

# European Account Preservation Orders are coming

The EU has passed a Regulation that will allow a court in one member state to freeze bank accounts in another. These orders will, however, be significantly less readily available, less easily obtainable and less uniform in application than under the Commission's original proposal. The claimant will have to show that there is a real risk that the defendant will dissipate its assets through unusual action outside the normal course of business. The claimant will also usually need to provide security unless it has already obtained judgment. The scope of bank accounts covered by the Regulation is restricted to cash accounts, and only claimants who already have judgment will be able to search across Europe for bank accounts held by the defendant. The effect, including the ranking, of these orders will not be the same in each EU member state since it will depend upon national law.

The Regulation establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters (Regulation (EU) 655/2014) will come into effect on 18 January 2017. It will apply in all EU member states except the UK and Denmark, and will allow courts in one participating member state to freeze bank accounts in another participating member state in support of claims in the first state. In summary, the features of the Regulation include the following.

**Jurisdiction:** A European Account Preservation Order (an EAPO) can only be granted by the court with jurisdiction over the substantive claim. Further, a court cannot grant an EAPO over bank accounts within its jurisdiction or in the member state where the claimant is domiciled.

**Requirements:** In order to obtain an EAPO, the claimant must show that it is likely to succeed on the merits of its claim and that there is a real risk that, without an EAPO, enforcement of a judgment would be impeded or made substantially more difficult. This latter condition will only be met if there is a real risk that the defendant will hide or dissipate its assets to an unusual extent or through unusual action. What this means in terms of the threshold that courts will apply in practice is likely to vary between courts and member states, leading to inconsistent approaches and significant uncertainty. The requirements for the grant of an EAPO are somewhat less strict if the claimant has already obtained judgment. Applications for EAPOs will be made by completing a standard form, which is not yet available.

## Key issues

- EAPOs are a much watered down (or tightened up) version of what the Commission wanted
- The restrictions may result in EAPOs being little used in practice
- EAPOs cannot be granted over accounts in a court's own jurisdiction
- Claimants can be liable to a defendant if they obtain an EAPO wrongly
- Banks must implement EAPOs without delay
- A bank's liability for failing to implement an EAPO depends upon the law of the law of the relevant bank account

**Amounts frozen:** The sum frozen by an EAPO will be the amount claimed by the claimant, plus interest.

**Security:** A claimant will generally be required to provide security as a condition for obtaining an EAPO. The security will be in an amount sufficient to prevent abuse of the procedure and to ensure compensation for any damage suffered by the defendant. If the claimant already has judgment, the requirement for security is less strict.

**Banks and bank accounts:** EAPOs can be made in respect of bank accounts, including accounts at the branches of foreign banks (although how far the obligation on branches to search for and freeze accounts extends is not clear). For these purposes, bank accounts are confined, essentially, to cash accounts.

**Identifying bank accounts:** In order to obtain an EAPO, a claimant must specify at least the name and address of the bank (probably the branch) at which it believes that the defendant holds accounts. If the claimant does not have these details but has already obtained judgment against the defendant, the Regulation contains procedures that allow the claimant, through national authorities, to obtain details of accounts held by the defendant.

**Effect of an EAPO:** This will be determined by the law of the location of the bank account frozen. An EAPO will have the same rank as an equivalent order under that local law.

**The bank's obligations:** On receipt of an EAPO, a bank must freeze the accounts specified without delay and must notify the relevant authorities of the amount, if any, frozen. Any liability of the bank for failing to implement an EAPO will be determined by the law of the location of the bank account in question.

**Rights of set-off:** A bank's ability to exercise any prior rights of set-off in respect of a frozen account will depend upon the law of the location of the bank account.

**Protection for defendants:** A defendant will be served with an EAPO only after the EAPO has been implemented by the bank (ie after the account has been frozen). Differing rules on service depending on the defendant's location mean that service may in some cases take up to six months, though the defendant is likely to have found out about the EAPO in the meantime through its bank. Whether, and the extent to which, a defendant is allowed access to its bank accounts (eg to pay for food and shelter or ordinary business expenses) is a matter for the law of the location of those bank accounts.

**Claimant's liability for a wrongly granted EAPO:** A claimant is liable to the defendant for any damage caused to the defendant due to fault on the claimant's part. Fault is presumed for certain procedural failings by the claimant, but individual states can add other grounds of liability, including strict liability. The law governing the claimant's liability is that of the location of the bank account frozen but, if accounts in more than one jurisdiction are frozen, the applicable law is that of the defendant's habitual residence (provided that accounts in that jurisdiction are frozen) or (if not) the law of the jurisdiction in which accounts are frozen that has the closest connection with the case (eg where the largest sum is frozen).

In general terms, what has emerged from the Brussels political process is far more limited than the European Commission had wanted. The Commission wanted EAPOs to be the norm in cross-border claims and to be uniform in their application. The Regulation as enacted is likely to be

relevant only in a small number of cases, and the effect of an EAPO will vary according to the laws in each member state.

In particular, the primary rule of jurisdiction in the EU is that a defendant must be sued in its domicile, which is where it will hold most, if not all, of its bank accounts. But an EAPO cannot be granted by the courts in the defendant's domicile over accounts in that country (nor in respect of accounts in the creditor's domicile), which will limit the use of EAPOs. In addition, EAPOs can only be obtained against consumers in the courts of their member state. Since European jurisdictional rules for consumers favour domicile to an even greater extent than for defendants generally, this means that in practice EAPOs are unlikely to be available for use against consumers.

Further, the stricter requirements for the granting of an EAPO and the need for the claimant to provide security may deter many, including smaller businesses, from applying for an EAPO.

As a result, there is a real chance that EAPOs will be confined to rare cases of cross-border fraud (though they may be of use in enforcing judgments) or that the Regulation will join the club of largely unused EU civil justice measures, like the European small claims procedure. The EU's trumpeted vision of small businesses revolutionising their debt collection efforts by obtaining as a matter of course EAPOs against defaulting customers in other jurisdictions has long since fallen by the wayside.

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