
litigation lawflash

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European Account Preservation Orders: A New Method for Debt Recovery

The European Union has introduced a new procedure to facilitate cross-border debt recovery, which aims to preserve funds and recover bad debt.

Background

Regulation No. 655/2014 (the Regulation) was introduced to preserve funds and allow recovery of bad debt across EU borders. The European Commission estimated that the Regulation will lead to the recovery of €373 million—€600 million per year. However, this is not the only impact of the Regulation—it also provides shared rules regarding the procedure for issuing an order, a disclosure order relating to banking information, enforcement standards, and available remedies.

To achieve its aims, the Regulation has created European Account Preservation Orders (EAPOs) (commonly referred to as “Preservation Orders” in the Regulation text), which are available as an alternative to any instrument available under the relevant national law. EAPOs are separate and standalone Europe-wide orders, which enable creditors to apply without notice to prevent transfer or withdrawal of funds held by a debtor in a bank account maintained in another member state.

The Regulation was published in the Official Journal of the European Union on 27 June, following a meeting of the Council of the European Union (Council). As confirmed in Article 54, the Regulation will enter into force on 18 July 2014 and will apply from 18 January 2017.

Scope and Application

An EAPO is only available to creditors that seek a pecuniary claim in civil and commercial matters and in cross-border cases. The definition of “cross-border,” is set out in Article 3:

[A] cross-border case is one in which the bank account or accounts to be preserved by the Preservation Order are maintained in a Member State other than:

- (a) the Member State of the court seised of the application for the Preservation Order pursuant to Article 6; or
- (b) the Member State in which the creditor is domiciled.

This means that some or all of the bank accounts that a creditor seeks to preserve must be in member states that are different from where the creditor is located or where the creditor has commenced proceedings. The bank account’s location is to be determined by its International Bank Account Number (IBAN) or, if there is no IBAN, where the branch or head office that holds the account is located.

Notably, “bank account” or “account” is defined as “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.” Although this includes savings accounts held in joint names, as confirmed in Article 24(7), it is not clear whether this applies to funds held for a client by a law firm.

Article 2(2) stipulates that EAPOs are not available to creditors in regard to wills and succession, insolvency/bankruptcy, social security, arbitration, or rights in property (that arise from a matrimonial relationship) and do not apply to bank accounts held by or with central banks when acting in their capacity as monetary authorities.

Article 5 affirms that EAPOs are available to creditors both prejudgment (at any time prior to and during proceedings) and postjudgment. To secure an order in either case, the creditor must satisfy the test set out in Article 7(1), which provides that:

The court shall issue the Preservation Order when the creditor has submitted sufficient evidence to satisfy the court that there is an urgent need for a protective measure . . . 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.

The requirements regarding an "urgent need" and the definition of a "real risk" are likely to be interpreted differently by the member states. It will, therefore, take time before there is a clear authority on the prerequisite standards. For now, however, it appears there is a fairly considerable burden on the creditor.

Furthermore, in the case of an application prejudgment, "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." This wording suggests that the court should be assured of the merits of the case; however, this is again likely to have a varying standard based on the court's location.

Article 8 sets out the information required to make an application for an EAPO. It includes, among other things, court details; details concerning the creditor and debtor; information identifying the banks where the debtor holds accounts (or, if this cannot be provided, a request for such information); the amount sought; a description of the circumstances justifying the request; a list of evidence provided; relevant declarations; and all other supporting documentation. Where a creditor is yet to obtain judgment, Article 8(2)(h) specifies that the creditor should provide a description of all elements that support the court's jurisdiction, the facts supporting the claim, and a statement indicating whether the creditor has already initiated proceedings against the debtor. If postjudgment, Article 8(2)(i) requires an indication of any noncompliance by the debtor. The form for such an application is yet to be completed, but it is to be developed in accordance with the advisory procedure as set out in Article 4 of Regulation (EU) 182/2011.

In the application form, creditors will be required to indicate whether they should be exempt from providing security. Security paid to the court is designed to protect debtors should they fall foul of unfair or erroneous applications. Article 12 includes a requirement for the creditor to provide security if the application is made prejudgment (although the court may dispense with this if considered inappropriate) and postjudgment only if considered necessary.

