

The EAPO (European Account Preservation Order): Implementation and Remedies in Italy

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1. Introduction

The European Account Preservation Order (hereinafter: EAPO) established by Regulation (EU) No 655 of May 15th 2014 (hereinafter: EAPO Regulation), will be applicable, within the Member States ⁽¹⁾, from January 18th 2017 ⁽²⁾. Thanks to the EAPO Regulation, for the first time, preservation orders have been regulated on a European level. The EU Commission justified its proposal (as noted by the Recital No 5 of the EAPO Regulation) by the need to provide uniform rules on protective measures in cases having cross-border implications. For this reason, the EAPO Regulation shall apply solely to cross-border cases.

According to Article 3 of the EAPO Regulation, a cross-border case is one in which the bank account or accounts to be preserved by the EAPO are maintained in a Member State other than:

- (a) The Member State of the court seized of the application for the EAPO pursuant to Article 6 EAPO Regulation; or
- (b) By the Member State, in which the creditor is domiciled.

The relevant moment for determining whether a case is a cross-border case is the date on which the application for the EAPO is lodged with the court having jurisdiction to issue the EAPO.

The court having jurisdiction to issue the EAPO will be the court located in the Member State, with jurisdiction to rule on the substance of the matter in accordance with the Regulation No 1215/2012 (“Brussels I Recast Regulation”).

⁽¹⁾ Except United Kingdom and Denmark.

⁽²⁾ For an overview on the EAPO Regulation see e.g. Riebold, *Die Europäische Kontopfändung*, Tübingen, 2014; M. Farina, *Approvato il Regolamento che istituisce l'ordinanza di sequestro conservativo sui conti bancari*, *Int'l lis*, 2014, 151 ff.; Marino, *Circolazione dell'ordinanza europea di sequestro conservativo dei depositi bancari*, *Rivista di diritto internazionale*, 2014, 1182 ff.

Where the creditor has already obtained a judgment or a court settlement, jurisdiction to issue a EAPO for the claim specified in the judgment or court settlement, shall lie with the courts of the Member State in which the judgment was issued or the court settlement was approved or concluded.

In principle, the vertical competence to issue a EAPO is regulated at national level: For example, in Italy “the competent court” will be the tribunal with jurisdiction to rule on the substance of the matter, in accordance with Article 669-*bis* and subsequent Articles of the Italian Code of Civil Procedure.

The EAPO will be rendered without a prior hearing of the debtor (*ex parte* proceeding) in order to ensure a “surprise effect”. Such a “surprise effect” allows to facilitate cross-border debt recovery. To this intent, the debtor shall not be notified of the application for a EAPO.

Indeed, according to Article 28 EAPO Regulation, only after the EAPO has been pronounced, it shall be served without delay ⁽³⁾ on the debtor, together with the following documents:

- (i) The application for the EAPO submitted by the creditor to the competent court of the Member State of origin;
- (ii) Copies of all documents submitted by the creditor to the competent court to obtain the EAPO;
- (iii) The declaration of the bank concerning the preservation of funds, rendered in accordance with Article 25 EAPO Regulation, under which

by the end of the third working day following the implementation of the EAPO, the bank or other entity responsible for enforcing the EAPO in the Member State of enforcement shall issue a declaration using the declaration form established by means of implementing acts adopted in accordance with the advisory procedure referred to in Article 52(2), indicating whether and to what extent funds in the debtor’s account or accounts have been preserved and, if so, on which date the EAPO was implemented”

According to Article 49 EAPO Regulation, the documents listed in points (a) and (b) of Article 28, para 5, EAPO Regulation are to be served on the debtor in the official language of the Member State in which the debtor is domiciled or, where there are several official languages in that Member State, in the official language or one of the official languages of the place where the debtor is domiciled or in another language which he understands, shall be accompanied by a translation or transliteration into one of those languages. On the contrary, all documents submitted by the creditor to the competent court to obtain the EAPO shall not be translated unless the competent court

⁽³⁾ According to the Recital No 31 EAPO Regulation the documents submitted by the creditor to the court in the Member State of origin and the necessary translations shall be served on the debtor promptly after the implementation of the EAPO. Anyway, pursuant to Article 33, para 1, lett. b) EAPO Regulation, the service of the documents must be made no later than 14 days after the implementation of the EAPO. Otherwise the EAPO shall be revoked by the competent court of the Member State of origin, unless the lack of service is cured within 14 days of the creditor being informed of the debtor's application for a remedy pursuant to point (b) of paragraph 1 EAPO Regulation. In addition, the creditor shall be liable for any damage caused to the debtor by the EAPO due to fault on the creditor’s part (Article 13 EAPO Regulation). The fault of the creditor is presumed if the EAPO is revoked because the creditor has failed to comply with his obligations under this Regulation with regard to service (or translation) of documents.

