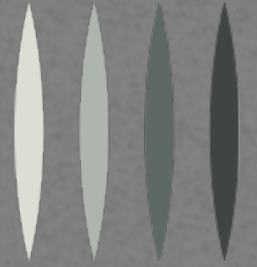


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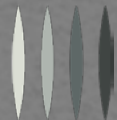
French and EU freezing orders

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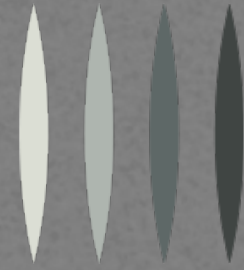
Injunctive relief in France

Preliminary remarks

- In certain circumstances, a creditor may directly seek from such bailiff that he/she applies measures that will freeze the assets of his/her debtor provided that the said creditor already has a certain type of titles – e.g. a court decision not yet enforceable, a promissory note, an unpaid check, a residential lease drafted in the form of a deed (for unpaid rents).
- Otherwise, a creditor may use legal techniques which will allow him/her to freeze the assets of his/her debtor before any judgment, pending a court decision on the substance of the dispute.
- These precautionary legal measures, referred to as “freezing orders”, are quite effective in guaranteeing on a preemptive basis the subsequent execution of a judgment.
- In France, any kind of preventive measure aimed at freezing a debtor’s assets may only be undertaken by a bailiff (“Huissier de justice”).



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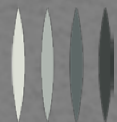
Freezing orders in France

Legal provisions applicable

- Article L511-1 of the French civil enforcement proceedings code reads as follows:

“Any person whose claim appears justified in principle may seek from the judge an order for any an interim measure to be enforced on the assets of his/her debtor, without prior notice, if he/she justifies circumstances likely to threaten the recovery of his/her claim.

The interim measure can either be a preventive seizure or a judicial security.”



There are two types of freezing orders

- *Preventive seizure*

A **temporary seizure** by a creditor whose claim is threatened of a **movable property** of his/her debtor to guarantee its claim. Once his/her property seized temporarily, the debtor's can no longer give, sell or damage it though he/she may still use it (e.g. he/she may still drive his/her car).

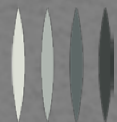
- *Judicial security*

A guarantee granted to a creditor whose claim is threatened over certain specific assets of his/her debtor as listed under **Article L.531-1 of the French civil enforcement proceedings code**: buildings, businesses (going concerns), shares or securities.

These debtor's assets **remain alienable and assignable**; they may thus be sold but the creditor who is the beneficiary of the judicial security will be granted a **preferential right and a resale right**.

Examples of judicial securities include mortgages, pledge of a business, surety bonds...

This procedure is **more cumbersome and thus more expensive** than that of a preventive seizure as the creditor needs to carry out publicity measures to inform third parties of the property's unavailability.

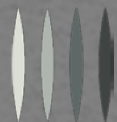


The issuance of a freezing order is subject to certain conditions

There are essentially two conditions required from a creditor seeking a freezing order as provided by Article L511-1 of the French civil enforcement proceedings code:

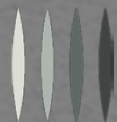
- **The creditor must prove that he/she has a claim which “appears to be justified in principle”** – i.e. he/she does not need to prove that his/her claim is valid on the merits (certain, of a fixed amount and due) but only that its existence is reasonably plausible.
- **The creditor must justify circumstances likely to threaten the recovery of his/her claim/debt.**

Freezing orders can be justified, for example, if the creditor fears that the debtor is seeking to sell his/her assets to avoid paying him/her.
- Finally, since the procedure to seek freezing orders is *ex parte* – i.e. without information of the debtor, thus guaranteeing the effect of surprise when the seizure is carried out – **the creditor must also prove that, if the debtor were to be informed of his/her initiative aimed at obtaining a freezing order, there is a risk that such debtor would organize his/her insolvency** (e.g. transfer the funds out of his/her bank accounts).



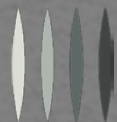
The procedure to seek, obtain and enforce freezing orders

- The creditor must file a petition seeking a freezing order from a judge.
- The petition must be reasoned (relevant conditions are met + amount of the claim/debt and nature of the assets to be seized are specified).
- Hearing or no hearing but in any case, it is an **ex parte procedure**.
- The judge may refuse to grant the freezing order.
- When the judge issues a freezing order, the creditor has 3 months to have it enforced by a bailiff and then 1 month to file a court action to obtain a decision with a writ of execution acknowledging his/her claim.



