

# European Account Preservation Orders: must try harder

The European Commission has achieved its aim of creating a European Account Preservation Order that will allow the cross border freezing of bank accounts. But the instrument that has emerged is a pale shadow of what the Commission wanted. For example, the instrument is limited to bank accounts as conventionally understood rather than extending to just about any transaction a bank might enter into with its customers, the availability of the instrument will no longer be near automatic in cross-border litigation, and the applicant will usually be required to provide security in order to protect the defendant. This dilution begs the question as to whether the instrument will really be used in practice and whether it is worthwhile those EU member states, like the UK, that have not opted into the instrument now doing so. We think not - yet at least.

European Account Preservation Orders (EAPOs) will allow courts in one EU member state to freeze the defendant's bank accounts in another member state in order to secure for the claimant assets against which to enforce a judgment. Enforcement is, according to the European Commission, the Achilles' heel of the European Civil Judicial Area; making EAPOs readily available would, the Commission boasted, gain businesses €600 million a year through a reduction in bad debts.

The European Commission embarked upon its course towards the creation of EAPOs with a green paper in 2006, followed by a formal proposal in 2011. There were innumerable flaws and infelicities in the Commission's original proposal, including in the calculation of the supposed gain from EAPOs (see our briefing entitled

*European Asset Protection Orders: the good, the bad and the costly*, August 2010). As a result, the Regulation that has eventually emerged from the Brussels political machine is a much watered down (or tightened up) version of what the Commission wanted.

*The Regulation establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters* (Regulation (EU) 655/2014) is now focused on acting through existing national legal structures rather than creating a new one, has stricter requirements for freezing bank accounts, allows a more limited range of bank accounts to be frozen and includes many more safeguards for defendants. Uncertainties and ambiguities remain (eg as to banks' rights of set-off), but

the EU member states have cut back the Commission's original proposal to such an extent that the Regulation could well join the club of largely

## Key issues

- EU branches of UK banks could be affected by EAPOs
- The effect of EAPOs will not be uniform across the EU
- Ranking, including banks' rights of set-off, depend upon national law, as do banks' liabilities
- The strict requirements for issue and the need for security could deter the use of EAPOs
- There is little or no evidence that EAPOs will reduce bad debts

unused EU civil justice measures, alongside the European small claims procedure and the European order for payment procedure.

The Regulation will apply from 18 January 2017. The UK, like Denmark, is not bound by the Regulation because it exercised its right not to opt in to the Regulation in the light of the concerns expressed about the Commission's proposal. As a result, the UK courts will not be able to grant EAPOs, nor will the courts of other EU member states be able to freeze bank accounts in the UK. UK banks with branches or subsidiaries elsewhere in the EU will be affected.

However, the UK must decide whether the Regulation in its final form is acceptable and, as a result, whether the UK should now apply to the Commission to adhere to the Regulation. We consider that the UK should not do so - yet. The ambiguities and uncertainties about the Regulation are such that the prudent course would be wait to see how - indeed, if - the Regulation works in practice before the UK seeks to opt in. We set out our reasons for this when considering the terms of the Regulation, a matter to which we now turn.

### Who will be able to obtain an EAPO?

EAPOs will be available for "pecuniary claims", provided that the case is a civil and commercial matter (Article 2(1)). "Claims" are defined to mean claims for payment of a specific amount of money that has fallen due or a determinable amount of money arising from a transaction or event that has already occurred (Article 4(5), though it is not clear whether the addition of "pecuniary" (not defined) to "claims" (defined) is meant to limit

the kind of "claims" that are subject to the Regulation or is merely redundant verbiage). Recital (12) explains that pecuniary claims include claims in "tort, delict and quasi-delict". The Regulation is therefore probably intended to apply to most civil claims that will lead to a money judgment, but there may be some ambiguities left (eg are claims for breach of trust covered?). The core aim of the Regulation is to address the non-payment of contractual debts, and that has been achieved.

### "... the Regulation could well join the club of largely unused EU civil justice measures"

EAPOs will only be available in "cross-border cases" (Article 2(1)). This means that the bank account that the claimant wants to freeze must not be in either the country of the court to which the application for an EAPO is made or the member state in which the claimant is domiciled (Article 3).

So, for example, a Spanish claimant suing a French defendant in the French courts cannot obtain an EAPO from the French courts to freeze bank

accounts in either France or in Spain, but it can seek an EAPO to freeze any accounts the defendant may have in Italy. If the claimant wants to freeze accounts in France, it must use the weapons that French domestic law has available for this purpose, and if it wishes to freeze accounts in Spain, it must apply separately to the Spanish courts under Article 31 of the Brussels I Regulation (from 10 January 2015, Article 35 of the Brussels I Regulation (recast)) for whatever interim remedy against bank accounts is allowed by Spanish law in support of substantive proceedings elsewhere.

