Regulation does not expressly indicate that the title has to be enforceable. This is something that the CJEU determined in the first judgment it rendered concerning the EAPO Regulation. It argued that only creditors with an enforceable title could access the EAPO through the most lenient access regime: C-555/18, 7 November 2019, *K.H.K. (Account Preservation)*, ECLI:EU:C:2019:937, para. 44.

⁷ Art. 5(b) EAPO Regulation.

⁸ Conversely, the EAPO Commission Proposal traced a clear separation between the regime for creditors with an enforceable title and the regime for creditors without an enforceable title, devoting a specific for each of section to each of them: Section 1 and Section 2, Chapter 2 COM/2011/0445 final. However, the Council considered it was more appropriate to have a single EAPO procedure, withdrawing such separation: Presidency of the Council, *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 - Revised text proposal on Chapter 2*, 11713/13 JUSTCIV 156 CODEC 1632, p. 1.

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".⁹ This first prerequisite corresponds to one of most typical prerequisites to obtain interim measures: the *periculum in mora*.¹⁰ However, creditors without an enforceable title "shall also submit sufficient evidence to satisfy the court" that they are "likely to succeed on the substance of his claim against the debtor". This second prerequisite corresponds to the *fumus boni iuris*.¹¹ Furthermore, for creditors without an enforceable title the provision of a security is mandatory.¹² Exceptionally, they can be exempted from providing a security if the court "considers that the provision of security referred to in that subparagraph is inappropriate in the circumstances of the case".¹³ For instance, if they show the court that they have "particularly strong case but does not have sufficient means to provide security".¹⁴ While creditors with an enforceable title are in principle exempted, the court can also ask that they provide a security if it considers "this necessary and appropriate in the circumstances of the case".¹⁵

5. Access to the information mechanism to search for a debtors' bank accounts also depends on whether the creditor has a title. Only creditors with a title can apply for information about a debtor's bank accounts.¹⁶ Furthermore, the EAPO Regulation also traces a difference between creditors with a non-enforceable title and those with an enforceable title.¹⁷ Creditors with a non-enforceable title can only request access to a debtors' bank accounts if "the amount to be preserved is substantial taking into account the relevant circumstances" and they 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 jeopardised and that this could consequently lead to a substantial deterioration of the creditor's financial situation".¹⁸

6. Divergences between the regime for creditors with and without an enforceable title can be also appreciated at the jurisdictional level. The jurisdiction to grant an EAPO when there is no enforceable title is established according to Member States' domestic courts that have jurisdiction to decide on merits of the claim which the EAPO intends to secure.¹⁹ Conversely, when creditors do have title,

⁹ Art. 7(1) EAPO Regulation. Although under the EAPO Commission Proposal, this prerequisite was limited to creditors without an enforceable title: Art. 7(1)(b) COM/2011/0445 final.

¹⁰ C. SENÉS MOTILLA, *La orden europea de retención de cuentas: aplicación en derecho español del Reglamento (UE), núm. 655/2014, de 15 de mayo de 2014*, Thomson Reuters-Civitas, 2015, p. 72.

¹¹ E. SILVESTRI, "Article 7" in E. D'ALESSANDRO/F. GASCÓN INCHAUSTI (eds), *The European Account Preservation Order. A Commentary on Regulation (EU) No 655/2014*, Edward Elgar, 2022, para. 1.

¹² Art. 12(1) EAPO Regulation.

¹³ Art. 12(1) EAPO Regulation.

¹⁴ Recital 18 EAPO Regulation.

¹⁵ Art. 12(2) EAPO Regulation.

¹⁶ Art. 14(1) EAPO Regulation. The EAPO Commission Proposal gave access to all creditors to the information mechanism whether or not they had a title: Art. 17 COM/2011/0445 final. It was decided to limit access to the information mechanism following criticism received from some Member States, in particular, France: Comments on Chapters I, II and III from the French delegation, 13260/11 JUSTCIV 205 CODEC 1280, 13140/12 ADD 13, pp. 14 - 15. Some authors have criticized this restriction: M. Á. ARTOLA FERNÁNDEZ, "La orden europea de retención de cuentas y la implicación del cobro transfronterizo del crédito empresarial en la UE, así como de otras deudas civiles, laborales y de responsabilidad derivada del delito" in Carmen Otero García-Castrillón (ed.), *Ejecución de decisiones relativas a deudas monetarias en la Unión Europea. Experiencia española y adopción de decisiones informadas*, Dykinson, 2020, 135.

