

Avaleht>Raha/Rahalist nõuded>Hagi tagamine nõude puhul ELi liikmesriikides Securing assets during a claim in EU countries

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1 What are the different types of measures?

Civil procedural law (basically, the Law on Civil Procedure (Ley de Enjuiciamiento Civil) - LEC) is the primary source for precautionary measures; however, other measures are set out in special substantive laws.

Among the measures provided for in the LEC (Article 727) are the following:

Precautionary attachment [el embargo preventivo de bienes], aimed at ensuring the enforcement of judgments ordering the delivery of amounts of money or yields, rents and fungible goods that can be estimated in cash by applying fixed prices.

Judicial administration or court-ordered receivership of productive assets [la intervención o la administración de bienes productivos], when a judgment is sought ordering their delivery under the title of owner, usufructuary or any other title involving a legitimate interest in maintaining or improving productivity or when guaranteeing the latter is of paramount importance for the effectiveness of the judgment to be passed in due time.

The **impounding of a movable asset [el depósito de cosa mueble]**, when the claim seeks an order to deliver the said asset and the latter is in the possession of the defendant.

The **drawing up of inventories of assets [la formación de inventarios de bienes]**, in accordance with the conditions specified by the court.

The **provisional filing of claims [la anotación preventiva de demanda]**, when it concerns assets or rights subject to registration in public registries.

Other registry entries [otras anotaciones registrales], in cases where the public nature of the registry may help to achieve a satisfactory outcome.

A court order to provisionally cease an activity [la orden judicial de cesar provisionalmente en una actividad]; an order to temporarily abstain from behaving in a certain way; or a temporary ban preventing the interruption or withdrawal of a service that was being provided.

Seizure and confiscation of revenue [la intervención y depósito de ingresos] obtained through an activity considered illicit and whose prohibition or cessation is requested in the claim, as well as the consignment or deposit of the amounts claimed as compensation for intellectual property.

The **temporary confiscation of original copies of the works or objects [el depósito temporal de ejemplares de las obras u objetos]** allegedly produced contrary to the rules on intellectual and industrial property, as well as the deposit of the material employed for their production.

The **suspension of contested corporate decisions [la suspensión de acuerdos sociales]**, when the claimant or claimants represent at least 1 or 5 per cent of the share capital, depending on whether or not the defendant company had issued securities that, at the time of the contest, were admitted to trading on an official secondary market.

Together with these, the last paragraph of Article 727 of the LEC allows the judge to agree other measures not included among the above, meaning the list is not exhaustive (for example, those laid down in Article 762 of the LEC):

Any **other measures** expressly established by law for the protection of certain rights or deemed necessary to ensure the effectiveness of the judicial protection that may be granted in the judgment that may be handed down at the trial.

Outside this general system, there are other legal provisions on the matter of interim protection, among which are the following:

Proceedings on the **legal capacity of persons**: Article 762 of the LEC permits the court to officially adopt the measures it considers necessary for the protection of the person presumed to lack capacity or of their estate.

Proceedings concerning **parenthood, paternity and maternity**: Article 768 of the LEC provides protection measures for the person and assets under the authority of whoever may appear to be a parent and the granting of provisional alimony to the claimant, including without a prior hearing in urgent cases.

Protection of the **estate of a deceased person**: it may be necessary to secure the estate's assets and the deceased's documents or to verify the deceased's relatives, among other measures (Articles 790 to 796 LEC).

Specific precautionary measures may also be found in special rules including, but not limited to, the following:

Law on Intellectual Property (Royal Legislative Decree 1/1996 of 12 April 1996), Articles 138 and 141 (seizure and confiscation of income arising from the illicit activity in question, suspension of reproduction, distribution and public communication activity, confiscation of the items produced, seizure of equipment, apparatus and physical media, etc.).

Trademark Law (Law 17/2001 of 7 December 2001), Article 61b (preventive filing of the claim in the Trademark Register)

Patent Law (Law 24/2015 of 24 July 2015), Article 11 (suspension of the procedure for granting a patent) and Articles 117 and 127 et seq. (cessation of acts liable to infringe the rights of the applicant, seizure and retention of the goods alleged to infringe the rights of the patent holder, guarantee of compensation for damages and the ensuing registry entries).

Bankruptcy Law (Royal Legislative Decree 1/2020 of 5 May 2020, approving the recast text of the Bankruptcy Law). Article 133 (attachment of assets and rights of administrators or liquidators, in law and in fact, and general directors of the insolvent legal person or partners, where applicable), Article 18 (Ensuring non-disposal of debtor's assets, *inter alia*).

