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Tracing and Attaching Bank Accounts in EU Cross-border Insolvency Proceedings

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Tracing & Attaching Bank Accounts (TAB): setting the scene

- TAB as a sector of Asset Tracing & Recovery
- Broad meaning of 'bank account': cash, securities, crypto assets
- Cross-border scenario: problems and challenges of getting information, freezing accounts, and recovering assets
- TAB in cross-border insolvency: general remarks under the modified universalism approach (centralizing TAB for assets located abroad)
- The EIR as the paper's perspective. The UNCITRAL's work on ATR.



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TAB and Regulation EU 2015/848 (EIR)

- Power of insolvency practitioners under the automatic recognition (Articles 19 and 32) of:
 - Judgments opening the insolvency proceedings
 - Insolvency-related judgments (e.g. judgments on avoidance disputes)
 - Defendants domiciled in third countries.
 - Universal effect of *vis attractiva*: yes (CJEU, Case C-328/12 *Ralph Schmid*)
 - Enforcement against the bank account: yes for account in Member States. Maybe for accounts in third countries (interplay with 1997 UNCITRAL Model Law: recognition and relief)
 - Preservation measures issued after the opening



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TAB and Regulation EU 2015/848 (EIR)

- *Lex concursus* governs the substantive profiles, including the debtor's duty to disclose its assets and IP's power to trace and recover assets in bank accounts (unless secondary proceedings have been opened in the State of the account): Article 21 (1)
 - Likewise for secondary IP if the account's contents are 'removed from the territory of the State of the opening of proceedings to the territory of that other Member State after the opening of the insolvency proceedings': Article 21 (2)
- The EIR sets the framework of recognition and enforcement (possibly through the Brussels Ibis Regulation)
- *Lex loci* (law of the Member State where the bank account is located) governs the concrete execution of the measure: Article 21 (3). Obtaining information and freezing assets according to the *lex loci*.



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Insolvency practitioners may request TAB measures *directly* under the *lex loci*

- Obstacles to enforce foreign *ex parte* measures: lack of adversarial proceedings may contrast the public policy of the requested State.
- Alternative option: demanding the measure in the State of the bank account. Territorial effects as a general principle shared by the EIR and the Brussels Ibis Regulation
- Option available to temporary IP appointed according to Article 52 ‘in order to ensure the preservation of a debtor's assets’ [...] for the period between the request for the opening of [main] insolvency proceedings and the judgment opening the proceedings’.



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TAB and Regulation EU 2015/848 (EIR)

TAB may be barred by Article 8

- Rights *in rem* on debtor's assets in bank accounts
- Bank accounts located in a Member State other than that of the insolvency proceedings
- Rights *in rem* validly constituted under the *lex rei sitae*, i.e. the law of the bank account (as determined according to Article 2 no 9 EIR)
- ***On the other hand***, seizure of bank accounts may in turn represent a right *in rem* under Article 8 (CJEU, Case C-557/13 *Lutz*)



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TAB as a specific objective of cooperation between the authorities of insolvency proceedings opened against a single debtor

TAB and the cooperation about 'assets':

IP-to-IP cooperation Article 41 (2): 'In implementing the cooperation [...] the insolvency practitioners shall: a) as soon as possible communicate to each other any **information** which may be relevant to the other proceedings [...]; c) coordinate the administration of the **realisation** or **use** of the debtor's **assets** [...]; the insolvency practitioner in the secondary insolvency proceedings shall give the insolvency practitioner in the main insolvency proceedings an early opportunity to submit proposals on the realisation or use of the assets in the secondary insolvency proceedings.

Court-to-court cooperation Article 42 (3): The cooperation [...] may be implemented by any means that the courts consider appropriate. It may, in particular, concern: (c) coordination of the administration and supervision of the debtor's **assets** and affairs; (e) coordination in the approval of protocols [concerning assets in bank accounts]. The same for **Court-to-IP cooperation** (Article 43 (2)).



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Groups

- TAB within the same cooperation framework as those for single-debtor proceedings
- Coordination proceedings. TAB or not TAB? ... a *recommendation* from the coordinator depending on the contents and purposes of the group coordination plan



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TAB and Regulation EU 2015/848 (EIR)

Determining the banks account location

Article 2 (9)(iii): ‘the Member State in which assets are situated’ means, in the case of: ‘cash held in accounts with a credit institution, the Member State indicated in the account's IBAN, or, for cash held in accounts with a credit institution which does not have an IBAN, the Member State in which the credit institution holding the account has its central administration or, where the account is held with a branch, agency or other establishment, the Member State in which the branch, agency or other establishment is located’

Definition **not necessarily restricted** to the debtor’s assets.