¹⁷ Art. 14(1) EAPO Regulation.

¹⁸ Art. 14(1) EAPO Regulation. This special "risk" that creditors with a non-enforceable title have to satisfy to access the information mechanism should be mistaken with the general *periculum in mora* that creditors have to satisfy to access the EAPO under Article 7(1): G. CUNIBERTI/S. MIGLIORINI, *The European Account Preservation Order Regulation: A Commentary*, Cambridge, 2018, p. 178.

¹⁹ Art. 6(1)(2) EAPO Regulation.

the jurisdiction to grant an EAPO lies with the courts of the Member State where the judgment was rendered,²⁰ the court settlement approved,²¹ and the authentic instrument drawn up.²²

7. Deadlines for courts to decide on an EAPO application also varies depending on whether the EAPO application had been submitted with or without an enforceable title.²³ For those EAPO applications relying on an enforceable title, courts only have 5 working days to render the decision.²⁴ Conversely, where there is no enforceable title, the deadline is 10 working days.²⁵ The deadline is longer because the court has to examine the *fumus boni iuris*.²⁶

8. In *Starkinvest*, the question at stake is whether the creditor has a valid title, and thus it would be exempted from proving the *fumus boni iuris*.²⁷

III. Background of case

9. The preliminary reference of the case *Starkinvest* has its roots in the litigation between *Starkinvest* and *Soft Paris* before the Commercial Court of Liège (*Tribunal de commerce de Liège*) in Belgium.²⁸ In 2015, this court rendered a judgment in favour of *Starkinvest*, ordering that *Soft Paris* cease the sale of its products in the Benelux countries.²⁹ This order was accompanied by a penalty order establishing that for each day the order was breached, *Soft Paris* would have to penalty payment of 2.500 euros.³⁰

10. Six years later, in 2021, *Starkinvest* issued an order for payment against *Soft Paris* for the breach of the order to cease the sale of products.³¹ At the same time, *Starkinvest* applied for an EAPO to freeze the bank accounts that *Soft Paris* held in France before the First Instance Court of Liège.³² *Starkinvest* used the judgment that established the penalty order as a title to apply for the EAPO.³³

11. The First Instance Court of Liège wondered whether such judgment could serve as a title. If the creditor considered it a valid title, they would not have to prove the *fumus boni iuris*, which, as explained in the previous section, only applies to creditors without an enforceable title.³⁴ There were two main reasons behind the doubts of the First Instance Court of Liège. The definition of the *fumus boni iuris* under the EAPO states that creditors have to prove it unless the creditor has a judgment “requiring

²⁰ Art. 6(3) EAPO Regulation. The EAPO Commission Proposal also permitted requesting the EAPO directly in the Member State where the bank accounts to be attached were located: COM/2011/0445 final. Case law in Luxembourg and Slovakia show that, although this option is not available, some creditors have tried it. In Luxembourg a creditor with an enforceable judgment obtained in Spain, applied for an EAPO before the District Court of Luxembourg (*Tribunal d'arrondissement de Luxembourg*): Tribunal d'arrondissement de Luxembourg, 15.03.2022, Ordonnance (unpublished). Similarly, two Slovakian courts received requests for EAPOs on the basis of enforceable payment orders which had been obtained in Germany: Okresný súd Bratislava I, 31.05.2021, 25Cbud/7/2020, ECLI:SK:OSBA1:2020:1120216618.1; Okresný súd Banská Bystrica, 20.06.2022, 9C/49/2022, ECLI:SK:OSBB:2022:1321206534.1.

²¹ Art. 6(3) EAPO Regulation.

²² Art. 6(4) EAPO Regulation.

²³ I. ANTÓN JUÁREZ, “El concepto de resolución...”, p. 6.

²⁴ Art. 18(2) EAPO Regulation.

²⁵ Art. 18(1) EAPO Regulation.

²⁶ G. CUNIBERTI/S. MIGLIORINI, *L'ordonnance européenne de saisie conservatoire des comptes bancaires, Commentaire du règlement UE no 655/2014, Belgique, France, Luxembourg*, Legitech, 2021, p. 231.

