

The attachment of bank accounts in the EU

On the 25th of July 2011, the European Commission submitted a proposal for an European Account Preservation Order (“EAPO”).¹ Currently, when recovering claims from foreign countries, creditors are still faced with obstacles which often prevent them from recovering those claims. The proposal introduces an additional option, in conjunction with the current legislation for national attachment of bank accounts, for the attachment of bank accounts in the EU. By means of this proposal, the European Commission wishes to simplify the recovery of cross-border claims and to increase the effectiveness of the procedure for cross-border enforcement. An EAPO has an immediate effect throughout the European Union. Based on the EAPO, a creditor has the option of attaching a foreign bank account in a different member state without further proceedings through serving the EAPO to the bank. Furthermore, an EAPO can be used to obtain information about the debtor’s bank accounts if it is unclear whether the debtor has one or more bank accounts in the relevant member state.

The proposal has been submitted to the European Parliament and the Council of Ministers for review. The Dutch State Secretary of Foreign Affairs has informed the Dutch Lower House that the cabinet is cautiously positive about the proposed resolution. Because the resolution meets a significant need of creditors, it differs significantly from Dutch legislation in some aspects and will have a significant impact on Dutch banks, we discuss the proposal’s main elements below. This article will consider the procedure for obtaining the EAPO, its enforcement, account information and the legal protection of the debtor.

Procedure

The procedure can be executed only if one of the reference points is located abroad. This can be either the bank account or one of the parties involved. An EAPO can be requested prior to or during the proceedings on the merits of the case or if the creditor has already received an entitlement to enforcement that is, however, not yet enforceable in the member state where the bank account is held. The procedure is expected to be used mainly during the interlocutory phase, as executory attachment of the bank account will generally be possible at the enforcement stage.

An EAPO can be issued by the court which has jurisdiction over the main action following the attachment. An EAPO

can also be requested from the court of the member state where the bank account is held. However, in the latter case, the EAPO is only effective nationally and is not enforceable in the other member states. If bank accounts have to be attached in several countries, the request has to be made by the court that ultimately has to pass judgment on the claim for which the attachment is being made.

The request is made by submitting the standard form (Appendix I to the proposal). The creditor can submit this form without a lawyer’s assistance. On the form the creditor gives details of the parties, information about the bank accounts and the amount of the claim (including interest and costs). In addition, the creditor provides a description of all the relevant circumstances on which the claim is based. The creditor further provides a description of all the relevant circumstances justifying the issue of the EAPO and the competence of the requested court. The form contains a list of evidence that the creditor has submitted or which he has offered to submit. He also has to declare whether he has submitted a request to other courts for an EAPO or similar request.

On 1 July 2011, a new version of the Attachment Guide used by the Dutch Garnishment Court came into force. The Attachment Guide has been amended such that, in making an attachment request, the judgement creditor now has to substantiate the claim better and also has to state the

¹ COM (2011) 445 final, Brussels 25 July 2011



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known defence of the debtor against the claim. The person requesting an EAPO only has to demonstrate that he or she has "a good prospect" of winning the action. They have to have a strong prima facie case. Finally, there has to be a risk that the enforcement of a judgment will be thwarted if the order is not granted. The EAPO is issued in proceedings where the attachment debtor is not heard. This to achieve the desired shock effect of the attachment. Only exceptionally will the person requesting an EAPO be heard.

Although relevant evidence does have to be submitted with the request, it can be argued that the European test is more flexible than the current Dutch test. Unlike in the Netherlands, the defence put forward by the attachment debtor against the claim need not be stated. The attachment debtor is therefore less protected against the attachment of his bank accounts than in the Netherlands. The current proposal still contains too few safeguards against misuse of attachment law. The European legislator would do well to adopt the requirements laid down in the new Attachment Guide to prevent misuse of attachment law.

