

EAPOs in Luxembourg: a further erosion of bank secrecy?

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Introduction

On January 18 2017 [EU Regulation 655/2014](#) became fully applicable, making it possible for creditors in Luxembourg to obtain a preservation order for the bank accounts of a debtor situated in another EU member state and vice versa.

The regulation introduces a certain degree of transparency at the EU level with regard to debtors' assets which is greater than that provided under existing Luxembourg law. In addition, the new procedure implies enhanced cooperation between banks and is accompanied by certain mechanisms designed to protect debtors. However, its scope of application is somewhat limited.

Attachment orders under existing Luxembourg law

Under existing Luxembourg law, a creditor can attach the moveable assets of its debtor, provided that it can rely on an irrefutable claim. The assets concerned will thus be frozen, pending the presentation of an enforceable title (eg, a judgment, an authentic instrument or an arbitral award) which entitles, if applicable, the creditor to receive payment up to the value of its claim.

This procedure has proven effective, but entails one major disadvantage: creditors are responsible for identifying the third party or parties in possession of their debtors' assets.

Greater transparency

European account preservation orders (EAPOs) provide for greater transparency than existing Luxembourg law with regard to a debtor's assets (those held in a bank account), by allowing a creditor which possesses insufficient information about its debtor's assets to petition the court to order the Luxembourg financial sector regulator (CSSF) – the competent authority in Luxembourg under Bill 7083/1 – to produce information to this end.

In this regard, aside from the other conditions required for the issuance of a preventive attachment order, a creditor in a member state need only justify to the court the reasons that led it to believe that the debtor holds an account in the EU member state in question. The CSSF will then request banks to declare if a debtor, be it a natural or legal person, holds assets with them. In order to guarantee the effectiveness of the measure, banks must refrain from informing their clients of such a request for 30 days after the information has been sent to the CSSF.

At present, Parliament is discussing Bill 7083/1. Once enacted, it should provide further clarification

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on how EAPOs will be applied under Luxembourg legislation.

Enhanced bank cooperation

Aside from the transparency obligation regarding their clients' assets, banks must also ensure that an EAPO is implemented. Unless provided otherwise in Luxembourg legislation, the bank responsible for implementing an EAPO must, by the end of the third working day following receipt of the EAPO, issue a declaration using a standard form indicating if and to what extent the funds held in the debtor's account or accounts form the object of the EAPO and, if so, the date on which the EAPO was implemented.

Among the other rules applicable to banks, the regulation provides the possibility for them to seek payment or reimbursement from the debtor (or creditor) for the costs incurred in implementing an EAPO and provides for an order of priority if the debtor holds different types of account (eg, savings or current accounts). As above, banks will have to wait for the measure to be in place before notifying their clients.

Debtor protection

The regulation provides a high degree of debtor protection, as:

- attachments are limited to the claim amount (thus making it possible that an attached account will not be rendered completely unavailable); and
- debtors have various fast remedies against an EAPO and its implementation, including the possibility to provide appropriate alternative security, such as a bank guarantee or mortgage. Further, an EAPO is subject to proof by the creditor not only of its claim, but also of the urgency of preserving the amounts concerned.

It remains to be seen whether the high degree of protection afforded by the regulation will be incorporated in Luxembourg legislation.

Limited scope of application

The EAPO covers only bank accounts. The regulation expressly states that it does not apply to a wide range of assets and situations, including arbitration.

Comment

It will be interesting to see what the exact terms are for the application of this new procedure in Luxembourg.

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