²⁷ CJEU, 20 April 2023, C-291/21, *Starkinvest*, ECLI:EU:C:2023:299, para. 25.

²⁸ CJEU, 20 April 2023, C-291/21, *Starkinvest*, ECLI:EU:C:2023:299, para. 18.

²⁹ CJEU, 20 April 2023, C-291/21, *Starkinvest*, ECLI:EU:C:2023:299, para. 18.

³⁰ CJEU, 20 April 2023, C-291/21, *Starkinvest*, ECLI:EU:C:2023:299, para. 18.

³¹ CJEU, 20 April 2023, C-291/21, *Starkinvest*, ECLI:EU:C:2023:299, para. 19.

³² CJEU, 20 April 2023, C-291/21, *Starkinvest*, ECLI:EU:C:2023:299, para. 20.

³³ CJEU, 20 April 2023, C-291/21, *Starkinvest*, ECLI:EU:C:2023:299, para. 22.

³⁴ CJEU, 20 April 2023, C-291/21, *Starkinvest*, ECLI:EU:C:2023:299, para. 23.

the debtor to pay the creditor's claim".³⁵ The EAPO Regulation states that a claim means "a claim for payment of a specific amount of money that has fallen due or a claim for payment of a determinable amount of money arising from a transaction or an event that has already occurred, provided that such a claim can be brought before a court".³⁶ The judgment establishing the penalty order only sets out the basis to calculate the penalty payment, it does not specify the final amount of money to be paid if the order to cease the sale of products were infringed.³⁷

12. The First Instance Court of Liège also remarks that the Brussels I bis Regulation permits the recognition and enforcement of penalty payment judgments only "if the amount of the payment has been finally determined by the court of origin".³⁸ This contrast with Belgian law which does not require "the amount of the penalty payments to be determined prior to the preservation, provided that the decision ordering penalty payments is enforceable and has been served".³⁹ The First Instance Court of Liège wondered whether the determination of the amount of the payment required by the Brussels I bis Regulation also applies to the EAPO.

13. Unable to decide whether the judgment establishing the penalty order was a valid title or not, referred the following questions the CJEU:⁴⁰

- "(1) Does a judgment which has been served, ordering a party to make a penalty payment in the event of breach of a prohibitory order, constitute a [judgment] requiring the debtor to pay the creditor's claim within the meaning of Article 7(2) of [Regulation No 655/2014]?"
- (2) Does a judgment ordering a party to make a penalty payment, although enforceable in the country of origin, fall within the meaning of "judgment" in Article 4 of [Regulation No 655/2014] where there has been no final determination of the amount in accordance with Article 55 of [Regulation No 1215/2012]?"

IV. The CJEU's analysis

14. The CJEU relied on different hermeneutic tools to provide an answer to the preliminary reference. Firstly, it conveyed a literal and systematic interpretation of the EAPO. Secondly, it assessed which solution would ensure an adequate balance between the interests of the creditors and debtors. Thirdly, it explores to what extent the recognition and enforcement regime under Article 55 of the Brussels I bis Regulation can be exported to the EAPO Regulation.

1. A literal and systematic interpretation of the EAPO Regulation

15. The CJEU started its analysis of the referred questions by scrutinizing the autonomous notion of claim contained in Article 4(8). The judgment which established the penalty payment does not reflect a claim as defined in Article 4(8). It is not a "claim amount that has fallen due" nor "a claim for payment of a determinable amount of money arising from a transaction or an event that has already occurred".⁴¹ In the present case, by the time the judgment which established the penalty order was rendered, the defendant had not yet infringed the obligation to cease the sale of Starkinvest's products that

³⁵ CJEU, 20 April 2023, C-291/21, *Starkinvest*, ECLI:EU:C:2023:299, para. 24.

³⁶ Art. 4(5) EAPO Regulation.

³⁷ CJEU, 20 April 2023, C-291/21, *Starkinvest*, ECLI:EU:C:2023:299, para. 23.

³⁸ Art. 55 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L 351, 20.12.2012, p. 1–32.

³⁹ CJEU, 20 April 2023, C-291/21, *Starkinvest*, ECLI:EU:C:2023:299, para. 23.

⁴⁰ CJEU, 20 April 2023, C-291/21, *Starkinvest*, ECLI:EU:C:2023:299, para. 28.