Maritime Navigation Law (Law 14/2014 of 24 July 2014), Article 43 and Article 470 et seq. (arrest of seagoing ships).

Commonhold Property Law (Law 49/1960 of 21 July 1960), Article 7 (cessation of prohibited activity) and Article 28 (suspension of agreements adopted by owners' associations).

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

2.1 The procedure

The measures are granted by the judge or court with jurisdiction over the subject or the territory. This will be the judge or court hearing the case, or if proceedings have not been started, the judge or court whose duty it would be to hear the case.

Precautionary measures may be applied for before a claim is lodged, provided that their nature does not make it impossible to grant them (as in the case for the provisional filing of a claim), and provided that the law does not require application together with the claim (as with the cessation of prohibited activities, or the suspension of community agreements in cases of litigation concerning commonhold property). Due to their exceptional nature (usually just the claim itself would be dealt with), it must be a case of simultaneous necessity and urgency. They can be adopted without the opposing party to the proceedings being heard (without prejudice to their right to object to the measures once they have been granted); however, they expire if the corresponding claim has not been filed within twenty days of their being granted.

As indicated above, however, it is more usual to apply for the measures at the same time as filing the claim. In this case, the judge or court orders the preparation of a separate file for the precautionary measure to be handled at the same time as the main case, in which evidence can be offered and produced to demonstrate that the conditions for obtaining interim protection have been met. The general rule is that the parties are called to a hearing at the court before precautionary measures are adopted. Statements are made and any evidence relevant to the matter of whether or not to adopt precautionary measures can be produced; where appropriate, the guarantee to be required from the party requesting the precautionary measure is considered, in case the application is dismissed. Notwithstanding this, the party applying for the measure may request its adoption without the other party being heard, if they show evidence that there are urgent grounds or that the hearing could compromise the success of the measure - for example, if there is the risk of concealment or waste of the debtor's estate. In this case, the injured party may object once the measure has been adopted.

Measures may also be applied for after the claim or during an appeal, although such an application must be supported with facts or circumstances that justify its timing.

In cases where the intervention of a lawyer and public prosecutor is needed, their involvement is required in order to apply for the adoption of precautionary measures. In the case of urgent measures prior to the claim, legal representation is not necessary (Articles 23 and 31 LEC).

2.2 The main conditions

In order for a court to grant any of the measures listed above, the following must apply:

Risks arising from the course of time, or *periculum in mora*: this is constituted by the risk of harm the claimant could suffer through delay in the proceedings, which could frustrate the enforcement of that which is granted in the judgment or decision concluding the proceedings. The party applying for the measure must believe that if the measures applied for are not adopted, situations that would hinder or impede the effectiveness of the protection that might be granted in an affirmative judgment could occur during the pendency of the proceedings. In any event, it is not appropriate to grant the measure if the situation causing the risk has been borne by the applicant for a long time, unless they show evidence to explain why they have not applied for the measure before.

Appearance of good law or a *prima facie* case: The applicant must provide to the court reasons that lead it to make a preliminary judgment on the appropriateness in law of the claim. The requirement entails that the applicant must submit the particulars, arguments and documentary evidence on which the court can base, without prejudging the merits of the case (since in Spain, precautionary measures are adopted by the same court that will then judge the case), a provisional and circumstantial judgment in favour of the basis of the claim, Article 728(2) LEC. In addition to documentary evidence, other kinds of evidence (witnesses, experts, statements of the parties) are admissible.

Guarantee: unless expressly decided otherwise, the applicant for the measure must deposit a guarantee sufficient to compensate, in a speedy and effective manner, the damages that the adoption of the precautionary measure may cause to the assets of the defendant. The court must determine the amount taking into account: the nature and contents of the claim; b) its assessment of the basis of the application for the measure; and c) the reasons for its suitability or adequacy with regard to the quantification of the damage the measures could cause.

Proportionality: this requirement is not explicitly set out in the LEC, but we generally consider it to supplement the others, since the court would only grant measures that are strictly necessary to achieve the purpose of securing the proceedings served by the interim protection. It arises from the principles of the Rule of Law, and of minimal intervention in the sphere of liberty of the individual. Through the Constitution, these principles govern the entire legal system.

Complementarity: Precautionary measures follow the nature of the main procedure to which they are attached.

Variability: Precautionary measures may be amended if facts or circumstances are invoked and proven that could not have been taken into account at the time they were granted, or within the period for objecting to them.