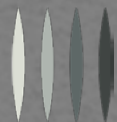
Enforcement procedures for preventive seizures and judicial orders differ:

- The implementation of a **preventive seizure** is a **four step process**: seizure, information of the debtor, initiating proceedings on the substance of the claim, conversion of the seizure into final enforcement.
- **Implementation of judicial orders:**
 - **Judicial orders are opposable to third parties on the day of the completion of the formalities of publicity.** When several creditors have a security interest on the same property, the first to register their claims will be paid off if the property is sold.
 - **There are two distinct types of advertisings provided under Articles L.532-1 and subsequent of the French enforcement civil procedures code:** provisional then final.
 - **Certain delays apply:**
 - ✓ The bailiff must officially inform the debtor **within 8 days** of the above mentioned formalities.
 - ✓ The provisional advertising guarantees the security for a period of **3 years renewable once**.
 - ✓ The creditor must confirm the provisional advertisement with a final advertisement within **2 months** from the date on the judgement acknowledging the creditor's claim has become res judicata.
 - ✓ In the absence of such confirmation in due time, the provisional publicity is null and void.

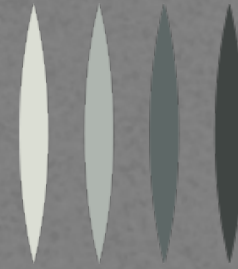


Can debtors challenge a freezing order?

- A debtor may challenge either the merits of the freezing order or its implementation.
- Challenging the merits of the freezing order may lead to its annulment or at least to amending its object. The debtor may seek either:
 - **The release of the measure (seizure or security)** when the conditions for issuing a freezing order are not met and the creditor cannot prove otherwise, OR if the debtor provides an adequate irrevocable bank guarantee.
 - **The revocation of the order** when the conditions for issuing a freezing order are not met, based on general principles of French law applicable to ex parte proceedings.
 - **The substitution of the measure** with any alternative measure that will safeguard the interests of the parties.
- **WARNING:** Article L. 512-2 of the French enforcement proceedings code provides that **when the release has been ordered by the judge, the creditor may be ordered to pay damages to the debtor for the prejudice caused by the precautionary measure.**



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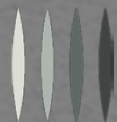


“EAPO”

EUROPEAN FREEZING ORDERS
OVER BANK ACCOUNTS

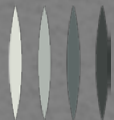
The EU Regulation that established the EAPO

- EU Regulation n°655/2014 of the European Parliament and of the Council dated May 15, 2014 (the “Regulation”) has established a European Account Preservation Order (“EAPO”) procedure to facilitate cross-border debt recovery in civil and commercial matters.
- This Regulation stems from the conclusion that national procedures for obtaining protective measures such as account freezing orders, though they exist in all EU member states, vary significantly when it comes to the conditions for the grant of such local measures and to the efficiency of their implementation.
- The EU has thus decided to adopt a legal instrument which is both binding on and directly applicable in its member states. The Regulation establishes a new procedure which is meant to allow in cross-border cases, for the preservation, in an efficient and speedy way, of funds held in bank accounts.
- However, this Regulation raises a number of issues related to the conditions of the granting of an EAPO, its implementation, and ultimately its real efficiency.



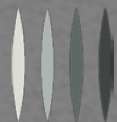
What is an EAPO?

- An EAPO is an order issued by a jurisdiction of a Member State that allows a creditor to freeze the banking assets held by its debtor in a Member State in order to prevent the subsequent enforcement of the creditor's claim on the substance of the dispute from being jeopardized through the transfer or withdrawal of funds by the debtor prior to such enforcement.



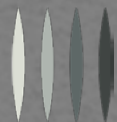
The main characteristics of the Regulation

- *An additional and optional tool*
- *Limited to civil and commercial matters*
- *Dedicated at freezing bank accounts*
- *Limited to cross-border cases*
- *Applicable in the EU except the UK and Denmark*
- *A freezing order applicable before any trial*
- *A freezing order available to claims whether due or not yet*
- *A seizure limited to the amount of the principle claim.*
- *Standard forms are available*
- *Respect of EU fundamental rights and principles*



Jurisdiction

- Jurisdiction to issue the EAPO is that of the courts of the Member State which have jurisdiction to rule on the substance of the matter
- However, if the debtor is a consumer domiciled in a Member State, jurisdiction to issue the EAPO belongs to the courts of that Member State.
- Courts of the Member State in which the EAPO was issued shall have jurisdiction over any action by the debtor aimed at granting remedies against **the issuance** of the EAPO.
- Courts or, where applicable, competent enforcement authorities in the Member State of enforcement shall have jurisdiction over any action by the debtor aimed at granting remedies against **the enforcement** of the EAPO.

