

European Preservation Order (Saisie européenne des avoirs bancaires)

Introduction

On 18 January 2017, the European Account Preservation Order Regulation (“**EAPO Regulation**”) will come into force and will apply in all EU Member States, except the United Kingdom and Denmark.

The EAPO Regulation gives a creditor the possibility to prevent the transfer or withdrawal of his debtor's assets in any bank account located in the European Union. A Preservation Order issued in one Member State 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.

The European procedure is an alternative to the existing procedure under national law (*'saisie-arrêt'*), which will continue to exist alongside the European Account Preservation Order (“**Preservation Order**”).

The scope of the Preservation Order is essentially restricted to cash accounts, or accounts with similar claims for the repayment of money, such as money market deposits. Financial instruments have been excluded, although this exclusion is subject to a review by 2022. As such, the Regulation only has an impact on credit institutions whose business is to take deposits or other repayable funds and to grant credits.

The EAPO's scope is further limited to cross-border civil and commercial matters apart from certain well-defined matters. In particular, the EAPO does not apply to claims against a debtor in insolvency proceedings.

Contrary to the Luxembourg garnishment order (*'saisie-arrêt'*), the Preservation Order is of a protective nature only (*'saisie conservatoire'*). It only blocks the debtor's account but does not allow money to be paid out to the creditor.

Contents

Introduction	1
The bank's obligations	2
Costs incurred by the bank	3
Liability of the banks	3

The Preservation Order is available to a creditor at any stage of the procedure on the substance of the matter, i.e. prior to initiating proceedings, during such proceedings, and after having obtained a judgment, court settlement or authentic instrument requiring the debtor to pay the creditor's claim.

To have the Preservation Order revoked or modified, the debtor shall have to file an application with the court of the Member State of origin. Alternatively, the debtor may submit an application to limit or terminate the enforcement with the court of the Member State of enforcement (i.e. a Luxembourg court in case of a Luxembourg bank account), but such remedy is limited to certain grounds as provided for in the EAPO Regulation. The defendant may also submit an application with the Member State court which issued the Preservation Order or the Member State court of enforcement to have its funds released in exchange for proper security.

The bank's obligations

The EAPO Regulation imposes various important obligations upon the banks where the defendant's account is held.

A creditor may request the court with which the application for the Preservation Order is lodged to request that the information authority of the Member State of enforcement (it is expected that, for Luxembourg, this role will be assigned to the CSSF) obtain the information necessary to identify the debtor's account(s).

Pursuant to the current draft act (*Projet de Loi; n°7083*), Luxembourg would impose the obligation on all banks in Luxembourg to disclose, upon request by the CSSF, whether the debtor holds an account with them.

Upon being served with a Preservation Order the bank will be obliged to ensure that the amount specified therein remains in the relevant account and is not transferred or withdrawn from the account(s) indicated in the order. Any excess remains at the disposal of the defendant.

Where an EAPO Regulation covers several accounts held by a debtor with the same bank and those accounts contain funds exceeding the amount specified in the EAPO, the order will be implemented in the following order of priority: (i) savings accounts in the sole name of the debtor; (ii) current accounts in the sole name of the debtor; (iii) savings accounts in joint names; and (iv) current accounts in joint names.

The bank served will then have three days to submit a declaration in a prescribed form confirming whether and to what extent the funds have been preserved. If, in exceptional circumstances, it is not possible for the bank to do this within three days, the bank has until the eighth working day to implement the terms of the order.

To adjust to this new regime, banks will have to ensure their compliance procedures are able to deal effectively with the new requirements.

Costs incurred by the bank

The EAPO Regulation provides for a right for the bank to obtain payment or reimbursement from the creditor or the debtor for the costs incurred in implementing a Preservation Order and information disclosure requests.

Such right is however subject to whether the bank is entitled to claim payment or reimbursement under its national law.

Liability of the banks

The liability of a bank that fails to comply with its obligations under the EAPO Regulation are left to the relevant national law. At this stage, no specific provisions as to bank liability are foreseen in the Luxembourg draft act.

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