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The United Kingdom's Stance to the Recently Introduced European Account Preservation Order

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Bank accounts; Cross-border disputes; Debts; Enforcement; EU law; Freezing of funds

Introduction

In 2011 the European Commission presented a proposal for a regulation introducing the European Account Preservation Order (EAPO). This remedy allows a claimant to obtain an order preserving a defendant's bank account upon proof that the defendant is likely to thwart the enforcement of a future judgment. Banks throughout the European Union (EU) must then enforce the order. In late 2013 the Council of the European Union presented a revised text of the proposal, which was later endorsed by the European Parliament. The text was finalised in May 2014 and the new regulation¹ (the Regulation) was published in the Official Journal of the EU on June 27, 2014. As confirmed in art.54, the Regulation entered into force on the twentieth day following that of its publication in the Official Journal and will apply from January 18, 2017. It will apply automatically to all Member States except the United Kingdom (UK) and Denmark, both of which have chosen not to opt in.

The Regulation in a nutshell

The EAPO will serve as an alternative to domestic remedies and claimants remain free to use any other procedure for obtaining an equivalent measure under the law of any Member State. It is only available in the context of pecuniary claims in civil and commercial matters in cross-border cases. Article 3 defines a cross-border case as one in which the bank account to be preserved is maintained in a Member State other than the Member State of the court where the claimant has commenced proceedings or the Member State in which the claimant is domiciled.

The Regulation's recitals state that an EAPO is available only to applicants who are domiciled in a Member State bound by the Regulation and orders issued under it should relate only to the preservation of bank accounts which are maintained in such a Member State. Since the United Kingdom and Denmark have chosen not to opt in to the Regulation, British and Danish claimants are not able to obtain an

¹ Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters.

EAPO, while bank accounts held in the United Kingdom or Denmark may not be preserved under it.

According to art.5, EAPOs are available to applicants both pre-judgment, i.e. at any time prior to and during proceedings, and after the applicant has obtained a judgment. Before the initial proposal by the European Commission, there was uncertainty about whether such procedure should be provisional in nature only or should be extended to allow a mechanism for enforcement. The Regulation, however, was finally restricted to provisional measures preserving the defendant's bank account until a measure to enforce judgment takes effect (art.20). Jurisdiction to issue an EAPO lies with the courts of the Member State that have jurisdiction on the substance of the matter or, when the applicant has already obtained a judgment, with the courts of the Member State in which the judgment was issued (art.6)

In order to obtain an EAPO, art.7 specifies that the applicant must satisfy the court that there is an urgent need for an order because there is a real risk that, without such an order, the subsequent enforcement of the applicant's claim against the respondent will be impeded or made substantially more difficult. Additionally, in the case of an application for an EAPO before a judgment is issued, the applicant must also satisfy the court that he or she is likely to succeed on the substance of his or her claim against the respondent. In order to ensure the element of surprise, essential to the successful operation of an EAPO, the respondent will not be informed about the application for an order nor be heard or notified prior to its issue and implementation. In other words, EAPOs will be granted *ex parte* (art.11).

Article 8 sets out the information required to make an application for an EAPO. It includes, *inter alia*, details concerning the applicant and the respondent, the amount for which an EAPO is sought, a description of the circumstances justifying the request, and all other supporting documentation. Furthermore, a declaration that the information provided by the applicant is true and complete is required.

In addition, information identifying the bank where the respondent holds the account to be preserved must be submitted with the application. If this information is not available, the applicant may file a request, pursuant to art.14, for the obtaining of account information from the designated information authority of the Member State in which the applicant believes that the respondent holds an account. To allow that mechanism to work, the Member States are required to make available in their national law one or more methods for obtaining such information. These methods include an obligation on all banks to disclose whether the defendant holds an account with them or giving access to registers where that information is held by public authorities or administrations.

In situations where a party applies for an EAPO before initiating proceedings on the substance of the matter, art.10 obliges him or her to initiate such proceedings within 30 days of the date on which he or she filed the application for an EAPO or 14 days of the date of the issue of the order, whichever date is the later. If the applicant fails to comply with this obligation, the order is revoked by the court of its own motion or terminates automatically.

Article 12 includes a requirement for an applicant who has not yet obtained a judgment to provide security for an amount sufficient to prevent abuse of the Regulation and to ensure compensation for any damage suffered by the respondent

as a result of the order to the extent the applicant is liable for such damage. The court may dispense with this requirement if it considers it inappropriate. Where the applicant has already obtained a judgment, the court may require the applicant to provide security if it considers this appropriate.