Any creditors pursuing EAPOs should bear in mind that they remain liable "for any damage caused to the debtor by the Preservation Order due to fault on the creditor's part." Although the burden of proof for liability lies with the debtor, the creditor should take care in reviewing the merits of the case. The Regulation has also considered instances where a creditor makes many applications to "try its luck" with multiple courts. Accordingly, under Article 16, the Regulation restricts any parallel requests for an EAPO.

Domicile Test for an EAPO

One of the major benefits of EAPOs is that they allow a claimant to obtain a single order that banks must enforce throughout the EU. However, the recitals to the Regulation state that the Regulation "should apply only to those Member States which are bound by it in accordance with the Treaties." Furthermore, in regard to those that are able to use the procedure and obtain an EAPO, an EAPO is "available only to creditors who are domiciled in a Member State bound by this Regulation and Orders issued under this Regulation should relate only to the preservation of bank accounts which are maintained in such a Member State."

Notably, the UK and Denmark have chosen not to opt in to the Regulation. However, for the other member states, once in force, the Regulation will be directly applicable. The effect of this current situation is that British and Danish creditors will not be able to obtain an EAPO, but they may still suffer the consequences of an EAPO because their accounts in other member states would be susceptible if they are the debtor. One possible benefit for a debtor will be that the other member states will not be able to enforce an EAPO on accounts in the UK.

Implementation of EAPOs

Article 18 provides that the maximum time limit for the court to reach judgment regarding an EAPO is 10 days pre-judgment and five days post-judgment.

Once the court grants an EAPO, the bank that holds the debtor's accounts either freezes the amount of funds, as specified in the order, or transfers that amount to a separate account for preservation. Any amount held in excess of the amount owed remains accessible to the debtor, whilst the "frozen" funds are preserved to satisfy any future judgment.

An EAPO gives no right of payment to the creditor because it is intended only as a tool to preserve assets. It will, however, once issued, continue in force until (i) it is revoked, (ii) enforcement is terminated, or (iii) a measure to enforce judgment or settlement has taken effect. Additionally, any other measure to preserve funds that currently exists under the relevant member state's national law will continue to be available.

Obligations Imposed on Banks

The Regulation imposes a number of obligations on banks located or operating in the relevant member states. Banks must implement an EAPO without delay and subsequently produce declarations by "the end of the third working day following implementation" to the issuing court or competent authority and the creditor. This declaration should confirm to what extent funds in the debtor's account have been preserved. Any liability incurred because of the bank's failure to comply with any of these obligations shall be determined by the relevant member state's national laws.

Further to these requirements, where a creditor has already obtained judgment, banks may have to search for and provide information regarding a debtor's accounts if the creditor has "reasons to believe that the debtor holds one or more accounts with a bank in a specific Member State" but does not have the full details. In particular, this provision benefits those requiring information in Italy, Germany, and France, where it is historically difficult to obtain information on the whereabouts of debtors' assets if not already known to the creditor. However, recital 21 to the Regulation notes that the debtor's banking information should be provided only to the requesting court and not to the creditor.

An additional consideration for banks is the ability to recover any costs incurred due to the obligations above, which are limited to, and determined by, the law of the enforcing member state.

UK Implementation

Although the UK had originally welcomed the proposal as a "a very valuable tool in the working of the internal market", it had raised concerns about the lack of protection for debtors regarding (i) the low threshold for obtaining EAPOs, (ii) the availability of an application without notice, (iii) the level of discretion for the member states' courts regarding security to compensate a defendant subject to a wrongful order, and (iv) possible procedural costs incurred when challenging an order in another member state.

The UK remains undecided about whether to opt in once the Regulation is enacted.

Morgan Lewis

Contacts

If you have any questions or would like more information on the issues discussed in this LawFlash, please contact any of the following Morgan Lewis lawyers:

London

David Waldron	+44 (0)20 3201 5590	dwaldron@morganlewis.com
Peter Sharp	+44 (0)20 3201 5580	psharp@morganlewis.com
Nick Greenwood	+44 (0)20 3201 5570	ngreenwood@morganlewis.com

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