⁽⁴⁾ Where the EAPO concerns more than one bank, only the first declaration pursuant to Article 25 EAPO Regulation showing that amounts have been preserved shall be served on the debtor. Any subsequent declarations pursuant to Article 25 EAPO shall be brought to the notice of the debtor without delay.

decides, exceptionally, that specific documents need to be translated or transliterated in order to enable the debtor to assert his rights ⁽⁵⁾.

Pursuant to Article 28 EAPO, once the EAPO and the other listed documents have been served by the creditor (or by the competent court, according to the *lex fori*) to the debtor, in a language which he understands, the latter may apply to the competent court of the Member State of origin in order to obtain the withdrawal of the EAPO in a proceeding where both parties are heard.

In addition, according to Article 34 EAPO the debtor may apply in the Member State of enforcement against the enforcement of a EAPO.

2. *Scope of this essay*

The purpose of this essay is to clarify what remedies are available to the debtor against the EAPO as well as against the enforcement of the EAPO, when the competent court will be located in Italy ⁽⁶⁾.

⁽⁵⁾ The wording of Article 49 EAPO Regulation was probably inspired by the the Judgment rendered by the CJEU in the case C-14/07, *Ingenieurbüro Michael Weiss und Partner* (ECLI:EU:C:2008:264) in a reference for a preliminary ruling concerns the interpretation of Article 8 of Regulation (EC) No 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters. In fact, Article 8 of Regulation No 1348/2000 was silent on the refusal to accept the service of annexes. Therefore it was doubtful whether the addressee of a document to be served had the right to refuse to accept service where only the annexes to the document were not in the language of the Member State addressed or in a language of the Member State of transmission which the addressee was able to understand. The CJEU held that Article 8 (1) of Council Regulation (EC) No 1348/2000 of May 29th, 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters is to be interpreted as meaning that the addressee of a document instituting the proceedings which is to be served does not have the right to refuse to accept that document, provided that it enables the addressee to assert his rights in legal proceedings in the Member State of transmission, where annexes are attached to that document consisting of documentary evidence which is not in the language of the Member State addressed or in a language of the Member State of transmission which the addressee understands, but which has a purely evidential function and is not necessary for understanding the subject matter of the claim and the cause of action. In the context of the EAPO Regulation the competent court of the Member State of origin who has pronounced the EAPO has also a duty to evaluate if the documents submitted by the creditor to obtain the EAPO have a purely evidential function or, on the contrary, if they are necessary for understanding the subject matter of the claim and therefore they need to be translated in a language reasonably understandable by the debtor.

⁽⁶⁾ It has been said by Kyriakides, *A European –wide Preservation Order How the Common Law Practice Can Contribute*, (33) *Civil Justice Quarterly*, 2014, 93-106, at. 95 that «such as Italy, Germany, and France, it is difficult for a party to obtain information about the whereabouts of his or her opponent's assets if he or she does not have that information. The reason for this lack of transparency is that the central registers containing the relevant information are inadequate». In this regard, in order to facilitate the obtaining of an EAPO, Article 14 EAPO Regulation states that where the creditor has obtained in a Member State an enforceable judgment, court settlement or authentic instrument which requires the debtor to pay the creditor's claim and the creditor has reasons to believe that the debtor holds one or more accounts with a bank in a specific Member State, but knows neither the name and/or the address of the bank nor the IBAN BIC or another bank number allowing the bank to be identified, he has the right to request the court with which the EAPO is lodged to request that the information authority of the Member State of enforcement obtain the information necessary to allow the bank and the debtor's account to be identified. When the Member State of enforcement is Italy, such information shall be obtained according to Article 492-*bis* of the Italian Code of Civil Procedure, introduced by art. 19 of the Law Decree No 132 of September 12th, 2014 turned into law No 162 dated November 10th, 2014, which provides that creditors

3. Remedies available to the debtor in the Member State of origin. Relationship with the provisions regulating protective measures laid down in Article 669-bis and subsequent Articles of the Italian Code of Civil Procedure

Article 33 EAPO provides that the EAPO shall be revoked or modified upon application by the debtor to the competent court of the Member State of origin.