If the court issues the EAPO (which must be within seven days of the submission) and the creditor is not entitled to enforcement, the claim in question has to be brought before the court within 30 days of the date of the EAPO. If the creditor does not comply with this condition, the EAPO

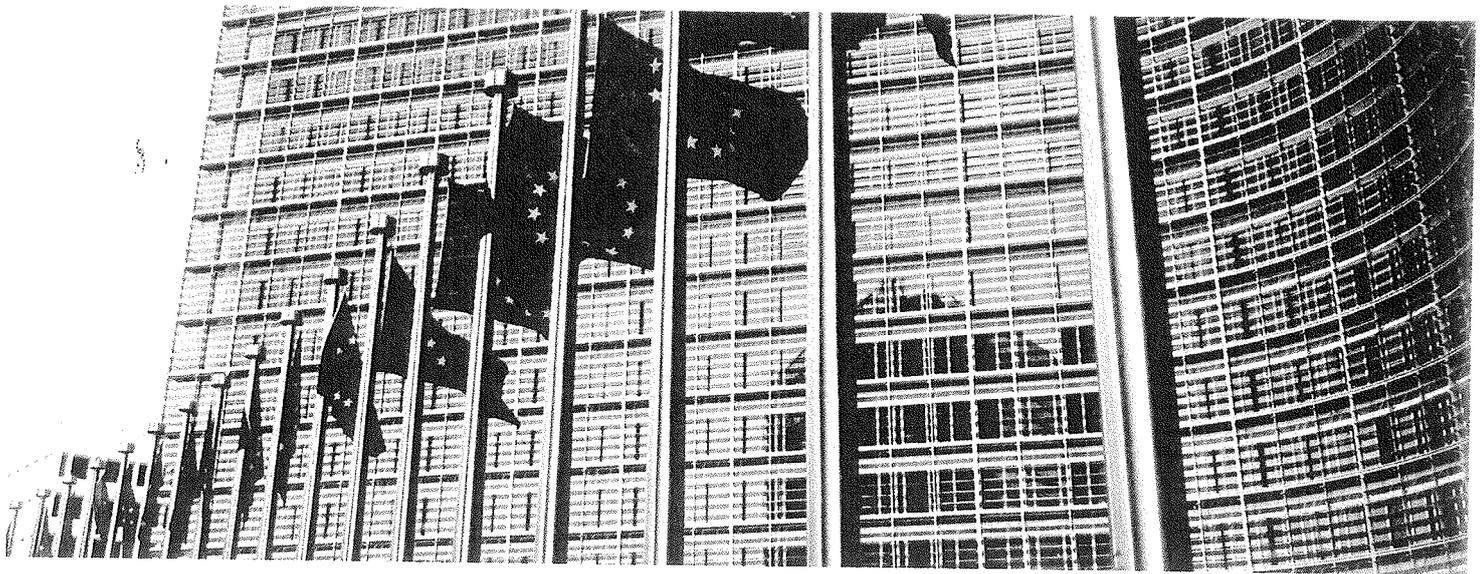
can be withdrawn at the debtor's request. Here, again, the European regulation differs from Dutch law. Under the latter an attachment legally expires if the claim in the principal action is not lodged in good time.

1 COM (2011) 445 final, Brussels 25 July 2011

Enforcement

If the EAPO is issued, it is immediately enforceable in the member state where the bank account is held. The court issuing the EAPO or the creditor himself sends the EAPO directly to the competent authority in the member state where the order is being enforced. In the Netherlands, this will be the court bailiff. This also differs from the Dutch legislation. With an attachment under Dutch law, the creditor chooses the time at which, after receiving leave to attach, he or she will make the attachment.

The competent authority has to serve the EAPO on the bank within three business days of receiving it. Immediately after receiving the EAPO, the bank is obliged to block the bank accounts listed in the EAPO for the amount stated in the EAPO. Attachment is laid on a specific bank account specified in the EAPO. Under Dutch law, this constitutes an attachment against a bank and the entire legal relationship between the bank and the debtor is affected by the attachment. In other words, if an attachment is made against a bank under Dutch law, all the bank accounts are



affected and it is no longer necessary for the relevant bank accounts to be specified in the attachment request. In the Netherlands, an attachment against a bank therefore affects all of the debtor's funds held in the bank. With a European bank attachment, only a specific account is blocked up to the amount stated on the EAPO. This means the debtor can withdraw the portion of the balance in excess of this amount and transfer it to a bank account outside the European Union in order to avoid further successful European attachment measures.

