

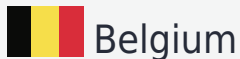
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Securing assets during a claim in EU countries

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European Judicial Network
(in civil and commercial matters)



1 What are the different types of measures?

The purpose of precautionary measures (*mesures conservatoires/bewarende maatregelen*) is to ensure that rights are preserved. In practice, creditors can use these measures to protect themselves against the risk that they will not receive payment from their debtors.

In the event that purely precautionary measures are insufficient, a court can order interim measures (*mesures provisoires/voorlopige maatregelen*) with consequences comparable to those of the decision expected in the main proceedings. The final judgment may confirm these interim measures or reverse them.

A court can order interim and precautionary measures in respect of the debtor's assets. For the purpose of recovering debts, the principle applies that a debtor is liable to meet the debt from his or her entire assets, whether movable (money, furniture, jewellery, shares) or immovable (land, buildings, residential dwelling). Creditors can also assert rights held by their debtor in the debtor's place (bank balances, wages).

1.1. Precautionary measures

A. Preventive attachment

In urgent cases, any creditor can ask the court for permission to impose a preventive attachment (*saisie conservatoire/bewarend beslag*) on any assets belonging to the debtor that are capable of attachment (Article 1413 of the Judicial Code (*Code judiciaire/Gerechtig Wetboek*)). The debtor can then no longer freely dispose of the attached assets. This means that the debtor can no longer sell, gift or mortgage such assets. The removal of the power of disposal applies only in favour of the attaching creditor: the debtor remains the owner of the assets and retains the right to make use of them and to draw profit from them.

B. Sequestration

Sequestration (*séquestre/sekwestering*) is the deposit of disputed assets for safekeeping until the final judgment is given (Article 1955 et seq. of the Civil Code (*Code civil/Burgerlijk Wetboek*)). Sequestration can be agreed between the parties (*séquestre conventionnel/conventioneel sekwestering*) or ordered by the court (*séquestre judiciaire/gerechtig sekwestering*). In contrast to ordinary deposits, sequestrations can also apply to immovable assets (Article 1959 of the Civil Code).

C. Inventory

The purpose of an inventory (*inventaire/inventaris* or *boedelbeschrijving*) is to determine the assets forming an estate, joint marital property, or undivided property (Article 1175 of the Judicial Code), at the request of creditors, a spouse or joint heirs. The parties requesting the inventory are entitled to choose a notary who will list the assets in a public document. In the event of disagreement, a notary will be appointed by the justice of the peace (*juge de paix/vrederechter*) (Article 1178 of the Judicial Code). The justice of the peace will also have

jurisdiction to resolve any disputes.

D. Placing under seal

The consequence of placing assets under seal (*aposition des scellés/verzegeling*) is that they become unavailable in practice. Where there is a serious reason for doing so, a creditor, spouse or heir can ask for seals to be placed on assets that form part of an estate, joint marital property or undivided property (Article 1148 of the Judicial Code). The request is made to the justice of the peace. The justice of the peace can order the removal of the seals at the request of the original applicant or of a creditor, a spouse or an heir. Any objection to the removal of the seals has likewise to be brought before the justice of the peace.

1.2. Interim measures

Interim measures are measures that can be revoked or reversed. They can be ordered in interlocutory proceedings (*référé/kort geding*) or in the main proceedings in the case.

1.3. Provisional enforcement

A judgment which has been given but is still open to challenge can be enforced on a provisional basis, under strict conditions.

Subject to the exceptions laid down by law, or where the court decides otherwise in a specially reasoned decision, and without prejudice to Article 1414, an objection (*opposition/verzet*) lodged against the final judgment in the main proceedings suspends its enforcement.

Subject to the exceptions laid down by law, or where the court decides otherwise through a specially reasoned decision, and without prejudice to Article 1414, the final judgment in the main proceedings is provisionally enforceable, notwithstanding any appeal (*appel/hoger beroep*), and without security being required unless the court has ordered that security be provided (Article 1397 of the Judicial Code).

2 What are the conditions under which such measures may be issued?

2.1 The procedure

A. Preventive attachment

A person who has obtained a judgment in their favour, even in another country, can instruct a bailiff (*huissier de justice/gerechtsdeurwaarder*) to place the assets of the judgment debtor under preventive attachment. In the absence of such a judgment, preventive attachment requires a court order.