⁴¹ CJEU, 20 April 2023, C-291/21, *Starkinvest*, ECLI:EU:C:2023:299, paras. 38 – 39.

would eventually trigger the penalty payment. In this regard, the CJEU stated that the judgment cannot not precede the claim.⁴²

16. Concerning the notion of judgment, the CJEU explored whether or not the amount of the claim had to be quantified in the judgment. Neither Article 4(5), which contains the definition of judgment, nor Article 7(2), the provision on the *fumus boni iuris*, states anything about the quantification of the claim in the judgment.⁴³ Nonetheless, other provisions do so. Article 6 refers to the “amount specified in the judgment”, while Article 8(2)(g) states that creditors can apply for an EAPO in “the amount of the principal claim as specified in the judgment”.⁴⁴ Therefore, a systematic interpretation of the EAPO Regulation suggests that the judgment would have to contain the precise amount of claim.

17. While the judgment establishing the penalty payment might not serve to circumvent the *fumus boni iuris*, interestingly, Advocate General Szpunar remarks that it is not “meaningless for the creditor”.⁴⁵ In his words, creditors can use it along “with documents provided by a court official in which the court official declares the breaches of the prohibitory order”, to justify the *fumus boni iuris*.

2 Balancing creditors and debtors’ interests in the EAPO proceeding

18. Subsequently, the CJEU proceeded to examine to what extent acknowledging the judgment establishing the penalty payment as a valid title could hinder an adequate balance between creditors’ and debtors’ interests.⁴⁶ Recital 14 of the Preamble states that “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”. In this regard, the CJEU found that if the judgment establishing the penalty order were a valid judgment, it would undermine the debtors’ protection.⁴⁷ It would deprive the court from assessing the likelihood of success on the merits of the claim, which would mean easier access to the EAPO for the creditor.⁴⁸ At this point it should be noted that the *fumus boni iuris*, along with the *periculum in mora*, are not the only prerequisites for creditors to access the EAPO but also a means to protect debtors against creditors abusing the EAPO proceeding.⁴⁹

⁴² CJEU, 20 April 2023, C-291/21, *Starkinvest*, ECLI:EU:C:2023:299, paras. 38 – 39.

⁴³ CJEU, 20 April 2023, C-291/21, *Starkinvest*, ECLI:EU:C:2023:299, paras. 42 – 43.

⁴⁴ Opinion AG Szpunar in C-291/21, *Starkinvest*, ECLI:EU:C:2022:819, para. 82.

⁴⁵ Opinion AG Szpunar in C-291/21, *Starkinvest*, ECLI:EU:C:2022:819, para. 83.

⁴⁶ Seeking a balance between creditors and debtors’ interests is a recurrent hermeneutic tool for the CJEU when assessing preliminary references concerning European Payment Order (Regulation no. 1896/2006): Joined cases C-119/13 and C-120/13, 4 September 2014, *eco cosmetics and Raiffeisenbank St. Georgen*, ECLI:EU:C:2014:2144, para. 37 (“the balance between the objectives pursued by Regulation No 1896/2006 of speed and efficiency, on one hand, and respect of the rights of defence, on the other hand, would be undermined”); C-245/14, 22 October 2015, *Thomas Cook Belgium*, ECLI:EU:C:2015:715, para. 41 (“Since the purpose of the procedure established by Regulation No 1896/2006 is to reconcile the swiftness and efficiency of court proceedings, whilst observing the rights of the defence”); C-18/21, 15 September 2022, *Uniqa Versicherungen*, ECLI:EU:C:2022:682, para. 38 (“national procedural rules must be regarded as complying with that principle where they do not undermine the balance which Regulation No 1896/2006 has created between the respective rights of the claimant and the defendant in a European order for payment procedure”); Opinion Advocate General Bot in Joined cases C 119/13 to C-121/13, 9 April 2014, *eco cosmetics and Raiffeisenbank St. Georgen*, ECLI:EU:C:2014:248 (para. 41: “is of prime importance in maintaining a balance between the different objectives pursued by that regulation”); Opinion Advocate General Wathelet in C-21/17, *Catlin Europe SE v O. K. Trans Praha spol. s r. o.*, ECLI:EU:C:2018:341, para. 44 (“the purpose of Regulations No 1896/2006 and No 1393/2007 is to ensure a fair balance between the applicant’s interests and those of the defendant, by reconciling the aims of efficient and rapid transmission of procedural documents with the need to ensure appropriate protection for the rights of defence of the addressee of those documents”). In the earlier case the CJEU received about the EAPO, Advocate General Szpunar also referred to the need to attain an adequate balance between the debtor’s and creditor’s interests when interpreting this instrument: Opinion Advocate General Szpunar in C-555/18, 29 July 2019, *K.H.K.*, ECLI:EU:C:2019:652, para. 68.