The grounds on which the revocation/modification of the EAPO is permitted, are constructed around three categories:

(1) First of all, the EAPO shall be revoked or modified if the conditions or requirement for the pronouncement of the EAPO set out in Articles 2, 3, 6, 7 EAPO Regulation were not met;

(2) Secondly, the EAPO shall be revoked or modified if the EAPO and the related documents were not served or not duly served or partially served or, finally, served in a language not comprehensible to the debtor in accordance with Article 28 EAPO Regulation. The remedy shall be granted unless the lack of service is cured within 14 days of the creditor being informed of the debtor's application for a remedy;

(3) Thirdly, the EAPO shall be revoked or modified by submitting new facts. In particular, the EAPO shall be revoked:

(a) If the creditor, once obtained the EAPO before initiating proceedings on the substance, has not initiated such proceedings and provide proof of such initiation to the court who has rendered the EAPO within 30 days of the date on which he lodged the application (Article 10, para 1, EAPO Regulation);

(b) If the preserved amounts exceeding the amount of the EAPO were not released in accordance with Article 27 EAPO Regulation;

(c) If the debt, the payment of which the creditor was seeking to secure by means of the EAPO, has been paid in full or in part;

(d) If a judgment on the merit has dismissed the claim proposed by the creditor who has obtained a EAPO;

(e) If the judgment on the merit, or the court settlement or the authentic instrument, the enforcement of which the creditor was seeking to secure by means of the EAPO, has been set aside or annulled.

The EAPO Regulation only lists ground on which the revocation/modification of the EAPO is permitted. On the contrary, procedural matters other than the form of the application for such a remedy, which must be presented using the form adopted by the Commission, for instance time-limits for the application for a review, are governed by the *lex fori*, according to Article 46, para 1, EAPO Regulation.

Such an application, in Italy, shall be certainly issued by electronic means according to Article 36 EAPO Regulation, at least if the competent court shall attribute legal values to applications for summary proceedings issued by electronic means, according to the Ministerial decree of February 21, 2011 containing technical rules for the adoption of information and communication technologies in civil proceedings. The Ministerial Decree is available on the website of the Italian Ministry of Justice (www.giustizia.it).

Representation by a lawyer will be mandatory, according to Italian procedural law.

will be allowed to investigate the existence of debtor's assets by interrogating – through the Courts' offices – the Public databases, such as the Public database of the Italian Tax Inspectorate.

The decision will be rendered without delay and hopefully no later than 21 days after the court has received all the information necessary for its decision, with a prior hearing of both parties (debtor and creditor).

The EAPO Regulation specifies that the decision revoking or modifying the EAPO shall be enforceable immediately, but, on the contrary, omits indications on the form of such a decision. Such a form shall be governed by the law of the Member State in which the procedure under Article 33 EAPO Regulation takes place. In Italy, such a decision will be an order (“ordinanza”) according to Article 669-*sexies*, para 1, of the Italian Code of Civil Procedure ⁽⁷⁾.

Having said that, one of the most difficult questions to answer, is whether the proceedings to revoke or modify the EAPO for issues not specifically dealt with in the EAPO Regulation, shall be governed, in Italy, by Article 669-*decies* of the Italian Code of Civil Procedure.

More precisely, article 669-*decies* of the Italian Code of Civil Procedure provides for the revocation and the amendments of protective measures rendered by a tribunal with a prior hearing of the debtor. It states that the court of the proceeding on the merit (tribunal or Justice of the peace) and not the court that issued the preservation order, may, upon motion by the interested party, amend or revoke the protective measure by order if changes in the circumstances occurred or, if the interested party alleges new elements of facts, also occurred before the issuance of the interim measure, but which became known to him after the issuance of the protective measure.

However, the scope of Article 669-*decies* of the Italian Code of Civil Procedure does not coincide with the scope of Article 33 EAPO.