In virtue of arts 22 and 23, an EAPO issued in a Member State will automatically be recognised and enforceable in the other Member States. The order will be enforced in accordance with the procedures applicable to the enforcement of equivalent national orders in the Member State of enforcement. Once the court grants an EAPO, the bank that holds the respondent's account either prohibits any transfer of the amount of funds that the order specifies or transfers that amount to a separate account dedicated for preservation purposes (art.24). The Regulation ensures that the preservation of the respondent's account does not affect amounts which are exempt from seizure under the law of the Member State of Enforcement, such as amounts necessary to ensure the livelihood of the respondent (art.31). Furthermore, art.32 provides that an EAPO shall have the same rank as an equivalent national order in the Member State of enforcement. Finally, arts 33 and 35 give to the applicant and the respondent various remedies for the revocation or modification of an issued EAPO.

The UK's reaction and the changes made to the initial proposal

The UK Government initially welcomed the EAPO proposal stating that it supported measures that make it easier for litigants to resolve disputes and enforce judgments across borders. However, various reservations were raised both by stakeholders in a public consultation conducted by the UK Government² as well as by the UK Government itself in an impact assessment it produced.³ The main argument in the public consultation against the Regulation was the lack of sufficient safeguards for defendants. In the impact assessment, the imposition of substantial costs on banks was the major concern. Consequently, in late 2011 a Written Ministerial Statement was made to Parliament confirming that the United Kingdom would not be opting in to the Commission's proposal.⁴

The United Kingdom consists of three separate jurisdictions: England and Wales, Scotland, and Northern Ireland. At first glance, the EAPO Regulation resembles more closely to in rem attachment orders found in civil law jurisdictions rather than to common law freezing orders. Litigants in England and Wales, and Northern Ireland-in contrast with Scotland, which follows a different practice-are accustomed to seeing certain measures accompanying this type of orders which were absent from the initial proposal. This was the main reason of the concerns raised that led the UK Government not to opt in to the Regulation. However, comparing the initial proposal by the Commission and the final text of the Regulation it can be seen that various changes were made most of which have gone the UK's way.

² Ministry of Justice, *Proposed EU Regulation creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters-Response to Consultation CP(R)* (2012).

³ Ministry of Justice, *Impact Assessment on Proposed EU Regulation Creating a European Account Preservation Order to Facilitate Cross-border Debt Recovery in Civil and Commercial Matters* (2011).

⁴ *Hansard*, HC col.28WS (October 31, 2011).

Specifically, in regard to the lack of adequate safeguards for defendants, a requirement for the applicant to provide security when requesting an order was introduced which was not mandatory in the initial proposal. The requirement for an undertaking in damages is fundamental in the English practice. Moreover, the applicant is obliged to declare that the information provided in the application is true and complete, which is identical to the condition for full and frank disclosure in obtaining a common law freezing order.

While the proposed Regulation was substantially improved, there is still significant divergence vis-à-vis the common law practice. First, the condition that the applicant has to fulfill in obtaining an EAPO, i.e. that there is a real risk that the subsequent enforcement of the applicant's claim against the respondent will be impeded or made substantially more difficult, is lower compared to the requirement for obtaining an English freezing order which is a real risk of dissipation of assets. Moreover, courts are provided with little discretion in the Regulation for deciding on the issuance and sum of the order in contrast with the discretion of the English courts to grant an injunction when it is "just and convenient". A further issue that remained unchanged is that access to information on bank accounts will place significant burdens on banks. In English law the court has jurisdiction to direct a party to provide information about relevant assets which are or may be the subject of an application for a freezing order, and if the respondent does not comply with that order, he or she may be held in contempt.

The next day

Since the United Kingdom did not opt in, litigants in the United Kingdom will be unable to use EAPOs. The consequences of this development will be determined in a few years. In the meantime, litigants in England and Wales, and Northern Ireland will keep using the Worldwide Freezing Order (WFO) which has the same purpose. A legislative competition between the two instruments (the EAPO and the WFO) could eventually emerge. This might lead to forum shopping and further legal uncertainty within the European Union. Nevertheless, the UK Government participated fully in the negotiations for the EAPO Regulation and the possibility for a post-adoption opt in is not ruled out. The review clause included in art.53 of the Regulation could be an important factor.