What about **other assets** held in bank accounts? A revision is needed, especially after the outbreak of digitalisation and insolvency cases in the crypto sector, insofar as rights on crypto assets may be controlled or detained through banks and in bank accounts, and analogy with cash accounts or other entries in Article 2 (9) (e.g. financial instruments, claims, etc) is not workable or possible.



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Determining the banks account location beyond attaching and recovering purposes

Example: Bank account's location in the comprehensive assessment needed to determine the COMI, especially for natural person. Poor formalities for the sake of efficiency and smoothness in the opening phase (see recently Oberlandesgericht Innsbruck, 30 May 2023 – 3 Nc4/23 f, which denied the need of an evidentiary procedure).



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TAB, the EIR and the EAPO

Regulation No 655/2014 of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters

The EAPO

- Alternative and equivalent means to national measures in cross-border cases
- Means to protect claims disputed or about to be disputed
- Provisional measure to protect claims ascertained in judgments, authentic instruments, or court settlements
- **Outcome of a process collecting earlier information and then assets (bank accounts)**
- It may turn into a full-blown judgment enforcement measure



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Coordination of EAPO and the EIR

Different timing and jurisdictional framework to issue an EAPO

- Request before or pending the proceedings: courts competent on the merits.
 - Jurisdictional rules ‘on the substance of the matter in accordance with the relevant rules of jurisdiction applicable’ (Article 6 (1)): jurisdictional rules of the EIR
- Request to protect the enforcement of ‘ascertained claims’: courts of the State in which the judgment has been rendered, the court settlement approved or concluded, the authentic instrument drawn up.



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EAPO and EIR

- Article 2(2)(c) of the EAPO Regulation states that this does not apply to ‘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’.
- Article 46(2) provides that ‘[t]he effects of the opening of insolvency proceedings on individual enforcement actions, such as the enforcement of a Preservation Order, shall be governed by the law of the Member State in which the insolvency proceedings have been opened’.
- Article 48(c) states that the EAPO’s Regulation ‘is without prejudice to’ the EIR.



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EAPO and EIR

Recital 8: the EAPO Reg. 'should not apply to claims against a debtor in insolvency proceedings. This should mean that no Preservation Order can be issued against the debtor once insolvency proceedings as defined in [the EIR] have been opened in relation to him. On the other hand, *the exclusion should allow the Preservation Order to be used to secure the recovery of detrimental payments made by such a debtor to third parties*' (emphasis added).



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EAPO at the disposal of Insolvency Practitioners

- No EAPO against insolvent debtors after the opening of insolvency proceedings. The underlying *rationale*: stay or prohibition of individual enforcement actions.
- The *lex concursus* determines the effects of the proceedings on the enforcement of an EAPO previously issued in another Member State.
- However (**and notably**), nothing prevents IPs from making use of the EAPO procedure to obtain information (tracing) and freezing (attaching) bank accounts.



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EAPO at the disposal of Insolvency Practitioners

IPs may apply to:

- the courts of the insolvency proceedings (Article 3 and 6 EIR),
- the courts competent under Article 6 (2) EIR (*forum connexitatis* triggered by the IP),
- the origin courts in the case of ‘post-judgment’ EAPO.

No alternative jurisdictions. Jurisdiction on a case-by-case basis.



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EIR, EAPO and the 2022 EC Proposal

- Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law (COM (2022) 702 final. Prospected provisions about TAB in insolvency proceedings (Articles 13-16).
- ‘Designated courts’ to implement measures or requests from IPs for TAB through the centralized mechanisms as per the Anti-Money Laundering Directive (it will be revised). The information is *directly* transmitted by an automated mechanism.
- Assets belonging to the estate or subject to avoidance actions.



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EIR, EAPO and the 2022 EC Proposal

- Request from IPs
- Are foreign IPs included?
 - Different wording between Article 14 (bank accounts) and Article 18 (other assets register). Only the second refers to IPs 'regardless of the Member State where they have been appointed'.
- Compliance with standards of confidentiality and data protection (see the recent CERIL Statement and Report 2023-1 on Confidentiality, Secrecy and Privilege – The Position of Insolvency Practitioners).
- Searching for info as to the bank account's beneficial owner. Preliminary issue to TAB if the account belongs to the debtor or is of other interest to the insolvency estate.



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Thanks!

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