Article 669-*decies* of the Italian Code of Civil Procedure implies that the protective measure to revoke or modify was rendered with a prior hearing of the debtor. For this reason, the order shall be amended or revoked only if changes in the circumstances occurred and not if there was a lack of conditions for issuing the measure.

Finally and most importantly, under Article 669-*sexies*, para 2, of the Italian Code of Civil Procedure a tribunal may grant a protective measure on a *ex parte* proceeding by motivated decree, in cases where serving the other party may compromise the implementation of the measure. With the same decree the tribunal has to fix a hearing within 15 days. In addition, the creditor has to notify the decree to the debtor within (maximum) 8 days. At that hearing, after an *inter partes* discussion, the tribunal, with an order, has to confirm, modify or revoke the decree rendered *inaudita altera parte*.

In the light of these considerations, it can be concluded that the proper way would be to refer to Article 669-*sexies*, para. 2, of the Italian Code of Civil Procedure rather than to Article 669-*decies* of the Italian Code of Civil Procedure.

In particular, the result of the coordination between Article 33 EAPO Regulation and Article 669-*sexies* of the Italian Code of Civil Procedure will be the following:

- Upon application of the debtor, the Italian Tribunal who has rendered the EAPO, with a decree has to fix a hearing within 15 days. The debtor has to notify to the creditor such a decree within (maximum) 8 days. At the hearing, at the presence of both parties, the tribunal may amend or revoke the EAPO with an order.

⁽⁷⁾ Articles 669-*bis* – 669- *terdecies* of the Italian Code of Civil Procedure provide for interim and protective measures.

The order (“ordinanza”) rendered pursuant to Article 33 EAPO Regulation shall be appealed by the losing party according to Article 37 EAPO Regulation.

With regard to such an appeal, the EAPO Regulation only states that the appeal shall be submitted using the appeal form established by means of implementing acts adopted in accordance with the advisory procedure referred to in Article 52, para 2, EAPO Regulation. Other procedural issues will be regulated by the *lex fori*.

In Italy, such an appeal will be governed by Article 669-terdecies of the Italian Code of Civil Procedure, which concerns the appeal against the delivery or the denial of request of revocation or modification of a protective or an interim measure. This means that no leave will be required to appeal.

The competent appellate court shall also be determined in accordance with Article 669-terdecies of the Italian Code of Civil Procedure. Consequently:

- The appeal against an order rendered by the Tribunal “monocratically” (as a monocratic judge) in accordance with Article 33 EAPO Regulation, shall be filed by the Tribunal, which will sit in panels of three judges. The judge who has rendered the decision “monocratically” shall not be a component of the panel.

- The appeal against an order rendered by the Corte d’appello, shall be filed before another section of the same Corte d’appello or, in absence, before the closest Corte d’appello.

As a general rule, the preparation of the case, the hearing for evidence, the form of the final decision shall be governed by Article 669-terdecies of the Italian Code of Civil Procedure.

In particular, according to Article 669-terdecies, para 4, of the Italian Code of Civil Procedure, all the new factual and legal circumstances (not only those specifically named in Article 33 lett. e, f, g) EAPO Regulation) must be filed, by both parties (creditor or debtor), in the course of the appeal proceeding.

The final decision on the appeal will be an order (“ordinanza”). The order pronounced at the end of the appellate proceedings, according to the Italian procedural Law, will take place instead of the original EAPO ⁽⁸⁾.

4. Modification or revocation of the EAPO on the ground that circumstances on which the EAPO was issued have changed (Article 35 EAPO Regulation). Relationship with the provisions regulating the Italian Protective measures

In regards to Article 35 EAPO Regulation, a distinction shall be made between paras 1-3 and para 4.

According to Article 35, paras 1-3, EAPO Regulation, the debtor or the creditor may apply to the Court that issued the EAPO for a modification or a revocation of the EAPO on the ground that the factual and legal circumstances on the basis of which the EAPO was issued, have changed.

In addition, the debtor and the creditor may apply jointly to the competent court to obtain the revocation or modification of the EAPO on the ground that they have agreed to settle the claim (new legal circumstance).

⁽⁸⁾ Article 669-terdecies of the Italian Code of Civil Procedure does not allow a further appeal to the Italian Supreme Court (corte di cassazione).

The new circumstances, on the basis of which the modification or revocation of the EAPO shall be pronounced, must be different from those named in Article 33, lett. e), f), g) EAPO Regulation, which are suitable only by the debtor.