The limitation of EAPOs to cross-border cases cuts down hugely the practical application of the Regulation. Under the Brussels I Regulation, a claimant must generally sue its defendant in the defendant's home state, which will be where the defendant keeps most, if not all, of its bank accounts. But the courts of that state cannot grant EAPOs over these accounts (nor, for that matter, over accounts held in the claimant's home state). The position in most cases will therefore remain as now, namely that the claimant must rely on whatever remedies the law of the defendant's home state provides to preserve the defendant's assets for enforcement purposes.

(Curiously, Article 25(2) begins "Where the [EAPO] was issued in the Member State of enforcement", ie the state where the account to be frozen is located. However, that can never be the case. The Commission failed to tidy up the drafting (in this and other areas) as negotiation steadily reduced the scope of the Regulation from the Commission's original proposal. The drafting of the Regulation generally leaves much to be desired.)



In addition, there is a nationality requirement. EAPOs are only available to parties domiciled in a member state bound by the Regulation (Article 4(6) and Recital (48)). As a result, if a Croat claimant sues a Danish defendant in Germany, the claimant can obtain an EAPO in respect of the defendant's bank accounts in Belgium even though Denmark, like the UK, is not bound by the Regulation (though the claimant could not obtain an EAPO in respect of accounts in Denmark, where the defendant is most likely to bank). But if the Danish defendant counterclaims against the Croat claimant, the defendant will not be entitled to an EAPO in respect of the counterclaim.

Some have suggested that this nationality requirement infringes the ban on discrimination on grounds of nationality in Article 18 of the Treaty on the Functioning of the European Union or the right to freedom of establishment under Article 49.

Consumers also gain a degree of extra protection. Where the defendant is a consumer and the claim lies on a contract, only the courts of the consumer's domicile can grant an EAPO (Article 6(2)). Since few consumers have bank accounts outside the country of their domicile, EAPOs will generally not be available against consumers.

### What are the requirements for an EAPO?

The two requirements for an EAPO set out in the Regulation and amplified in its Recitals are quoted in the box below. If these requirements are met, the court must grant an EAPO. The court has no residual discretion (except in the limited circumstances of the claimant already having obtained an equivalent national law remedy: Article 16(4)).

The first requirement is that the claimant is "likely" to succeed. Quite what this means is not clear. A higher

than 50% chance of success? If so, how much higher?

The second requirement is that, without an EAPO, there is a real risk that enforcement of a judgment would be impeded or made substantially more difficult. In the original proposal, this was met with the objection that the enforcement of every claim would be impeded or made more difficult by the absence of an identified and frozen bank account; EAPOs therefore risked driving defendants into insolvency if, as the Commission wanted, EAPOs became the norm in cross-border litigation. These concerns are addressed in Recital (14), which requires the claimant to demonstrate that there is a real risk that the defendant will hide or dissipate its assets to an "unusual" extent or through "unusual" action, outside the normal course of business; mere non-payment or financial difficulties are not sufficient for this purpose.

### The requirements for an EAPO

#### Article 7

"(1) The court shall issue [an EAPO] when the creditor has submitted sufficient evidence to satisfy the court that there is an urgent need for protective measures in the form of [an EAPO] because there is a real risk that, without such a measure, the subsequent enforcement of the creditor's claim against the debtor will be impeded or made substantially more difficult.

"(2) Where the creditor has not yet obtained in a Member State a judgment... the creditor shall also submit sufficient evidence to satisfy the court that he is likely to succeed on the substance of his claim against the debtor."

#### Recital (14)

"... the creditor shall be required in all situations, including when he has already obtained judgment, to demonstrate to the satisfaction of the court that his claim is in need of urgent judicial protection and that, without the Order, the enforcement of the existing or future judgment may be impeded or made substantially more difficult because there is a real risk that, by the time the creditor is able to have the existing or a future judgment enforced, the debtor may have dissipated, concealed or destroyed his assets or disposed of them at an undervalue, to an unusual extent or through unusual action.

"The court should assess the evidence submitted by the creditor... This could relate, for instance, to the debtor's conduct in respect of the creditor's claim... to the debtor's credit history, to the nature of the debtor's assets and to any recent action taken by him with regard to his assets. In assessing the evidence, the court may consider that withdrawals from accounts and instances of expenditure by the debtor to sustain the normal course of his business or recurrent family expenses are not, in themselves, unusual. The mere non-payment or contesting the claim or the mere fact that the debtor has more than one creditor should not, in themselves, be considered sufficient... Nor should the mere fact that the financial circumstances of the debtor are poor or deteriorating, in itself, constitute sufficient ground for the issuing of an Order. However, the court may take these factors into account in the overall assessment of the evidence of risk."