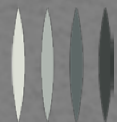


Conditions required to issue an EAPO – standard of proof

- When a creditor applies for an EAPO prior to obtaining a judgment, the court shall verify that:
 - the creditor is likely to succeed on the substance of his claim against the debtor,
 - its claim is in urgent need of judicial protection,
 - without the EAPO, the enforcement of a future judgment may be impeded because by the time it is issued, the debtor may have disposed of his assets.

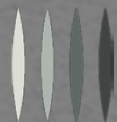
Main characteristics of the proceedings for the issuance and the enforcement of an EAPO

- **Ex parte** proceedings
- The creditor has the **right to appeal** the refusal to issue an EAPO.



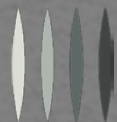
- **Enforcement of the EAPO:**

- An EAPO issued in a Member State shall be acknowledged and thus enforceable in other Member States without the latter requesting any special procedure.
- The Member State of origin is required to transfer the EAPO to the relevant authority of the Member State of enforcement by any appropriate means.
- Upon receipt of the EAPO, the relevant authority of the Member State of enforcement shall take the necessary steps to enforce the EAPO in accordance with its national law.
- Depending on the method available under the law of the Member State of enforcement, the EAPO shall be implemented by blocking the preserved amount in the debtor's account or by transferring that amount to a dedicated account for preservation purposes.
- The EAPO and all documents submitted by the creditor to the court in the Member State of origin and their translations must be served on the debtor promptly after the enforcement of the EAPO.
- When the EAPO is enforced on several accounts in the same Member State or in different Member States, or after the implementation of one or more equivalent national orders (against the same debtor and to secure the same claim), the creditor must take all necessary steps to ensure the release of any amount exceeding the EAPO's amount.



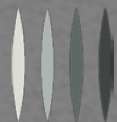
Liability of the creditor and defense against the EAPO

- *Guarantee provided by the creditor to deter and/or compensate an abusive use of the EAPO proceedings:*
 - The creditor may be required to provide security which serves as a deterrent against any abuse of the EAPO procedure and ensures compensation of the debtor if necessary.
 - The debtor carries the burden of proof of an allegedly abusive use of the EAPO proceedings weighs on the debtor, except in certain circumstances.
 - The law applicable to the liability of the creditor shall be the law of the Member State in which the EAPO was enforced.
- *The debtor as well as third parties may challenge the EAPO, its enforcement, or offer an alternative security:*
 - Considering the ex parte nature of the proceedings for the issuance of the EAPO, the debtor's right to a fair trial and his right to an effective remedy are guaranteed.
 - The debtor may request that the EAPO be reconsidered (revoked or amended).
 - The debtor may also challenge the enforcement of the EAPO (e.g. on the ground that certain amounts seized are exempt from seizure under local law).
 - The debtor has the right to apply for the release of the funds seized as a result of the enforcement of the EAPO if it provides appropriate alternative security.
 - Finally, third parties may as well challenge an EAPO and/or its enforcement.

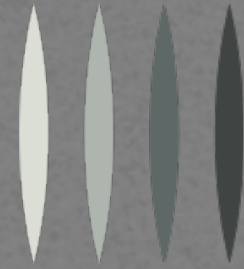


Practical issues raised by the EAPO

- Since the Regulation has entered into force less than three years ago, on January 18, 2017, there has been little use of it in France. This may have to do with the rather strict requirements provide in the Regulation, which, in certain instances, are more stringent that those provided under French law when seeking a freezing order to be enforced locally.
- In addition, certain notions and terms included in the Regulations may give rise to interpretation and clients are rarely eager to act as guinea pigs when it comes to experiencing a new legal tool.
- Therefore, even though some cases are now reaching the CJEU (see Opinion of the Advocate General Maciej Szpunar presented on July 29, 2019 in Case C-555/18 - K.H.K. v. B.A.C., E.E.K), it might take some time before EU case law secures a number of issues raised by the Regulation.



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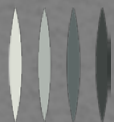


OTHER INJUNCTIVE RELIEF IN FRANCE :

Article 145 of the French Procedure Code

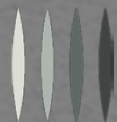
Article 145 of the French Procedure Code:

- “*If there is a legitimate reason for keeping or establishing before any trial the evidence of facts that might be relied upon in the solution of a dispute, the legally admissible measures of inquiry may be ordered at the request of any interested person, upon the filing of an application or in summary proceedings.*”
- In France, in the absence of a discovery process as we know it in the US, Article 145 provides a rather powerful tool to be used in pre-litigation.
- Primarily, the purpose of the Article 145 procedure is to try to **secure evidence in preparation for a future litigation**. However it also often serves an unsaid purpose, which is to **exercise pressure and/or obtain a leverage** against the other party in a commercial or civil dispute.
- There are essentially **two conditions required** to seek and obtain an order pursuant to Article 145 French Civil Procedure Code:
 - It must be requested “*before any trial*”
 - Plaintiff must prove a “*legitimate reason*” for keeping and/or establishing the evidence of facts which the solution of a dispute may depend upon.