⁴⁷ CJEU, 20 April 2023, C-291/21, *Starkinvest*, ECLI:EU:C:2023:299, para. 52.

⁴⁸ Opinion AG Szpunar in C-291/21, *Starkinvest*, ECLI:EU:C:2022:819, para. 76.

⁴⁹ CJEU, 20 April 2023, C-291/21, *Starkinvest*, ECLI:EU:C:2023:299, para. 51.

19. In his Opinion, Advocate General Szpunar went a step further stating that acknowledging the judgment establishing the penalty order as a valid title would also limit the debtor's possibilities to contest the EAPO.⁵⁰ Article 33 of the EAPO Regulation provides debtors with an autonomous mechanism to request the revocation of an EAPO under an exhaustive number of grounds.⁵¹ One of the grounds to request the revocation is that "the conditions or requirements set out in this Regulation were not met",⁵² including the *fumus boni iuris*.⁵³ The debtor would not have an opportunity "to assert that the amount in question is not due".⁵⁴

3. The EAPO Regulation in the light of the Brussels I bis Regulation

20. Finally, the CJEU examined whether the regime of the Brussels I bis Regulation on the recognition and enforcement of penalty payments could serve to clarify the regime of penalty payments under the EAPO Regulation.⁵⁵ Article 55 of the Brussels I bis Regulation states that "a judgment given in a Member State which orders a payment by way of a penalty shall be enforceable in the Member State addressed only if the amount of the payment has been finally determined by the court of origin".⁵⁶ Whereas the EAPO Regulation does not have a similar provision addressing penalty payments, the CJEU found that this does not mean that claims resulting from a penalty payment cannot be secured with an EAPO. Furthermore, it added that the determination of the amount of the penalty payment beforehand required by Article 55 of the Brussels I bis Regulation should also apply to the EAPO Regulation.⁵⁷ The CJEU considered that such solution "not only falls within the scope of the objective of effectiveness pursued by Regulation No 655/2014, but is also consistent with the balancing of interests pursued by that regulation".⁵⁸

V. Overall assessment of the judgment

21. The main contribution of the judgment in *Starkinvest* is that came to confirm that the EAPO can be used to recover claims arising from a penalty payment.⁵⁹ This might not have been clear for all national courts. In Germany, the Regional Court of Aachen (*Landesgericht Aachen*) rejected an EAPO application arguing that amount be paid resulting from a penalty payment was not a claim in the sense of autonomous definition of the EAPO Regulation.⁶⁰ That was an enforcement measure under German law, and the EAPO Regulation was not used to secure enforcement measures. The creditor appealed the decision before the High Regional Court of Cologne (*Oberlandesgericht Köln*), which followed the

⁵⁰ Opinion AG Szpunar in C-291/21, *Starkinvest*, ECLI:EU:C:2022:819, paras. 77 – 80.

⁵¹ M. L. VILLAMARÍN LÓPEZ, "Article 33" in E. D'Alessandro and F. Gascón Inchausti (eds), *The European Account Preservation Order. A Commentary on Regulation (EU) No 655/2014*, Edward Elgar, 2022, para. 33.06.

⁵² Art. 33(1)(a) EAPO Regulation.

⁵³ Point 6.1.1. Annex VII of the 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, C/2016/6339, OJ L 283, 19.10.2016, p. 1–48 (EAPO Commission Implementing Regulation). In several Dutch cases about the EAPO, debtors argued that the *fumus boni iuris* was not properly satisfied when asking for the revocation of the EAPO: *Gerechtshof 's-Hertogenbosch*, 29.08.2017, 200.215.789_01, ECLI:NL:GHSHE:2017:3764; *Gerechtshof Arnhem-Leeuwarden*, 12.10.2021, 200.283.655, ECLI:NL:GHARL:2021:9639.