This limitation on the ability of a court to grant an EAPO is a significant improvement, though its practical impact will depend upon how courts in different jurisdictions apply the tests. The Commission assumed that all claimants are virtuous and all defendants are villains, and therefore wanted EAPOs to be available almost automatically in cross-border litigation. But freezing an alleged debtor's assets is a penal measure. The consequences of freezing bank accounts could be very serious for any business or individual, potentially driving them into insolvency.

EAPOs should not, therefore, be available for routine debt collection, even if the debtor is financially challenged, still less against defendants who genuinely dispute the claim. The claimant should have to prove conduct outside the normal course of business - something that suggests an intention on the part of the defendant to evade legitimate debts. The stringent tightening of the requirements is therefore welcome, but it severely undermines the Commission's claims as to the likely financial benefits that will flow from EAPOs, even if those claims were to be treated at face value.

### What courts can grant an EAPO?

The court that has jurisdiction over the substance of the dispute is the only court that can grant an EAPO (Articles 6(1) and (3)). In principle, this approach must be correct. The aim of the Regulation is not to multiply the number of courts before which the parties must appear (though the definition of cross-border case could have this effect).

But this approach is not without its difficulties because the Brussels I

Regulation, which determines jurisdiction within the EU, does not always point neatly to one court. For example, if an EAPO is granted before proceedings are formally commenced and the defendant subsequently starts proceedings in another court with jurisdiction, the court that granted the EAPO must decline to hear the substance of the case (Articles 27 of the Brussels I Regulation; article 29 of the Brussels I Regulation (recast)). What then happens to the EAPO?

### What will the effect of an EAPO be?

The effect of an EAPO will be governed by the law of the location of the bank account in question (Article 32). An EAPO will have the same rank as an equivalent order under national law. So if the equivalent national order in one member state gives the claimant priority over other creditors in respect of the frozen bank account, an EAPO will do the same; but if (like an English freezing order), there is no priority in national law, again an EAPO will be the same. EAPOs will not, therefore, be uniform in their effect across the EU.

### How must an application for an EAPO be made?

The effect of an EAPO might differ from member state to member state, but the means of application will be the same. An application must be made, without notice to the defendant, in writing on the EU's standard form, which has yet to be drafted (Articles 8(1) and 11). It is to be a written, not an oral, procedure unless local law provides for the taking of oral evidence (Article 9).

The claimant must declare in its application that it is aware that "any deliberately false or incomplete

statements may lead to legal consequences under the law of the Member State in which the application is lodged or to liability under Article 13 [see below]" (Article 8(2)(o)). Though not clear, this could be a move towards a requirement, similar to that in English law, that the claimant must give full and frank disclosure of all material, particularly unhelpful, matters when making a without notice application. This will, however, be a matter for the national law of each member state with the result that there will be no uniformity across the EU in the obligation of claimants to give disclosure when applying for an EAPO.

The court must give its decision within ten working days of the application if the applicant has not already obtained judgment and within five working days if the applicant has entered judgment, though this can be extended if the court decides to hear oral evidence or if the court decides that the applicant must put up security (Article 18).

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### "EAPOs will not... be uniform in their effect across the EU"

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If the claimant has not issued substantive proceedings when it applies for an EAPO, it has 30 days from its application or 14 days from the court's making the order, whichever is the later, to institute the action, though this period can be extended (Article 10). If the claimant fails to start substantive proceedings, the EAPO will be revoked or shall terminate.

The Commission not only wanted EAPOs to be the norm in cross-border litigation but for the procedures



to be so simple and uniform that claimants could obtain EAPOs without needing legal advice. This now looks like a forlorn hope. Not only does the claimant need to understand in what court it can commence any litigation and the accounts in respect of which that court can grant EAPOs, but it also has to negotiate the provision of security and appreciate the liabilities, quite possibly under the laws of a different member state, it may be risking by seeking an EAPO, including the potential need to apply quickly in the courts of another state to release funds frozen by an EAPO (see below). It would be a bold claimant that took on this challenge without legal advice.

### Is security required?

If the claimant does not yet have judgment, the court is obliged to order the applicant to provide security "for an amount sufficient to prevent abuse of the procedure... and to ensure compensation for any damage suffered by the debtor" as a precondition to making the order (Article 12(1)). The court has a discretion to waive security, but Recital (18) emphasises that the general rule is that security will be required and that this requirement should be waived only if the court concludes that the provision of security would be "inappropriate, superfluous or disproportionate" in the circumstances of the case, for example where the applicant has a particularly strong case but insufficient means to provide security. The form of security is a matter for the court to which the application has been made, but can include a security deposit, a bank guarantee or a mortgage.

If the claimant already has judgment, the court has greater discretion regarding security. The court may

require the provision of security if it considers security "necessary and appropriate in the circumstances of the case" (Article 12(2)).

The tough requirements for pre-judgment security are a significant departure from the Commission's original proposal. Unless, for example, courts regularly require little more than nominal security, these requirements for security may make pre-judgment EAPOs unattractive to many, particularly smaller, businesses.