Also, in cases in which Italy is the Member State of origin of the EAPO, it must be noted that, according to the Italian *lex fori* (Article 669-*terdecies*), if the EAPO shall be appealed, all the relevant changes of circumstances known by the parties must be filed before the appellate court.

Consequently, in Italy, the debtor or the creditor shall apply according to Article 35 EAPO Regulation, solely in cases in which the appeal governed by Articles 37 and 669-*terdecies* of the Italian Code of Civil Procedure is no more suitable, for example because the time for proposing such a means of appeal has elapsed or in cases in which the proceeding according to Article 669-*terdecies* of the Italian Code of Civil Procedure has ended before the circumstances have been changed.

As said, Article 35, para 4, EAPO Regulation must be kept separate from the rest of Article 35. It holds that *only* the creditor may apply to the competent court of the Member State of enforcement (rather than the Member State where the EAPO was issued) invoking an adjustment to the exemption applied in that Member State on the ground that other exemptions have already been applied in a sufficiently high amount in relation to one or several accounts maintained in one or more other Member State and that an adjustment is therefore appropriate.

Such a provision would have been more properly placed *sub* Article 34 EAPO Regulation, which deals with the remedies available in the Member State of enforcement. However, it is quite probable that the provision was not placed *sub* Article 34 EAPO Regulation, due to the fact that Article 34 only deals with remedies available from the debtor (and not from the creditor).

To file a claim according to Article 35 EAPO Regulation the claimant – debtor or creditor, depending on the case – will have to fill in a standard claim form. During the proceedings, both parties will be heard. The decision shall be issued without delay, hopefully no later than 21 days after the court has received all the necessary information.

In Italy, such proceedings will be governed by Article 669-*decies* of the Italian Code of Civil Procedure.

In particular, it seems that the competent tribunal will be identified in accordance with Article 669-*decies* of the Italian Code of Civil Procedure.

The competent tribunal for the remedy described in Article 35 EAPO will be the tribunal who issued the EAPO or the judge of the pending proceeding on the substance, where the creditor has applied for a EAPO before initiating such kind of proceeding.

The final decision will be an order (“ordinanza”) in accordance with Article 669-*decies* of the Italian Code of Civil Procedure. Such order will accept or reject the request for a modification or a revocation of the EAPO.

The order rendered pursuant to Article 35 EAPO Regulation shall be appealed, as provided by Article 37 EAPO Regulation (probably) before the competent court and in the terms identified by Article 669-*terdecies* of the Italian Code of Civil Procedure.

5. Remedies of the debtor against enforcement of the EAPO in the Member State of enforcement and Italian Procedural Law

The creditor may act in the Member State of enforcement in accordance with Article 35, para 3, EAPO Regulation read in conjunction with Article 31 EAPO Regulation, the debtor may also apply to the competent Court or authority in the Member State of enforcement, for the following reasons illustrated in Article 34, para 1, EAPO Regulation:

- 1) To limit the EAPO on the ground that certain amounts held in the account should be exempt from EAPO in accordance with Article 31, para 3, EAPO Regulation, or on the ground that the amounts exempt from seizure have not or not correctly been taken into account in the implementation of the EAPO pursuant to Article 31, para 2, EAPO Regulation, or
- 2) To have the EAPO declared terminate on the ground that:
 - i) The account preserved is excluded from the scope of the EAPO Regulation;
 - ii) The enforcement of the condemnatory judgment, court settlement or authentic instrument which the creditor was seeking to secure by means of the EAPO has been refused in the Member State of enforcement in accordance with Article 45 of the Brussels I Recast Regulation ⁽⁹⁾ or, as alternative, with Article 21 of the Regulation No 805 of 2004;
 - iii) The enforceability of the condemnatory judgment, the enforcement of which the creditor was seeking to secure by means of the EAPO has been suspended in the Member State of origin;
 - iv) If the EAPO is manifestly contrary to the public policy of the Member State of enforcement.

Such a provision constitutes a safeguard clause. However, it seems hard to imagine an EAPO, whose enforcement may be manifestly contrary to substantial or procedural public policy of a Member State.

To file an application according to Article 34 EAPO Regulation the debtor will have to fill in a standard claim form.

