A Reform of French Law Inspired by an Inaccurate Interpretation of the EAPO Regulation?

Carlos Santaló Goris, Research Fellow at the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law and Ph.D. candidate at the University of Luxembourg, offers an analysis on the recently approved reform of the French Manual on Tax Procedures ("Livre des procédures fiscales") influenced by Regulation No 655/2014, establishing a European Account Preservation Order ("EAPO Regulation"). The EAPO Regulation and other EU civil procedural instruments are the object of study in the ongoing EFFORTS project, with the financial support of the European Commission.

FICOBA ("Fichier national des comptes bancaires et assimilés") is the French national register containing information about all the bank accounts in France. French bailiffs ("huissiers") can rely on FICOBA to to facilitate the enforcement of an enforceable title or upon a request for information in the context of an EAPO proceeding (Article L151 A of the French Manual on Tax Procedures). In January 2021, the Paris Court of Appeal found discriminatory the fact that creditors could obtain FICOBA information in the context of an EAPO proceeding but not in the context of the equivalent French domestic provisional attachment order, the "saisie conservatoire" (for a more extended analysis of the judgment, see here). While an enforceable title is not a necessary precondition to access FICOBA in the context of an EAPO, under French domestic law it is. Against this background, the French court found that creditors who could apply for an EAPO were in a more advantageous position than those who could not. Consequently, it decided to extend access to FICOBA to creditors without an enforceable title who apply for a *saisie conservatoire*.

In December 2021, the judgment rendered by the Paris Court of Appeals was transposed into French law. In fact, the French legislator introduced an amendment to the French Manual on Tax Procedures, allowing bailiffs to collect information about the debtors' bank accounts from FICOBA based on a *saisie conservatoire* (Art. 58 LOI n° 2021-1729 du 22 décembre 2021 pour la confiance dans l'institution judiciaire).

In is nevertheless noteworthy that the judgment of the Paris Court of Appeal that inspired such reform is based on a misinterpretation of the EAPO Regulation**. Access to the EAPO Regulation's information mechanism is limited to creditors with a title (either enforceable or not enforceable)**. Creditors without a title are barred from accessing the EAPO's information mechanism. From the reasoning of the Paris Court of Appeal, **it appears that the Court interpreted the EAPO Regulation as granting access to the EAPO's information mechanism to all creditors, even to those without a title**. Such an interpretation would have been in accordance with the EAPO Commission Proposal, which gave all creditors access to the information mechanism regardless of whether they had a title or not. However, the Commission's open approach was received with scepticism by the Council and some Member States. Notably, France was the most vocal advocate of limiting the possibilities of relying on the EAPO information mechanism. It considered that only creditors with an enforceable title should have access to it. In particular, the French delegation argued that, under French law, only creditors with an enforceable title could access such sensitive data about the debtor. Eventually the European legislator decided to adopt a mid-way solution between the French position and the EAPO Commission Proposal: namely, in accordance with the Regulation creditors are required to have a title, though this does not have to be enforceable.

The following is an interesting paradox. Whereas France tried to adjust the EAPO's information mechanism to the standards of French law, it was ultimately French law that was amended due to the influence of the EAPO Regulation. An additional paradox is that the imbalance between creditors who can access the EAPO Regulation and those who cannot (as emphasized and criticised by the Paris Court of Appeal) will continue to exist but with the order reversed. Once the French reform enters into force, creditors without a title who apply for a French *saisie conservatoire* of a bank account will be given access to FICOBA. Conversely, creditors who apply for an EAPO will continue to be required to have a title in order to access FICOBA. Only an amendment of the EAPO Regulation can change this.

The moment for considering a reform of the EAPO Regulation is approaching. In accordance with Article 53 of the EAPO Regulation, the European Commission should have sent to the European Parliament and the European Economic and Social Committee "a report on the application of this Regulation" by 18 January

2022. These reports should serve as a foundation to decide whether amendments to the EAPO Regulation are desirable. Perhaps, as a result of the experience offered with the judgment of the Paris Court of Appeal, the European legislator may consider extending the EAPO's information mechanism beyond creditors with a title.