This will be magnified by the need to consider the damages that a claimant might have to pay if an EAPO is wrongly granted (see below). Ironically, a plea of poverty may be one means to avoid the need to give security. This reverses what might be the normal position: the claimant's inability to meet any losses the defendant might suffer would generally be a reason to require the claimant to provide security, not to dispense with the need to do so.

### What accounts will be caught by an EAPO?

The Commission's original proposal applied to "bank accounts", but the definition of "bank accounts" extended far beyond what would ordinarily fall within that term. It included, for example, shares, bonds and derivatives of all kinds held with, issued by or entered into with a bank.

The Regulation limits the application of EAPOs to bank accounts as that term would more commonly be understood. A "bank" for these purposes is an "undertaking the business of which is to take deposits or other repayable funds from the public and to grant credits for its own account", including the branch of a non-EU bank (Article 4(2)); a "bank account" is "any account containing

funds which is held with a bank in the name of the debtor or in the name of a third party on behalf of the debtor" (Article 4(1)); and "funds" constitute "money credited to an account in any currency, or similar claims for the repayment of money, such as money market deposits" (Article 4(3)). There may be some uncertainty as to whether, for example, certain types of term deposits (eg those referred to as bonds) fall within this description, but the Regulation is a vast improvement on the Commission's unwieldy and impractical proposal.

An EAPO can be granted in respect of a joint account as well as an account in the sole name of the defendant. Monies in a joint account will only be frozen to the extent that they may be subject to preservation under the law of the location of the bank account in question (Article 30). In keeping with this, an application can be made to the courts for the location of the bank account to exclude sums held by the joint account holder who is not the defendant (Article 39(2)).

If a defendant has a number of accounts at a bank, some sole and some joint, and the money in those accounts exceeds the amount required to be frozen, the sole accounts are to be frozen first, and only any necessary balance blocked in the joint accounts (Article 24(7)).

### Identifying bank accounts

If a claimant wants to obtain an EAPO, it must provide the name and address of the bank at which the defendant holds accounts or other means to identify the bank (eg IBAN or BIC) and, if available, the account numbers (Articles 8(2)(d) and (e)).

It is not entirely clear whether, for these purposes, the claimant's

obligation to identify the bank means identifying the relevant branch, the country in which the branch is situated or merely the corporate entity as a whole (this ambiguity affects a number of provisions in the Regulation). Since an EAPO must be transmitted to the member state of enforcement, ie the member state in which the bank account is maintained, and enforcement of an EAPO takes place in accordance with the law of that state, it is probable that the creditor must identify at the least the country in which the account is maintained and, more likely, the particular bank branch in question. Clarity would, however, have been helpful.

If the claimant cannot identify where the defendant maintains a bank account, the Commission originally proposed allowing the claimant to trawl across banks in Europe searching for accounts. This would have been hugely burdensome to banks, as well as highly intrusive. The Regulation is much more limited in this regard.

If the claimant does not yet have judgment against the defendant, the claimant has no ability under the Regulation to demand information about the defendant's bank accounts. This removes what would have been a significant burden on banks. The availability of an EAPO before judgment therefore depends upon the claimant's knowing where the defendant banks.

If the claimant has judgment against the defendant, if the claimant has reason to believe that the defendant holds an account with a bank in a specific member state and if the judgment is enforceable, the claimant can ask the court to which it has applied for an EAPO to obtain

information from the authorities in the member state where the account is thought to be located about accounts held there by the defendant (Article 14(1)). The manner of these requests is dealt with below.

If the claimant has judgment against the defendant, if the claimant has reason to believe that the defendant holds an account with a bank in a specific member state but the judgment is not enforceable (eg enforcement has been stayed pending an appeal), the claimant can only request information about the defendant's bank accounts in more limited circumstances. The amount to be preserved (the amount of the judgment, interest and costs: Article 15(2)) must be "substantial taking into account the relevant circumstances" and there must be an urgent need for the information because there is a risk that, without such information, the subsequent enforcement of the claim is likely to be jeopardised and that this could lead to a substantial deterioration in the claimant's financial situation (Article 14(1)).

This is similar to the test for the granting of an EAPO pre-judgment, but the focus shifts towards the claimant's financial status rather than the defendant's acting in a manner outside the normal course of business. This opens up the possibility of defendants in financial difficulties being pushed into insolvency because their bank accounts are frozen for the period of an appeal, but only, it seems, if the claimant will also be in financial difficulty if it is not paid.