The application is made to the judge of attachments (*juge des saisies/beslagrechter*) and is examined in the same way as an application in interlocutory proceedings (Article 1395 of the Judicial Code). There must be at least two days between the summons and the hearing, but this period can be shortened in urgent cases.

An *ex parte* application (*requête unilatérale/eenzijdig verzoekschrift*) seeking preventive attachment is submitted by a lawyer to the judge of attachments, who can authorise the attachment. The judge of attachments must issue an order within eight days. The order and the notice of attachment must be served by a bailiff on the judgment debtor, to ensure that the debtor is aware of the proceedings brought against him or her.

The order is provisionally enforceable without further formality, but is binding only between the parties. The judge of attachments can at any time vary or set aside the order owing to a change in circumstances. The fee charged by the bailiff is determined by the Royal Decree of 30 November 1976 (published in the official gazette of 8 February 1977).

B. Sequestration

In the case of sequestration by agreement, a valid agreement between the parties is sufficient, and no court order is required. Sequestration can also be ordered by a court.

In either case a depositary (*gardien judiciaire/gerechtelijke bewaarder*) will be appointed, either in the

agreement or by the court. The depositary must exercise all due care with regard to the assets entrusted to him or her. He or she must return the assets when the sequestration ends. The depositary is entitled to receive a salary determined by law (Article 1962, third paragraph, of the Civil Code).

C. Interim measures

Interim measures have to be requested from the court, either in interlocutory proceedings or in the main proceedings. They can also be ordered by an arbitrator (Article 1696 of the Judicial Code).

The presiding judge of the court of first instance (*tribunal de première instance/rechtbank van eerste aanleg*) can order an interim measure in any urgent case that does not by law fall outside the jurisdiction of the courts (Article 584, first paragraph, of the Judicial Code). Such a measure must be purely provisional and cannot have any final and irrevocable effects. The presiding judges of the labour tribunal (*tribunal du travail/arbeidsrechtbank*) and commercial court (*tribunal de commerce/rechtbank van koophandel*) can also order interim measures in urgent cases that fall within the jurisdiction of their courts.

The order made in the interlocutory proceedings cannot prejudge the judgment on the merits in the main proceedings, which means that it is binding only on the parties. The judge in the main proceedings cannot be bound by such an order in any way; the judge of attachments can order only interim measures.

In divorce proceedings, the presiding judge of the family court (*tribunal de la famille/familie rechtbank*) can order interim measures relating to the person, maintenance and assets of the spouses and their children (Article 1280, first paragraph, of the Judicial Code).

The bailiff serves notice of the measures that have been ordered on the opposing party, and invites the opposing party to comply with those measures, if necessary under threat of enforcement by the authorities or of a periodic penalty payment. The fee charged by the bailiff is determined by the Royal Decree of 30 November 1976 (published in the official gazette of 8 February 1977).

When ruling at first instance, the justice of the peace can order interim measures for the period of time during which spouses or legal cohabitants whose relationship has broken down continue living together. Such measures may relate, for example, to the family home, the children, or assets of the children. These measures are only provisional and will end when the spouses or legal cohabitants stop living together. They do not determine the long-term arrangements that may follow a divorce. The final arrangements following a divorce must be decided by the court of first instance.

D. Provisional enforcement

A judgment includes an enforcement formula. However, until the judgment is no longer open to any challenge that might suspend it, it cannot be enforced. Subject to the exceptions laid down by law, or where the court decides otherwise through a specially reasoned decision, enforcement is suspended as long as an objection can be lodged, but not by the possibility of an appeal to a superior court or an appeal on points of law to the Court of Cassation (*Cour de cassation/Hof van Cassatie*) (Article 1397 of the Judicial Code).

The judge who delivered the judgment can authorise its enforcement on a provisional basis, except in cases in which this is prohibited by law (Article 1399 of the Judicial Code), such as cases concerning personal status.

If provisional enforcement is possible, it is undertaken at the risk of the party seeking it. The judge can require that party to provide security before the judgment is provisionally enforced (Article 1400 of the Judicial Code). This means that the party can have the judgment provisionally enforced, but must lodge a sum of money or a bank guarantee with the Deposits and Consignments Fund (*Caisse des dépôts et consignations/Deposito- en Consignatiekas*). This is because the judgment may be varied on appeal and the defendant may be entitled to compensation.

