



Beware of the EAPO



A PROPOSED EU REGULATION THAT WOULD MAKE IT EASIER TO OBTAIN POWERFUL COURT ORDERS TO RECOVER DEBTS COULD HAVE PAINFUL CONSEQUENCES FOR UK BUSINESSES AS **JOSEPH KEAN** EXPLAINS.

Avital consideration at the start of any court process is whether the proposed defendant will be able to pay any judgment that might be obtained. Once you are happy the defendant is good for the cash, consideration turns to whether they may act to avoid payment, perhaps by dissipating or hiding their assets. The position is further complicated when the defendant is resident in a foreign jurisdiction and the claimant will have to enforce the judgment against assets there. The funds in the defendant's bank account are the usual means of satisfying a money judgment but will those funds be there when judgment is obtained and enforcement attempted?

THE EUROPEAN COMMISSION'S PROPOSAL To address this question within the EU at least, the European Commission has proposed a European account preservation order (EAPO) to assist with the recovery of debts and damages in cross-border civil and commercial matters. The EAPO would offer a standardised mechanism for claimants to obtain an injunction freezing money held by a defendant in accounts across Europe. The order would restrict the account holder's ability to deal with the funds in the accounts, including transfers. Currently such orders are a matter of domestic procedure, which differs widely throughout European member states. The proposed EAPO would be an alternative to national procedures and in addition to them.

The UK government announced in October that it had decided not to opt in to the proposal, citing concerns raised in the public consultation (see below). The government still intends to participate as far as possible in the final negotiations at EU level in the hope that changes can be agreed which will allow the UK to opt into the proposed regulation later. But even if the UK ultimately stays out of the regime, UK companies with bank accounts in other EU member states or undertaking litigation in European courts will need to take careful note of EAPOs if and when they are adopted.

HOW WILL AN EAPO WORK?

Under the proposal, an EAPO will be available to a claimant in civil and commercial matters in disputes with cross-border

implications (ie. where the bank accounts sought to be preserved are outside the jurisdiction of the court considering the substantive dispute). Applications for an EAPO will be made without notice to the defendant, allowing the surprise effect of the measure to be preserved.

EAPOs will come in Section 1 and Section 2 variants. A Section 1 EAPO will be available in two circumstances:

- prior to or during substantive proceedings in a member state (ie. an interim remedy); and
- after a judgment has been obtained in a member state but not yet declared enforceable in the member state of enforcement as required.

A Section 2 EAPO will be available once a judgment has been obtained in a member state which is directly enforceable in the member state of enforcement under usual European enforcement principles.

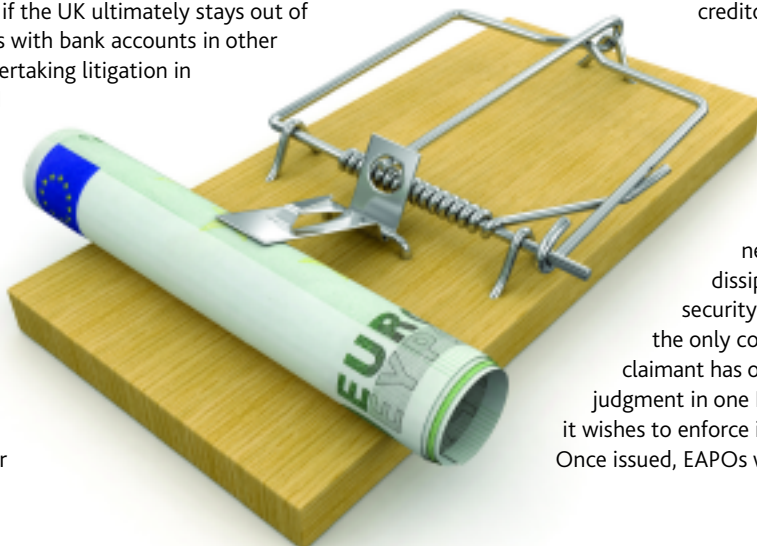
In both cases, an EAPO will be available from either the court hearing the substantive dispute or issuing the substantive judgment, or the court of the jurisdiction in which the bank account to be frozen is located. In the latter case, the order will be limited to bank accounts held within that jurisdiction in order to avoid "forum-shopping".

CONDITIONS OF ISSUE A claimant applying for a Section 1 EAPO will need to show that it has a good prospect of winning its case on the substance (ie. that its claim is prima facie well founded) and that there is a real risk of the debtor removing or dissipating the funds in its bank accounts if the measure is not granted, frustrating enforcement. In addition, the court may require the creditor to provide security to

ensure compensation for any loss suffered by the debtor if, for example, the creditor ultimately fails on the substantive claim.