### How bank account information is provided to judgment creditors

A request for bank account information must be made in the

application for an EAPO. The provision of the information is a condition precedent to the granting of an EAPO - absent that information, an EAPO cannot be enforced. The information is obtained by the court to which the application for an EAPO has been made transmitting the request to the "information authority" in the country in which the defendant's bank accounts are supposedly situated (Article 14(3)). The information authority must have available to it under its national law at least one of four methods to identify bank accounts held by the defendant (Articles 14(4) and (5)). These methods are:

- an obligation on banks in its territory to disclose whether a defendant holds accounts with them
- access to public registers or other information held by public authorities about bank accounts
- the possibility of its courts obliging the defendant to identify its accounts, coupled with an in personam order preventing the defendant from withdrawing funds from his accounts up to the amount of the EAPO
- other efficient and effective methods, provided that they are not disproportionately costly or time-consuming.

As far as the UK is concerned, the first of these methods would be impracticable - at least if there was more than a thin trickle of requests - because the UK has a large number of banks, and it would involve a UK information authority contacting all banks to see if they happened to hold an account for the defendant. This would be costly and disproportionate (though a bank can charge fees not higher than the costs actually incurred,

but payment of the fees does not seem to be a condition precedent to the bank's providing the information: Article 43(3)).

The position might be more manageable - for the claimant as far as fees are concerned, though not necessarily for banks - if the claimant could specify the banks on which the request should be served, but there is no provision in the Regulation for a limited request of this sort.



The second method can have no application in the UK: there are no public registers of bank accounts.

The third method is the means by which freezing injunctions are often policed in the English courts. A freezing injunction is an in personam order prohibiting the defendant from dealing with its assets, and it is common for a defendant also to be ordered to swear an affidavit setting out its assets. The claimant can then serve the freezing injunction on any banks identified in the defendant's affidavit of means.

How this third method would work in practice in England in the context of an EAPO is, however, less clear. On receiving a request for information, the UK's information authority would, it seems, be obliged to make an

application to the English court for a freezing injunction and a disclosure order against the defendant. Since the English court would have no discretion in the matter, this could be done by simply forwarding to the court the papers received from the foreign court.

The sanction for disregarding a freezing injunction or a disclosure order made by an English court is committal for contempt. Without the threat of this sanction, the defendant has little incentive to comply.

In order to bring committal proceedings, the English court's order must generally be served personally on the defendant (CPR 81.5 and 81.6). If the defendant is domiciled in England, the UK information authority could send the injunction to a bailiff, with instructions to the bailiff to serve it on the defendant. But what the court would do if the defendant is not resident in England is less clear. Presumably, the UK information authority must arrange for personal service of the freezing injunction on the defendant wherever the defendant is to be found. This may involve use of the EU's Regulation on the service of judicial documents (Regulation (EC) 1393/2007), which requires translations and aspires to effect service within a month (an aspiration often not achieved). If service is required outside the EU, it usually takes even longer.

Then what happens if the defendant fails to provide an affidavit setting out its bank accounts? Is the UK information authority obliged to issue committal proceedings, or can it merely respond to the requesting court under Article 14(7) that it is unable to obtain the information? Would the claimant be able to bring committal proceedings? Article 23(1)

provides that an EAPO shall be enforced in accordance with the procedures applicable to the enforcement of equivalent national orders (though Article 23(5) requires the "competent authority" where the bank account is situated to enforce an EAPO). Does "procedure" extend to the person who initiates enforcement? Enforcement of court orders in England lies in the hands of the person in whose favour the order was granted.

Even overlooking the practical problems with this method, it is bound to be slow and expensive. Article 44 of the Regulation allows the authorities to charge fees on the basis of a scale or other set of rules published in advance, which can take into account the complexity involved but which must not be higher than fees charged in connection with equivalent national orders. It is, perhaps, a matter for national law whether payment of the fees can be made a pre-condition to the authorities acting (Recital (27), though this only refers to fees being "requested" in advance). Presumably most national authorities will make payment of fees a pre-condition if they can; if not, national authorities could be left significantly out of pocket.

The practical reality is that the English financial and legal systems would be ill-suited to dealing with incoming requests for information. The first method available could possibly work, but only if the number of requests is small in order to avoid banks being deluged with costly, time-consuming or, in most instances, idle requests. The third method sits ill with the way in which courts in England work, and would place considerable, unaccustomed burdens on the court or other staff who would be required to administer it. These staff, as well

as banks, are doubtless grateful that the UK has not opted into the Regulation.

### How will an EAPO be served on the bank?

Assuming that a claimant knows the location of the defendant's bank accounts or can find out, an EAPO (in standard form) can be made and, if so, it must be recognised and is enforceable in all other member states without any special procedure (Article 22). The EAPO must be transmitted to the competent authority in the location of the bank accounts (this can be done either by the claimant or the court, depending on the law applicable in the court that granted the EAPO: Article 23(3)).

The competent authority in the location of the bank accounts must then take the necessary steps to have the order enforced (Article 23(5)). This means serving the EAPO on the bank or banks identified in it (Recital (25)).

