DEBT COLLECTION, RESTRUCTURING & INSOLVENCY

Cross-Border Debt Recovery:

A European Regulation on the Seizure of Bank Accounts Comes into Force

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Debt recovery will be easier and faster thanks to the European Account Preservation Order procedure to facilitate the seizure of bank accounts: this is the expected new communitarian regulation.

Starting from 18 January 2017, the Commission Implementing Regulation (EU) 2016/1823 of 10 October 2016 establishing the forms referred to in Regulation (EU) No 655/2014 (per breviter "Regulation") of the European Parliament and of the Council was entered into force, in which the UK and Denmark did not take part.

The system set out by EU authorities, which empowers the civil judiciary cooperation between the state members, establishes a European Account Preservation Order procedure to facilitate cross-border debt recovery "EAPO". The purpose of this new instrument is to forbid the debtor from dissipating or destroying his assets within the period needed by the creditor to execute his credit. Bank deposits are encompassed in a category of goods that the debtor can easily distract from the creditor with activities not mandated to be publicly disclosed.

A claimant will be able to make an application to the courts of one Member State to obtain a Preservation Order (PO) only for financial credit regarding civil and commercial cross-border matters, independently from the judiciary authority interested. The procedure could be used for cross-border cases according to the following stipulations: 1) the Member State in which the creditor is domiciled is different from the one where the bank account or accounts preserved; and 2) the Member State of the court seized of the application for the PO is different from the one where the bank account is set. However, the creditor cannot apply multiple time to several judiciary authorities versus the same debtor.

Firstly, this procedure is characterised by rapidity with which the court sifts through the creditor's application. The court decides within and not more: a) 5 working days from the commencement of the application, if the creditor has obtained a judgment, court settlement or authentic instrument that requires the debtor to pay the creditor's claim; b) 10 working days from the application deposit, if the application is presented before the creditor has obtained a judgment, court settlement or authentic instrument.

Secondly, this procedure is unexpected: the debtor is not informed about the application of the creditor before the PO is issued. In other words, when the creditor obtains a sentence, a settlement or a deed, the PO could be passed by the authorities of the State Member where the sentence was issued, the settlement was agreed or the deed was drafted. If the creditor has not obtained a judgment, the jurisdiction for issuing the PO lies with the courts of the Member State that have jurisdiction on the substance of the matter in accordance with the applicable

rules. Moreover, if the application was presented before the start of the trial, the creditor has to start the trial within 30 days from the presentation of the application for the PO or within 14 days from the date the ordinance was issued, if this is posterior.

If the creditor cannot prove the commencement of the trial within the aforesaid terms, the effects of the PO will be revoked and the parties will be informed. Thus, it is important to underline that, if a judgment, court settlement or authentic instrument has not been obtained, the PO can only be granted if the creditor presents relevant facts that claim it is in urgent need of judicial protection, and that those facts are reasonably corroborated by evidence of the real risks, in which defect the consecutive execution of the credit will be compromised or will be made substantially more difficult.

If the court believes that the grounds provided by the creditor are not sufficient, the authority can ask the creditor to integrate documentation, if the national set of laws allows it, or to use any other instrument to support the grounds.

Another interesting innovation relates to the applying methods for the PO (art. 8 Reg. n. 655/2014). It is sufficient that the creditor fills the standard forms with the requirements of Reg. n. 655/2014 and deposits it, without needing any legal advice, to any juridical authority. With a simplifying purpose, the European Regulation indicates that the creditor can request information regarding the debtor's bank accounts and ask the court with which the creditor has lodged the application for the PO to request that the information authority in the Member State where the account is located, obtains the necessary information to identify the bank and the debtor's account.

The creditor can apply for the PO even if he does not own any information about the debtor's bank account and even if he has not obtained yet a judgment, court settlement or authentic instrument.

Personal data cannot be retained over the period of time necessary to absolve its purpose that in every case does not exceed 6 months from the end of the proceeding. In order to protect the debtor from any abuse of the creditor and, with the purpose to balance all parties interests, the Regulation expresses that, in case the creditor has not obtained a judgment, court settlement or authentic instrument, the court may force the creditor to make a sufficient deposit in order to avoid any abuse of the procedure and guarantee compensation for any damage that the debtor could bear.

The PO is issued with a Form (All. 2 Reg. n. 1823/2016) that contains all elements indicated by art. 19 of the Regulation and, once adopted, is automatically recognised in all other Member States (art. 22 Reg. n. 655/2014).

Regarding the fulfilment of the procedure, the PO has to be immediately transferred to the bank where debtor's bank account is set in order to freeze the sum indicated on the PO or, alternatively the sum has to be transferred to an account used for the procedure. By the end of the third working day after the PO, the bank or any other party responsible for the execution of the order in the Member State of the execution must disclose the declaration of seizure indicating the precise sum on the bank account that has been forfeit.

After the above declaration has been issued, the debtor is informed about the seizure though the notification of the PO and its attachments. The debtor can activate his right to defence and ask to revoke or modify the order or to limit his effects.

In conclusion, the PO – so expected on the European overview – represents an alternative instrument used by the creditor to protect his credits, with particular focus on small and medium companies that register enormous annual losses caused by inefficiency and red tape in cross-border debt recovery.

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