3 Object and nature of such measures?

In adopting a precautionary measure, the intention is to meet or cover the possibility that, during a current or future case, the defendant may be obliged either to not carry out certain actions with their assets, or to carry out others. It is an attempt to hinder the defendant from carrying out actions aimed at preventing access to their assets and rights, causing or allowing damage to those assets, or removing certain assets from the reach of the law by creating insolvencies, in order to prevent any possible judgment from being enforced.

In Spanish legislation, precautionary measures can only be adopted by the courts. They cannot be adopted by arbitrators or mediators; there is not a specific, fixed number of them; they are enacting in nature (they can only be adopted through the application of one party); they relate to property, since they affect the assets and rights of the defendant; their purpose is to ensure the enforceability of a possible affirmative judgment; they are instrumental in the decision to be handed down in the main proceedings.

They can be adopted in regard to both material and immaterial assets. They are not solely economic in nature; precautionary measures can be adopted to limit personal rights.

They enable the adoption of orders and prohibitions, so they may contain things to be done or not done.

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

Precautionary measures may be handed down concerning concrete and specific assets, and concerning everything that can be quantified in monetary terms, such as the products, rents and yields that are obtained from things.

An attachment on these goods may be applied for, to obtain a right to recovery arising from a generic obligation in which the things owed are not individualised but substituted by a specific, assessable amount of money by means of simple mathematical operations.

Specific movable goods are deposited with a suitable custodian designated by the judge.

There is also the possibility of seizing, consigning and confiscating sums of money. There is a distinction between seizure and confiscation income arising from illegal activities, and doing so with income arising from permitted activities, such as those arising from intellectual property.

Another group of measures that might be adopted are acts the court may grant with regard to a claim given notice of in an application which does not affect a specific asset.

Thus, there is the possibility of the intervention or court-ordered receivership of productive assets, when a judgment is sought ordering their delivery under the title of owner, usufructuary or any other title involving a legitimate interest.

The drawing up of inventories of assets, in accordance with the conditions specified by the court, can also be applied for.

The precautionary filing of a claim is permitted when this refers to assets or rights subject to inscription in public registries, or other registry entries in cases where the public nature of the registry may help to achieve a satisfactory outcome.

Finally, a court order to provisionally cease an activity, to temporarily abstain from behaving in a certain way, or a temporary ban suspending or stopping the provision of a service that was being provided, may be ordered.

The last group of things that may be affected by the measures are materials and objects attached to an exclusive regime (in reality this is a court receivership or an intervention in the assets used in the production of industrial and intellectual property rights).

The corporate decisions of any kind of commercial company may also be suspended.

Finally, in Spanish legislation there is the possibility of adopting a series of unspecified measures for the protection of certain rights established by law or deemed necessary to ensure the effectiveness of judicial protection. What these might affect is not specified, and they may be of any kind provided that they are necessary.

3.2 What are the effects of such measures?

Precautionary attachment of quantifiable goods, money, income, products is used to ensure a balance so that the defendant can meet the costs of any possible order obtained, especially in cases where compliance with the judgment would not occur voluntarily.

The depositing of movable property may only be granted when the application is for delivery of a specific item which is in the possession of the defendant. When judicial administration or receivership is granted, the intention is to secure particularly productive assets in order to prevent poor management allowing their productive yields to diminish or disappear.

Placing capital goods under the care of administrators involves judicial control but does not deprive the defendant of management; receivership on the other hand, entails a further step with the receiver replacing the defendant's management.

An application for the drawing up of inventories may be granted in any kind of proceeding, whatever its purpose, with the sole requirement that the inventory is necessary to ensure that an affirmative judgment can be obtained. The judge must clearly establish the details it must contain and the manner in which they should be achieved.

The effects of precautionary filing of the claim extend to the procedural sphere connected to the proceeding in which they are granted. The procedure seeks to suspend the protection provided by the public nature of the registries and the confidence this could give in the holder of the asset or right, while third parties cannot argue ignorance in respect of the effect on them of the filing. This precautionary filing may be granted in all kinds of proceedings, providing protection in any public registry, such as property and commercial registries.

Temporary limits on the conduct of the defendant: the regulation of these is developed in separate special laws. They should therefore be adopted in accordance with the provisions of the relevant laws. Their effects extend to the granting of an order to provisionally cease an activity carried out by the defendant: an order to temporarily abstain from behaving in a certain way, or a temporary ban preventing the withdrawal or interruption of a service that was being provided.