### What must a bank receiving an EAPO do?

When a bank receives an EAPO, the bank must implement the EAPO "without delay" (Article 24(1)), perhaps a less onerous task than the Commission's original proposal that a bank should do so "immediately". Implementation means ensuring that the amount specified in the EAPO is not transferred or withdrawn from the accounts indicated in the EAPO (Article 24(2)).

The accounts specified in the EAPO can be one or more identified accounts and/or all accounts of the defendant at the relevant bank (Article 19(2)(e)). Even if a claimant knows of a particular account, it is in practice still likely to ask for all accounts of the

defendant at the relevant bank to be frozen (the bank must, it seems, freeze any account specifically identified even if the account has nothing to do with the defendant because, eg, the account number has been mis-typed). The bank can notify the defendant whose accounts it has blocked that the bank has received an EAPO (Article 25(4)).

Where an account is in a different currency from the sum set out in the EAPO, the amount specified in the EAPO must be converted at the relevant central bank exchange rate on the day and at the time of implementation, and the corresponding amount frozen (Article 24(8)).

There are significant, and unfortunate, ambiguities in the obligations of banks served with an EAPO. For example, an EAPO may be addressed to a particular account at a particular branch of a bank but is likely also to require the bank to freeze "any other accounts held by the debtor with the same bank" (Article 19(2)(e)). A "bank" is defined as a "credit institution... including branches... of credit institutions having their head offices inside or... outside the Union where such branches are located within the Union" (Article 4(2)).

The bank must clearly freeze all accounts specifically identified in the EAPO and all other accounts held by the defendant at the relevant branch (though what if the wrong branch is listed?). But, faced with the wide definition of "bank", is the bank also obliged to freeze all accounts held by the defendant at other branches in the same country? What about branches in other EU member states? Or even branches worldwide?

These last two possibilities are, perhaps, unlikely given the focus in

the Regulation on the national effect of EAPOs, but it is not inherently implausible that an EAPO could stretch to all the defendant's accounts at the bank in the same country. Given that banks are not involved in the underlying dispute and the potential severity of a failure to implement an EAPO correctly, any ambiguity in what banks must do on receipt of an EAPO is unsatisfactory. That is why English freezing injunctions aim to be clear about the extent of their application so that banks are not faced with these uncertainties. (It would not presumably be argued that a bank is obliged to freeze accounts at branches outside the EU.)

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**"... any liability on the part of the bank is governed by the law of the country in which the relevant account is situated."**

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By the end of the third working day following implementation of an EAPO, the bank must issue a declaration to the authorities in its state, for onward transmission to the court that granted the EAPO, setting out whether, and if so what, funds have been frozen by the EAPO and the date on which the EAPO was implemented (Article 25(1)). This might suggest that an EAPO applies only to funds in the account at the date of implementation, not to monies paid in subsequently, but again this is not clear. It might apply to sums subsequently paid into the account but, if so, there is no prescribed means of alerting the claimant to its bonus capture.

Banks are entitled to charge fees for implementing an EAPO but only if



banks are able to charge for implementing equivalent orders made under national law and provided that the amount is not higher than for implementing the equivalent national order (Articles 43(1) and (2)). It is unclear whether the bank can demand payment of the fees before implementation of an EAPO, but probably not. Recital (27) leaves it to national law whether the "payment of fees" for the "enforcement" of an EAPO can be "requested in advance". It may be that only national authorities "enforce" EAPOs, whereas banks "implement" them, and the Recital in any event only refers to a "request" for payment, not payment itself (perhaps any request by a bank for fees should be made through the national information authorities).

If a bank fails to implement an EAPO in accordance with the Regulations, any liability on the part of the bank is governed by the law of the country in which the relevant account is situated. Under English law, a bank has no liability to the claimant in the tort of negligence (*Customs & Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181), but a deliberate failure to comply with an order could constitute contempt of court, punishable by a fine or other sanction. It is unclear who would be able to take proceedings for contempt - the UK authorities responsible for enforcement or the claimant.

### Can a bank exercise a right of set-off?

The standard form of English freezing injunction expressly allows a bank to exercise a right of set-off available under a facility entered into before the bank was notified of the injunction, though this is probably a declaration of the position at law rather than a

necessary step to preserve a right of set-off.

There is no comparable provision in the Regulation. Transactions that are "already pending" when a bank receives an EAPO can be settled, provided that settlement takes place before the bank gives its declaration as to the implementation of the EAPO (Article 24(2)). The meaning of this is not clear, but it may indicate that the bank has three days to settle transactions in train when the EAPO was received, but it is not enough to preserve a right of set-off.

In an English context, it is likely that a bank would be entitled to exercise a pre-existing right of set-off but, until this was clarified, the safer course would be for the bank to apply to its home courts for confirmation that it can exercise its right of set-off (though this would be a cumbersome way to exercise what is normally a simple and cheap self-help remedy).