2.2 The main conditions

A. Preventive attachment

Preventive attachment can be ordered only in urgent cases and if the debt is certain, of a fixed amount and due.

Urgency requires that the debtor's solvency be under threat, thereby jeopardising the creditor's rights over the debtor's assets. Preventive attachment cannot be used as a means of applying pressure, but is permitted where, on the basis of objective criteria, the debtor's financial situation is compromised. There must be urgency both when the attachment is ordered and at any time when the court is required to rule on its continuation.

The creditor's claim must be certain, which means that it must appear to be sufficiently justified and beyond reasonable dispute. It must also be of a fixed amount. The amount of the claim must have been determined or at least be capable of being provisionally estimated. If the exact amount of the debt has not yet been determined, it will be estimated by the court. Finally, payment of the debt must be due: in other words, the creditor must be entitled to demand payment. Article 1415 of the Judicial Code qualifies this condition so that claims in respect of regular income in the future (maintenance, rent, interest) and even contingent or potential claims can also be eligible for preventive attachment.

B. Sequestration

A court can order the sequestration of movable assets that have been attached, movable or immovable property whose ownership or possession is in dispute between two or more persons, and goods that a debtor is offering in order to settle a debt (Article 1961 of the Civil Code). In general terms, this rule applies whenever the circumstances of the case justify the use of sequestration as a form of precautionary measure to ensure that the goods remain as they are, without compromising any final solution. Urgency is irrelevant. The court will, however, exercise caution when ordering sequestration, as it is a serious and exceptional measure that can be granted only where there are sufficient and important grounds for it.

C. Interim measures

Interlocutory proceedings seeking interim measures can be brought only if the case is so urgent that unless measures are taken immediately the applicant will suffer a substantial loss or serious disadvantage. Urgency is therefore an essential requirement in interlocutory proceedings.

Interim measures granted in the main proceedings must also be a matter of urgency. That is why these measures are also referred to as 'urgent provisional measures' (*mesures provisoires urgentes/dringende voorlopige maatregelen*) when they are requested from the justice of the peace.

D. Provisional enforcement

The criterion used by the court when deciding whether to allow or refuse provisional enforcement is the danger to the creditor that the opposing party will unnecessarily delay or prevent enforcement of the judgment. If the opposing party lodges an objection or appeal solely to prevent the judgment from being enforced, that will prompt the court that delivered the judgment to order provisional enforcement. However, this is prohibited in certain cases (see above).

3 Object and nature of such measures?

3.1 What types of assets can be subject to such measures?

A. Preventive attachment

All types of assets (movable, immovable, intangible) can be subject to preventive attachment. Certain assets cannot, however, be attached, or can be attached only in part. Their ineligibility for attachment stems from the law, the nature of the asset, or the link that exists between the asset and the debtor.

Assets that cannot be attached are listed in Article 1408 of the Judicial Code. In short, these are assets indispensable to the debtor, which are needed to continue the debtor's or the debtor's children's studies or vocational training, which are essential for the debtor's profession, or which are needed for religious worship, as well as food and fuel. Article 1410(2) of the Judicial Code indicates the types of claim that can never be attached, in particular claims to family benefits and the minimum wage.

The debtor's salary and similar income can be attached only in part. The amounts concerned are determined in Article 1409(1) of the Judicial Code and are adjusted each year by Royal Decree on the basis of the consumer

price index. Article 1410(1) of the Judicial Code extends the range of eligibility for partial attachment to include provisional and final maintenance payments, pensions, unemployment benefits, and allowances for incapacity for work and disability.

The assets being attached are listed by the bailiff in an official record, with a view to their possible future sale, unless agreement can be reached with the creditor through the bailiff. It is strictly prohibited to hide assets that have been recorded by a bailiff and such action can result in criminal prosecution.

B. Sequestration

A court can order the sequestration of movable assets of a debtor that have been attached, movable or immovable property whose ownership or possession is in dispute between two or more persons, and goods that a debtor is offering in order to settle a debt (Article 1961 of the Civil Code).