The decision shall be issued after both parties have been given the opportunity to defend their proper position. The final decision will be immediately enforceable.

By July 18th 2016, the Member States, including Italy, shall communicate to the Commission some information, including the courts competent to grant such a remedy.

However, in the light of the content of:

- a) Article 34 EAPO Regulation which refers to the Member State of enforcement;
- b) Article 669-*duodecies* of the Italian Code of Civil procedure dealing with the implementation of provisional and interim measures, under which the implementation of seizures shall take place in accordance with Article 677 and subsequent Articles of the Italian Code of Civil Procedure;
- c) Article 678 of the Italian Code of Civil Procedure, which states that the seizure of movables and credits shall be implemented in accordance with the provisions governing the action for expropriation ⁽¹⁰⁾,

⁽⁹⁾ According to its Article 66, The Brussels I Regulation Recast shall apply only to legal proceeding instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded on or after the January 10th 2015. The Regulation (EC) No 44/2001 shall continue to apply to judgments given in legal proceedings instituted, to authentic instruments formally drawn up and to court settlements approved or concluded before January 10th 2015, concerning civil and commercial matters.

⁽¹⁰⁾ See Corte di cassazione, order of March 6th 2013, No 5582, *Foro italiano*, 2013, I, 3285 and, among the Italian Authors, CONTE, *Il sequestro conservativo nel processo civile*, Torino, 2000, 207 ff.;

it will be desirable that the Italian competent courts to grant the remedies referred in Articles 34 and 35, para 3, EAPO Regulation will coincide with the competent courts (generally speaking: the tribunals or the Justice of the Peace if the value of the credit does not exceed 5000€) to “oppose an enforcement” according to Article 615 of the Italian Code of Civil Procedure, almost in cases in which the debtor will deny the creditor’s right to enforcement, or, the debtor will raise objections concerning the regularity of particular acts of the enforcement, with the tribunal competent for the proceeding of objection to particular acts of the enforcement (Article 617 of the Italian Code of Civil Procedure).

Due to Article 37 EAPO Regulation the decision rendered on the remedies referred in Articles 34 and 35, para 3, EAPO Regulation, shall be appealed by the losing party.

The name of the competent courts before which the appeal is to be lodged shall be communicated by Italy, by July 18th 2016.

6. Releasing of the funds preserved according to Article 38, para 1, EAPO Regulation. Relationship with Article 684 of the Italian Code of Civil Procedure

Pursuant to Article 38, para 1, EAPO Regulation, upon application by the debtor, the Court which issued the EAPO may order the release of the funds preserved if the debtor provides to that Court security in the amount of the EAPO or an alternative assurance in a form acceptable under the law of the Member State in which the court is located and of a value at least equivalent to that amount.

According to Article 38, para 2, EAPO Regulation, the competent court or the competent enforcement authority of the Member State of enforcement may terminate the enforcement of the EAPO in the Member State of enforcement if the debtor provides to that court of authority security in the amount preserved in the Member State, or an alternative assurance in a form acceptable under the law of the Member State in which the court is located and of a value at least equivalent to that amount.

Due to Article 38, para 1, EAPO Regulation, read in conjunction with Article 684 of the Italian Code of Civil Procedure, where the Member State of origin of the EAPO is Italy, the Tribunal which issued the EAPO – if the proceeding on the substance has not been initiated yet ⁽¹¹⁾ – or – if such a proceeding has been initiated – the Court before which the proceeding on the substance is pending, may order the release of the funds preserved. Such order is defined as unchangeable by Article 684 of the Italian Code of Civil Procedure.

Pursuant to Article 86 of the Implementation Rules of the Italian Code of Civil Procedure, unless otherwise prescribed in Article 119 of the Italian Code of Civil Procedure, security must be provided in cash in the manner described for judicial deposit. Finally, Article 119 of the Italian Code of Civil Procedure states that the tribunal, when ordering that a security be provided, has to indicate what the subject

CONSOLO, *L'intervento del terzo nel giudizio cautelare, reclamo del terzo e pregiudizio da mera attuazione scorretta (da farsi valere in altro modo)*, *Giurisprudenza italiana*, 1996, I, 2, 194 ff.; LUISO, in CONSOLO-LUISO-SASSANI, *Commentario alla riforma del processo civile*, Milano, 1996, 680 ff.; PROTO PISANI, *La nuova disciplina del processo civile*, Napoli, 1991, 362; SALETTI, *Art. 669-duodecies*, in TARZIA-CIPRIANI (Edited by), *Provvedimenti urgenti per il processo civile*, Padova, 1992, 391.