Article 39 provides that the right of a third party to contest the grant of an EAPO is governed by the law of the court that granted the EAPO and must be brought in that court. In contrast, the right of a third party to contest the enforcement of an EAPO is governed by the law of the place where the account is held and must be brought in the courts of that place.

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### "In an English context, it is likely that a bank would be entitled to exercise a pre-existing right of set-off"

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A claim to exercise a right of set-off is concerned with enforcement rather than whether the EAPO should ever have been granted. An EAPO has

the same priority as an equivalent national order (in England, a freezing injunction) (Recital (28) and Article 32). The argument, in England, would be that the bank has an existing right (set-off) that takes priority over a freezing injunction and, therefore, over an EAPO; as a result, the EAPO cannot be enforced to the extent that the bank wishes to or can exercise its right of set-off.

This does not, however, sit easily within the structure of the Regulation. Banks must make a declaration as to the amounts frozen as a result of service of the EAPO. There is no obvious need or ability for a bank to notify the claimant of any prior rights that it may have. The implication of the declaration is that these amounts will be available for enforcement of any judgment the claimant may have or may subsequently obtain. There are provisions for releasing excess sums from the freeze (discussed below). An account against which a right of set-off, or other security interest, may be exercised in future can still be frozen; it is just that if a right of set-off is exercised, the value in the account will be reduced, perhaps to zero.

### What protection does a defendant receive?

An EAPO must be served on the defendant, though the defendant may in practice first find out about an EAPO when its bank refuses to honour its instructions. A bank can tell the defendant the reason for not honouring the defendant's instructions: Article 25(4).

If the defendant is domiciled in the state of the court that granted the EAPO, the claimant or other authority responsible for service of process in that state must serve the EAPO on

the defendant by the end of the third working day following receipt of the declaration by the bank showing the amount preserved (the first bank to do so or the last if more than one bank is identified?): Article 28(2). If the defendant is domiciled in another EU member state, the EAPO must be transmitted to the relevant authority in that other state, which must effect service without delay: Article 28(3). If the defendant is domiciled in a non-member state, the EAPO must be served in accordance with the rules for international service in the state that issued the EAPO: Article 28(4). In this last case, this could mean service under the Hague Convention, which can easily take six months.

An EAPO will require the amount of the claimant's claim to be frozen (including interest, but only costs if the claimant already has judgment: Article 15). Where more than one bank has been served with an EAPO (or with an equivalent national order), and the declarations by the banks show that more than the amount specified in the EAPO has been frozen, the claimant is required to request the release of any excess amounts (Article 27).

The claimant must make this request to the authorities in which the relevant account is situated by the end of the third working day following receipt by the claimant of the declaration by the bank showing the over-preservation (Article 27(2)). It appears that the claimant can choose which bank accounts in which countries to release, but will be liable in damages to the defendant if it fails to make this request (see below). If a claimant is seeking to freeze accounts in several countries, it may need to have lawyers on standby in each country in order to make a prompt application to release surplus frozen funds.

### Are defendants allowed access to any of their money?

Having their bank accounts frozen could, in the case of individuals, deprive them (and their families) of the ability to buy even food, in the case of companies, drive them into insolvency and their employees into penury, and, in both cases, prevent defendants from taking legal advice since they may have no means to pay for any advice or representation. The Regulation contains no automatic exclusion from the funds frozen of amounts necessary to prevent these consequences. Instead, it is left to the local law applicable to any particular bank account to relieve the defendant (Article 31).

If that law provides for exempt amounts, the body responsible for exempting amounts must do so automatically (Article 31(2)). If it is the responsibility of the defendant to apply for exemption, then the defendant must make that application (and, hopefully, the relevant court will give its decision rather more quickly than the 21 days after the hearing that is contemplated by Article 36(4)). Where amounts are exempted on these grounds in more than one member state, the claimant can apply for an "adjustment" of the amounts exempted (Recital (36)).

### What if the EAPO should not have been granted?

The defendant can challenge the making of the EAPO in the court that did so on, for example, the grounds that the requirements for making an EAPO were not met (Article 33). The defendant can also challenge the enforcement of the EAPO in the courts for the location of the relevant bank account on the grounds that, for

example, certain amounts should be exempt from the seizure (Article 34). Any application must be made, on notice to the claimant, on the EU's standard form, and court's decision must be made within 21 days of the court "receiving all information necessary for its decision" (Article 36).

A claimant is liable to the defendant for "any damage caused to the debtor by the [EAPO] due to fault on the creditor's part" (Article 13(1)). Article 13(2) lists certain cases where the claimant's fault will be presumed, such as a failure to initiate substantive proceedings within the required time and a failure to apply to release over-preserved amounts, but this list does not seem to cover the case of the claimant ultimately losing its substantive claim (though Article 13(2)(c) is somewhat ambiguous). However, Article 13(3) allows member states to introduce additional grounds of liability, including strict liability, in their national laws, which could include liability if the claimant should never have been granted the EAPO because its underlying claim was rejected (Recital (19)).