C. Interim measures

Interim measures can be ordered in interlocutory proceedings in cases of any kind. The presiding judge of the court of first instance has jurisdiction in all types of civil dispute under ordinary law. Cases under employment law or commercial law are dealt with by the presiding judge of the labour tribunal or commercial court.

The family court can order interim measures for a period of time during which the parties continue living together. Such measures may relate, for example, to the family home, the children or assets of the children. However, this applies only to married couples (Article 223(1) of the Civil Code) and legal cohabitants (Article 1479(1) of the Civil Code), and not to de facto cohabitants.

D. Provisional enforcement

In principle, all judgments can be provisionally enforced if the court so orders, except where this is prohibited by law (Article 1399 of the Judicial Code).

3.2 What are the effects of such measures?

A. Preventive attachment

The judgment debtor does not lose the rights of ownership or of the attached assets or the rights to use them and draw profit from them (use, rental, income, profits). The effect of preventive attachment is only that the assets cannot be sold or mortgaged. The removal of this power of disposal means that any such transaction that is nevertheless concluded by the judgment debtor will be valid in itself but is not effective against the judgment creditor. The creditor need take no account of such a transaction and can act as if it did not exist.

B. Sequestration

As with ordinary deposits, sequestration means that material possession of an asset is transferred to the depositary. The only measures the depositary can take are measures intended to preserve the assets.

C. Interim measures

Not applicable.

D. Provisional enforcement

Provisional enforcement means that the judgment is enforced despite the possibility that it may be varied on appeal or if an objection is lodged. The applicant bears the risk associated with enforcement (see above).

3.3 What is the validity of such measures?

A. Preventive attachment

Preventive attachment is subject to a time limit, which in principle is three years. The judge of attachments can, however, set a shorter time limit. The attachment can be renewed as long as the initial time limit has not expired. Renewal - which is, in fact, an extension of the existing time limit - is permitted where there are valid

reasons for renewing the attachment and the urgency of the situation has not changed.

B. Sequestration

The law does not impose any time limit on sequestration. If there is no longer any risk that the assets cannot be preserved as they are and that a final solution may consequently be compromised, the sequestration is lifted.

C. Interim measures

The law does not impose any time limit on interim measures. The final judgment in the dispute may confirm or reverse such measures.

D. Provisional enforcement

Not applicable.

4 Is there a possibility of appeal against the measure?

A. Preventive attachment

If the judge of attachments refuses authorisation for a preventive attachment, the judgment creditor can challenge the judge's order within one month of its being served (Article 1419, first paragraph, and Article 1031 of the Judicial Code). The case is handled in the same way as before the first judge; the judgment is delivered by the court in chambers (*en chambre du conseil/in raadkamer*). If the attachment is then allowed, and the judgment debtor wishes to prevent the attachment, the judgment debtor must bring an objection as an affected third party (*tierce opposition/derdenverzet*) before the court of appeal (*cour d'appel/hof van beroep*).

If the judge of attachments grants authorisation for a preventive attachment, the judgment debtor or any other interested party can likewise bring an objection against that order as an affected third party (Article 1419 of the Judicial Code). The objection must be initiated within one month of the date when the order authorising the attachment is served, and will be heard by the judge who issued the order (Article 1125 of the Judicial Code). Unless the judge of attachments grants a stay of enforcement, such an objection does not have suspensive effect.

B. Sequestration

Not applicable in the case of sequestration agreed between the parties.

A sequestration ordered by a court is a court decision open to challenge through the ordinary avenues provided for in the Judicial Code.

C. Interim measures

Any party that considers itself wronged by an order issued in interlocutory proceedings can lodge an objection or appeal. Appeals against orders issued by the presiding judge of the court of first instance or commercial court are heard by the court of appeal. Appeals against orders issued by the presiding judge of the labour tribunal must be lodged with the labour court (*cour du travail/arbeidshof*).

The time limit for objection or appeal is one month from the date when the order is served by the bailiff if the proceedings were initiated by summons (*assignation/dagvaarding*) or voluntary appearance (*comparution volontaire/vrijwillige verschijning*), and one month from the date when the order is served by special registered letter (*pli judiciaire/gerechtsbrief*) if the order was issued following an ex parte application.

D. Provisional enforcement

Provisional enforcement is not open to appeal. The appeal court can under no circumstances prohibit or suspend the enforcement of a judgment (Article 1402 of the Judicial Code).

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