⁽¹¹⁾ See Tribunal of Rome, order of April 26th 1993, *Foro italiano*, 1993, I, 1991.

matter of the security must be, the manner in which and the time within which it must be provided.

As regards to Article 38, para 2, EAPO Regulation, the releasing of funds by the court of the Member State of enforcement is permitted only if so provided by the local *lex fori*.

If the Member State of enforcement will be Italy, Article 495 of the Italian Code of Civil Procedure will be applicable for all procedural issues not specifically dealt with in Article 38, para 2, EAPO Regulation, in cases in which the Italian enforcement proceedings will have been started (alias “forced execution”) with the attachment. Indeed, in Italy, “forced execution” begins with an attachment (“atto di pignoramento”) which is an act of the court officer (“ufficiale giudiziario”). It consists in an order by the process server to the debtor to refrain from any action finalised at removing the assets attached.

Article 495 of the Italian Code of Civil Procedure, upon application by the debtor, allows the judge of execution, once that the forced execution has been started with the attachment, to order the substitution of the attached assets with a sum of money.

7. Right of a third party to contest the EAPO. Meaning of the term “third party”

Finally, Article 39 EAPO Regulation concerns the right of a third party to contest the EAPO.

The term “third party” doesn’t designate the bank, where the account of the debtor is held (Article 4, No 1, EAPO Regulation).

Conversely, the term “third party” designates a natural or a legal person which holds one or more bank accounts on behalf of the debtor. Such a “third party” shall be the addressee of an EAPO (I).

In addition, the expression “third party” seems referable to a natural or legal person, which holds one or more bank accounts, who has suffered an erroneous implementation of an EAPO, without being the debtor and, consequently, without receiving the addressee of the EAPO (II).

From a practical perspective, for example, the third party may contest the fact of being the account holder on behalf of the debtor.

According to Article 39, par. 1, the right of a third party (in the sense aforementioned under I) to contest the regularity of the EAPO (in other words: the circumstances on the basis of which the EAPO was issued) is governed by the law of the Member State of origin. Article 39, para 3 (a) EAPO Regulation contains uniform rules on jurisdiction with respect to any action brought by a third party to contest a EAPO. In such cases the jurisdiction shall lie with the courts of the Member State of origin. Unfortunately, in absence of a uniform definition, the concrete possibility to contest the EAPO will depend on national procedural law.

In Italy, such a remedy exists and it is governed by Article 669-*decies* of the Italian Code of Civil Procedure entitled “revocation or amendment of interim measures”.

The right of a third party to contest the enforcement of a EAPO is regulated by the law of the Member State of enforcement. Consequently, in such a case, the jurisdiction to contest the enforcement of the EAPO shall lie with the courts of this Member State. For example, the third party (in the sense aforementioned under I and II) may bring an

action affirming that the bank, due to an error, has implemented a EAPO rendered against a debtor, transferring money from a wrong bank account. In this case, however, some interpretative doubts shall be raised under Italian procedural law, where, at the present time, it is debated whether the right of a party to contest the enforcement of an interim measure shall be governed by Article 669-*duodecies* of the Italian Code of Civil Procedure, which concerns the implementation of provisional measures by the judge of the provisional proceedings, or by Article 619 of the Italian Code of Civil Procedure ⁽¹²⁾, regulating “the third party opposition” before the Italian judge of execution.

Due to the fact that the question is still debated among Italian Authors and case-law, it is to presume that it will be not easy to find a unanimous solution for the EAPO Regulation. Unfortunately, we cannot await guidelines from ECJ case-law.

¹² On this debate see: FRUS, in CHIARLONI (Edited by), *Le riforme del processo civile*, Bologna, 1992, 763 ff.; PROTO PISANI, *La nuova disciplina del processo civile*, Napoli, 1991, 362; VULLO, *L'attuazione dei provvedimenti cautelari*, Torino, 2001, 311 ff.; RECCHIONI, *L'attuazione delle misure cautelari e le opposizioni esecutive*, *Rivista dell'esecuzione forzata*, 2005, 53 ff.