⁵⁴ Opinion AG Szpunar in C-291/21, *Starkinvest*, ECLI:EU:C:2022:819, para. 79.

⁵⁵ C-291/21, 20 April 2023, *Starkinvest*, ECLI:EU:C:2023:299, para. 54 – 55.

⁵⁶ For a comprehensive analysis on Article 55 of the Brussels I bis Regulation, see: VALLINES GARCÍA (n 3), pp. 744 – 755.

⁵⁷ CJEU, 20 April 2023, C-291/21, *Starkinvest*, ECLI:EU:C:2023:299, para. 55.

⁵⁸ CJEU, 20 April 2023, C-291/21, *Starkinvest*, ECLI:EU:C:2023:299, para. 55.

⁵⁹ Before this judgment was rendered, *Wiedemann* had remarked that this was an unsettled issue: D. WIEDEMANN, "Artikel 4 EU-KpfVO" in T. RAUSCHER (ed.), *Europäisches Zivilprozess- und Kollisionsrecht*, Otto Schmidt, 2022, margin no. 11.

⁶⁰ *Landesgericht Aachen*, Beschluss v. 02.10.2020, 41 O 15/17, (unpublished).

same interpretation of the Regional Court of Aachen.⁶¹ This reasoning by the Regional Court of Aachen is more restrictive than that adopted by the CJEU in *Starkinvest*. Had the CJEU decided on *Starkinvest* before the German courts faced the dilemma of whether or not an EAPO could be used to secure a penalty payment,⁶² they might well have reached a different interpretation.

22. By opening the door to the possibility of using EAPOs to secure amounts due because of penalty payments, the CJEU also achieves coherency between the EAPO and Brussels I bis Regulation. Both instruments could be combined to recover the same penalty payment claim. While the EAPO would serve as an interim measure to secure the amount due because of the penalty payment, the Brussels I bis Regulation would serve to facilitate the enforcement of judgment which orders the payment of the penalty.

23. The *Starkinvest* decision also serves to shed light on the autonomous notion of judgment in the EAPO Regulation.⁶³ In the first CJEU judgment on the EAPO Regulation, it was clarified that judgments had to be enforceable in the Member State of origin to be considered as judgments.⁶⁴ In *Starkinvest*, the CJEU added that the amount of the claim has to be specified in the judgment. It also clarified that the judgment which establishes the penalty order could not serve as a valid title for creditors to apply for an EAPO intended to secure a penalty payment.⁶⁵ Both CJEU judgments on the EAPO Regulation reflect a restrictive approach to the notion of judgment intended to limit creditors' access to the EAPO through the more lenient regime. In seeking equilibrium between creditors and debtors' interests, the CJ seems to strike a balance in favour of debtors.

⁶¹ Oberlandesgericht Köln, Beschluss v. 20.12.2020, 13 W 40/20 (unpublished).

⁶² The creditor requested the High Regional Court of Cologne to make a preliminary reference to the CJEU asking precisely whether the EAPO could be used to secure an amount due to a penalty payment. The High Regional Court of Cologne refused to make the preliminary reference. It argued that, based on what the CJEU stated in C-107/76, *Hoffmann-La Roche*, courts are not required to submit a preliminary reference in interim measure proceedings, even when there is no judicial remedy against the decision resulting from those proceedings: Oberlandesgericht Köln, Beschluss v. 20.12.2020, 13 W 40/20 (unpublished).

⁶³ I. ANTÓN JUÁREZ, "El concepto de resolución...", p. 9; T. LUTZI, "What is a Judgment (in the context of Reg 655/2014)? – CJEU Case C-291/21 *Starkinvest*", Conflict of laws.net, 2023, available at: <<https://conflictoflaws.net/2023/what-is-a-judgment-in-the-context-of-reg-655-2014-cjeu-case-c-291-21-starkinvest/>> accessed on 15 July 2023.

⁶⁴ CJEU, 7 November 2019, C-555/18, *K.H.K. (Account Preservation)*, ECLI:EU:C:2019:937, para. 44.

⁶⁵ CJEU, 20 April 2023, C-291/21, *Starkinvest*, ECLI:EU:C:2023:299, para. 56.