The conditions for issuing a Section 2 EAPO are far less stringent. There is no need to show a risk of dissipation of assets and no security is necessary. In fact, the only condition is that the claimant has obtained an enforceable judgment in one EU member state that it wishes to enforce in another.

Once issued, EAPOs will be automatically





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recognised and enforced in other member states without any special procedure required, and a defendant's right to challenge the order will be largely restricted to alleging that the conditions for issue were not properly met. The defendant's only alternative will be to pay a security deposit in the amount of the EAPO, which would then be lifted.

OBTAINING INFORMATION ON THE DEBTOR'S ACCOUNT In both cases the application for an EAPO must be made on a prescribed form and include full details of the defendant and the accounts to be frozen. Given the difficulties the claimant may have obtaining information about its debtor's accounts, the proposed regulation requires member states to provide for a mechanism facilitating that task, either by obliging all banks in their territory to disclose whether the debtor has an account with them or by granting their enforcement authorities access to such information held by public authorities. Data protection considerations limit personal information exchanged under this provision to that necessary for enforcing and implementing the order.

EAPO ENFORCEMENT An EAPO will be served directly on the bank holding the account to be frozen, which must immediately block the amount of funds specified in the order. The defendant should be notified immediately after the order has taken effect. Funds in the account above the amount frozen by the EAPO remain available to the defendant.

POTENTIAL DIFFICULTIES So far so good, you might say, and certainly for a claimant wishing to recover money owed to it by another European business, the EAPO would provide a welcome additional tool in the enforcement armoury. However, what goes around has a nasty habit of coming around and that same organisation could just as easily find itself on the receiving end of an EAPO issued by the courts of another jurisdiction.

The proposal has been widely criticised as too pro-claimant, with Section 2 EAPOs raising particular concern. As there is no need under this provision for a claimant to show that assets are at risk without an order, defendants willing and able to pay the judgment debts may nonetheless find their bank accounts frozen without notice, with all the potentially serious consequences that may have for trading. In addition, there are a number of other safeguards missing that UK litigants are accustomed to seeing in measures of this type.

Under similar "without notice" procedures in the UK, where the defendant is not present to put its case, the claimant is obliged to make full and frank disclosure to the court of all matters the court should take into account when making its decision, including those which may have an adverse effect on the application. There is no similar obligation under EAPOs; indeed, in most continental European jurisdictions, parties routinely have only to disclose evidence that supports their case and on which they rely.

FREEZING INJUNCTIONS HAVE HITHERTO BEEN SEEN AS AN UNUSUAL AND EXCEPTIONAL REMEDY – UNDER EAPOs THEY MAY BECOME MORE MAINSTREAM.

Freezing injunctions have hitherto been seen as an unusual and exceptional remedy – under EAPOs they may become more mainstream, with potentially damaging effects for businesses on the receiving end.

Security, in the form of a cross-undertaking for damages, is routinely ordered by English

courts making freezing injunctions. While there is power for the court to order security to be provided in the case of Section 1 EAPOs, the amount and conditions are left to domestic law, which differs widely across European jurisdictions. There is a possibility that no security, or insufficient security, will be available to protect a defendant.

The amount of funds frozen by an EAPO is determined by the court making the order. The law of the member state enforcing the order may exempt certain amounts to ensure the livelihood of the defendant and their family or to allow a company to continue its ordinary course of business. However, this varies considerably between EU jurisdictions, making matters potentially uncertain for debtors forced to defend an EAPO in a foreign state.

EAPOs will also impact on banks and other account-holding institutions, which may find themselves having to devote more resources to complying with EAPOs served on them and providing account information to claimants. Banks have expressed concern at the considerable additional work required should the use of EAPOs become common. Their entitlement to compensation for this work, likely to be a single fixed fee, is left to national law, as is a bank's liability for failure to comply with an EAPO served on it.

WHAT DO YOU NEED TO DO? As things currently stand, as the UK has opted out of this proposal, EAPOs will not be obtainable in support of claims brought in the UK, nor will they be enforceable against bank accounts held in the UK. However, in modern business, commercial organisations maintain financial accounts in many jurisdictions. Businesses with accounts in European member states or litigating in the courts of other member states will need to take relevant legal advice on the applicability of EAPOs to their situation, whether claimant or defendant.

The proposal is still some way off becoming law, as the European Parliament and Council still need to consider it. However, it is clear that, if passed as currently drafted, the regulation would have a considerable impact on recovery of money judgments in European cases.

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The proposed EU regulation is at <http://bit.ly/tdCnsP>

The UK Ministry of Justice's consultation is at <http://bit.ly/rNg5bf>

The government's statement to parliament on 31 October 2011 is at <http://bit.ly/w3sx7E>