The law applicable to the liability of the claimant to the defendant is the law of the member state in which the relevant bank account is situated (Article 13(4)). If, however, accounts in more than one member state are frozen, the claimant's liability will be determined under the law of the defendant's habitual residence, provided that accounts in the defendant's habitual residence are subject to the EAPO, or, if not, under the law of the member state in which accounts have been frozen which has the closest connection with the case. The size of the amount frozen could be one of the factors taken into account in determining the law

governing the defendant's claim (Recital (19)).

These rules as to the law governing the defendant's claim could leave the claimant in considerable uncertainty as to what law will govern its potential liability. For example, if the claimant applies to freeze accounts in one country only, the position will be clear. But if the claimant applies to freeze accounts in, say, the defendant's habitual residence and in another country, the law governing the claimant's liability will be that of the defendant's habitual residence if any sums are in fact preserved in that country but will be the law of the other country if nothing is preserved in the defendant's habitual residence. If sums are frozen in more than one country not including the defendant's habitual residence, the only factor mentioned in the Regulation as influencing the relevant connection is the size of the amount frozen, but the claimant will not know that in advance - indeed, it could be a matter of pure chance.

Although the Regulation sets out the law applicable to a claim by the defendant against the claimant, it does not explain in which court the defendant can seek compensation. The security for the claimant's obligations will be in the member state whose courts granted the EAPO, which might suggest that the application must be made in those same courts. On the other hand, the law governing the claim will commonly be the defendant's home law, which might point to those courts. It could even be that an application for compensation will be treated as a wholly new claim to which the general jurisdictional rules in the Brussels I Regulation will apply.

## Conclusion

The Regulation is a huge improvement on the European Commission's original proposal, but the limitations imposed by the EU's member states on the Commission's ambitions call into question whether the resulting instrument will really be used in practice in more than a tiny number of cases, at least before judgment is obtained.

The requirement for the claimant to put up security in order to obtain an EAPO will discourage many - though it is a necessary restraint on over-zealous claimants - and the need to consult lawyers not only in the state where the application is made but also in the location of the bank accounts in order to understand the level of liabilities that the claimant risks by obtaining an EAPO means that an application will be neither easy nor cheap. The likelihood is that there will be proceedings in the court that granted the EAPO as the defendant challenges its grant and also in the courts for the frozen accounts as the defendant applies to release funds to provide for food, shelter and legal advice.

As far as banks are concerned, if the bank is provided with the name and

address of the defendant or an account number, the burden of implementing EAPOs may not be too onerous - at least, provided that EAPOs are relatively few in number and if the ambiguities in the Regulation can be resolved quickly by the courts. The provisions allowing claimants to search for bank account details are helpfully limited to post-judgment cases, and might work for countries that maintain central registers of bank accounts, but look cumbersome, if not impracticable, for those that do not. The failure to deal expressly with banks' rights of set-off and other security rights is singularly unfortunate.

It is hard to avoid the conclusion that if the Commission had known where it was going to end up, it would not have embarked down this route. The Commission's goal of a pan-European instrument that would be available almost automatically and that would allow creditors to bully recalcitrant debtors into paying has, rightly, not been achieved. The basis upon which the Commission claimed that EAPOs would offer massive gains to businesses in reduced bad debts has similarly evaporated. Instead, all that is left is an instrument more based on member states' domestic laws and procedures, requiring an array of legal advice, but an instrument still beset with many ambiguities and uncertainties.

With hindsight (or more realistic foresight), if the Commission genuinely believed this measure to be necessary, it should have proposed a directive requiring each member state to introduce a satisfactory judicial tool to allow the freezing of bank accounts in its jurisdiction in appropriate circumstances, whether in support of substantive proceedings in that state or in another member state. That



would have avoided much of the vagueness in the Regulation, and integrated better with the significant differences in member state law and procedure.

As to the UK, leaving aside the politics of the UK's relationship with the EU, the balance is between the benefits that EAPOs can reasonably be expected to bring and the costs and complexities that they will impose. A reduction in bad debts to business would be a real gain, but there is little or no evidence to suggest that this would or could materialise in practice from adherence to the Regulation. Against that, the potential costs and uncertainties to banks in implementing EAPOs could be significant, and the administrative tasks imposed on the court system in enforcing EAPOs from other member states could pose major challenges. Overall, better to wait and see.

## Contacts

**Helen Carty**  
Partner

T: +44 20 7006 8638  
E: helen.carty  
@cliffordchance.com

**Simon James**  
Partner

T: +44 20 7006 8405  
E: simon.james  
@cliffordchance.com

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