After three business days, the bank has to submit a declaration to the competent authority (using a standard form attached to the proposal) stating whether, and to what extent, the credit balances are affected by the attachment. This increases the workload considerably for the Dutch bank because, under the Dutch system, the bank does not have to issue this declaration until after 30 days. Once the bank has issued the declaration, it has to be served immediately on the debtor. The attachment can be terminated by the debtor lodging a bank guarantee to the amount specified in the EAPO. If a bank guarantee is not lodged, the attachment remains in place until the creditor receives an entitlement to levy execution and he then proceeds to execution. Another difference from the Dutch regulation is that, where the EAPO relates to several bank accounts and the total balance exceeds the amount specified in the EAPO, the creditor has to unblock the surplus amount. In the Netherlands, the person levying the attachment has to be ordered to do this (in interlocutory proceedings).

Account information

The greatest advantage for the creditor, however (and disadvantage for the debtor), is that the creditor can request an EAPO even if he does not know which bank the debtor uses. In such a case, the court can issue a disclosure order on the grounds of which banks have to state whether the debtor holds a bank account with them. Subsequently,

once the order has been granted, attachment can be made on that bank account. Creditors in the Netherlands, have been waiting for this regulation for a long time. At present they have to call upon the services of private investigators to acquire this type of information. Sometimes the information is not obtained and the debtor has a lucky escape. This results in many irrecoverable claims. In view of the current economic situation, the proposal deserves every support. The Dutch legislator would do well to extend the proposed regulation of information on bank accounts to Dutch bank attachments, too. At present, ignorance about the debtor's bank often leads to attachments being made against the large banks in the hope of hitting the target. The European regulation will incidentally also result in a considerable increase in the workload of the Dutch banks which, following the introduction of the European bank attachment, will have to deal with many requests for account information relating to many debtors who are not their customers.

Legal protection

The Dutch attachment debtor can commence interlocutory proceedings to lift the attachment if he believes that the attachment is unfounded or unnecessary. In the case of an EAPO, the debtor has various ways of contesting the EAPO. In the member state that issued the EAPO, he can resort to the legal remedy of reconsideration if the EAPO has been wrongly issued. This would be the case where the court is not competent to hear the request. It would also be possible if the debtor can demonstrate that the creditor's claim was unfounded or if there is no risk of embezzlement. Finally, this legal remedy will continue to be available if the creditor fails to bring a claim in the principal action within 30 days. A second legal remedy is the option for a party to ask the court issuing the EAPO to withdraw it on the grounds of a change of circumstances, for example, because the debtor has now been paid the claim. A third legal remedy is one that is instituted by the debtor in the enforcing member state. This would be a request to limit

the enforcement to an amount that is not susceptible to attachment under the legislation of the member state concerned. In the Netherlands, this would be the attachment-exempt threshold. This legal remedy can also result in cancellation of the EAPO, for example, if a judgement has been awarded in the enforcing member rejecting the creditor's claim.

Conclusion

Dutch creditors may regularly be confronted with debtors who have, or may have, bank accounts in an EU member state. The European regulation will therefore meet a considerable need. It offers an improvement on the Dutch situation, particularly where it is not known at exactly which bank an account is held in the EU member state concerned. The regulation also ensures that in EU member states in which the prejudgement attachment of banks is currently not or almost not possible, a prejudgement attachment will be possible in the future. If the proposal is agreed to by the European legislator, the banks have to be prepared for an increase in the workload within the department dealing with attachments. More requests will be made. The declarations to be issued after the attachment has been made will have to be issued more promptly. However, the proposal can contribute to reducing non-payment in the EU, which will in turn reduce the number of bankruptcies arising from the inability to collect claims. In the current economic situation, this is a significant improvement.



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