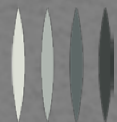


What is the process to seek and obtain an order pursuant to Article 145?

- **Writ of summons for summary proceedings:** a normal writ summons delivered to the other party requesting her to appear before a judge under a summary proceedings. A hearing date is set and parties will debate before the judge of the legitimacy of issuing an order under Article 145.
- **Petition:** it contains a written argument and relevant evidence supporting the request for an order under Article 145, as well as a proposed draft of order.
 - **It is an ex parte procedure.** Therefore, in addition to the general conditions, the petitioner must also prove that informing the party holding the evidence sought would create a risk that collection of these evidence be prevented.
 - Depending on the tribunal, **the petitioner's attorney may be given the opportunity to orally argue his case before the judge or the latter may decide simply on the basis of the petition and supporting evidence filed.**

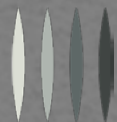


- **Motion for an order granted:** If the judge decides to grant the order, he/she may either use the draft provided by the petitioner, which he/she will amend as he/she sees fit. In certain tribunals, such as the Tribunal of Commerce of Paris, judges systematically include a provision in the order that prevents the bailiff carrying out the order from communicating any of the documents seized to the petitioner until a hearing dedicated to a review of such documents by the judge in the presence of both the petitioner and the party whose documents have been seized. This is to allow a debate between them over issues such as business secrets or attorney privilege protecting certain of the seized documents. It is also a precaution to avoid a petitioner from using the Article 145 ex parte procedure to carry out “fishing expeditions” at the premises of a competitor to gain an advantage in bad faith.
- **Motion for an order denied:** If the judge refuses to grant the order, the petitioner may eventually to strengthen its case with additional arguments and supporting evidence and petition again. Since the party holding the evidence sought by the petitioner is not informed of the judge’s refusal to grant the order the first time, the new petition may still be ex parte, thus guaranteeing the effect of surprise if the order is finally granted and carried out.



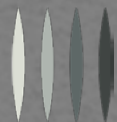
How is the Article 145 order enforced?

- Once the order is granted by the judge, **the petitioner uses the services of a bailiff**. The order usually provides that the latter may be accompanied by police officers, a locksmith, and eventually a computer expert, to enter and search the premises (any place, work or domicile), computers and servers. For purposes of securing a surprise effect, such measures will usually take place early morning around 7am and eventually in several places at the same time by different bailiffs.
- **Once the documents** (papers and electronic documents such as emails or computer folders) **are seized, the bailiff keeps them in his/her office**. Depending on what the order provides, he/she may release a copy of the seized documents to the petitioner or keep them until a hearing is set before the judge in the presence of the parties as mentioned hereinabove.
- Ultimately, if the petitioner succeeds in obtaining documents through this process, he/she may decide to use them as supporting evidence for an action on the merits and/or a summary proceedings. **Typically, Article 145 orders may be used by a petitioner who has reasons to believe that a competitor is acting unfairly**. If he/she collects proof of acts of unfair competition, he/she then may use them to start a court action and file unfair competition claims.

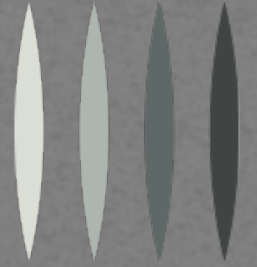


What kind of defense is there against an Article 145 order?

- As for the exercise of any right, using Article 145 has **its limit which lies in its potential misuse/abuse**. Indeed, sometimes petitioners will use the Article 145 order for hidden purposes such as getting vital information on their competitors and/or disrupting their business.
- The procedural move opened to the party challenging an Article 145 order obtained after an ex parte petition is to **seek the withdrawal of the said order before the judge who has issued it**.
- **Within one month from the execution of the measures authorized by the Article 145 order**, the party challenging this order can file a writ of summons under a summary adversarial proceedings and request that the judge withdraws his/her decision based on the fact that the conditions of Article 145 and for use of an ex parte procedure were not met. **If he/she succeeds and the order is withdrawn, the documents seized are returned to him/her.**



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