Seizure, consignment and confiscation of sums of money: this is clearly a protective measure and constitutes a precautionary attachment since it ensures the fulfilment of a claim with specific economic content. This measure enables the granting of seizure and confiscation of income arising from illicit activity. They cannot be adopted separately, so it is necessary to grant both seizure and confiscation. If only one or the other is intended, the generic measures described above should be used. This measure can also be adopted for the consignment or confiscation of sums of money claimed as remuneration for intellectual property, the rights of authors to receive sums of money for their work, consisting of a proportional share of the incomes generated by the different public expressions that are recognised by the Law on Intellectual Property.

Deposit of materials or objects attached to an exclusive regime: this is a precautionary measure which has its origins in the area of the protection of rights to exclusive exploitation, which the special laws on industrial and intellectual property grant to rights holders. It is court receivership specifically for the object to which the order applies, the objects or material necessary for production.

Suspension of corporate decisions: the provisions of this measure depend on the necessary requirements for applying for the measure: 1% of the share capital if the company has issued shares that, at the time of the claim are admitted to trading on an official secondary market; or 5% of the share capital if this is not the case. It can be applied to all types of commercial company.

3.3 What is the validity of such measures?

The precautionary measures are normally adopted after a hearing of the defendant. If the applicant so requests, and provides evidence of grounds for urgency, they may be granted by the judge without further formalities, providing grounds within a period of five (5) days for not hearing the defendant. Once adopted they may be amended if facts or circumstances are invoked and evidenced that could not have been taken into account at the time they were granted, or within the period for objecting to their being granted.

If the judgment dismisses the applicant's claim, the judge must immediately order the lifting of the measure, unless an application is made against this, taking into account the circumstances of the case and following an increase in the security.

If the case is partly upheld, after hearing the objecting party the judge must decide whether to lift or maintain the measure.

If the dismissal of the claim is confirmed, once a final decision is handed down, the court will lift the measures on its own authority and the party affected by them may commence a claim for damage caused (this also applies in the case of abandonment of the action or withdrawal from the proceedings by the claimant).

Another case where precautionary measures may be amended is when the measure is applied for before the claim and adopted without a hearing of the defendant. In this case, if the applicant does not comply with the legally established period of twenty (20) days to file the claim and this expires, the measure must be lifted immediately and the defendant compensated for the damage, with the applicant being charged the accrued costs of the proceeding.

Similarly, the measure cannot be maintained if the case is suspended for a period greater than six (6) months, for a reason attributable to the applicant.

If interim enforcement of a judgment is ordered, any precautionary measures granted that are related to that enforcement must be lifted and replaced by the enforcement measures, in such a way that the measures first adopted as precautionary ones change their nature.

Finally, the defendant may request that the court substitute the precautionary measure with enough security to guarantee effective fulfilment of the judgment. The judge who has adopted the measure has jurisdiction over this and can fix the security to be issued either in cash or as a guarantee.

4 Is there a possibility of appeal against the measure?

The procedural rules provide for the possibility of appealing to a higher court.

There is therefore recourse to appeal against the order granting the measures, although lodging an appeal does not suspend the measures. An order made refusing the measures can also be appealed against.

However, together with this possibility of appeal, in every case the applicant may repeat their application if circumstances change from those at the time of the original application.

There is no right of appeal against an order granting precautionary measures without a prior hearing of the defendant, since the correct procedure in this case is objection, which is made before the judge who adopted the precautionary measure. The defendant may lodge an appeal, which has no suspensory effect, against an order dismissing that objection. The applicant for the precautionary measures has the same right to lodge an appeal if the defendant's objection is upheld, either wholly or in part.

In contrast to the above, there is no right of appeal when a security is granted or denied.

The preparation and substantiation of the appeal is simply governed by the general rules (Article 458). If there are several appellants, their time limits are calculated individually.

As mentioned above, in the procedure for adopting precautionary measures, lodging an appeal has no suspensory effect: the judge will continue granting any orders considered necessary for the precautionary measure to be adopted.

Decisions refusing the measures take priority at the appeal court; dates for deliberation, voting and delivery of judgment must be given as early as possible.

COSTS OF THE PRECAUTIONARY MEASURE

Generally speaking, the costs are governed by the rule that the successful party may recover its costs and are covered by the party opposing the party whose claim (upholding or dismissal of the measures) is contained in the decision. Article 736 LEC, in particular, orders the applicant to pay costs in the event of refusal (the 'loser pays' principle) but there is no similar provision (that the respondent be ordered to pay the costs) if the measures are granted. In this case, there are different views in the legal literature and case-law in relation to costs.

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