

## EUROPEAN COMMISSION PAVES WAY FOR AN EU FREEZING ORDER

In high-value commercial litigation, it is often important for a claimant to consider at the outset whether it is possible to freeze assets belonging to the defendant to ensure that any judgment subsequently obtained can be enforced.

The European Commission has recently proposed to introduce an EU-wide freezing order known as a European Account Preservation Order (EAPO). At present, the UK Government is considering whether to opt-in and an announcement of the Government's decision is anticipated shortly. Potential claimants and defendants who may be affected by freezing orders should be aware of this possible development and financial institutions should be aware of their potential role in administering EAPOs.

### European Account Preservation Order (EAPO): The Potential Changes

Under the current law, a claimant must rely on the national laws of each relevant EU Member State to obtain a freezing injunction either by seeking to enforce a judgment abroad or by going directly to the courts of that Member State. In contrast, an EAPO would allow a claimant to obtain a single order which banks must enforce throughout the European Union.

The EAPO will be potentially available to a claimant in **any** civil or commercial matter having cross-border implications. A matter has cross-border implications if the defendant is located or domiciled in a different Member State to all or some of the bank accounts which the claimant is seeking to freeze.

The Commission has outlined two types of EAPO: a "Section 1" EAPO and a "Section 2" EAPO, both of which can be made without notice unless a claimant requests otherwise.

### "Section 1" EAPO

A "Section 1" EAPO can be obtained for the preservation of a bank account in the following circumstances:

- prior to the progress of proceedings in an EU Member State court;
- during the progress of proceedings in an EU Member State court; or
- once a judgment has been obtained but which, if required, has yet to be declared enforceable in the EU Member State of enforcement.



A “Section 1” EAPO can be obtained from the courts of the EU Member State with jurisdiction over the substance of the matter. Alternatively, a “Section 1” EAPO can be granted by the courts of the EU Member State where the bank account is located; however, if this route is pursued, the “Section 1” EAPO will be limited to bank accounts in that Member State.

#### **What are the requirements of a “Section 1” EAPO?**

In order to obtain a “Section 1” EAPO, a claimant must show he has (i) a well-founded claim; and (ii) that future enforcement of a judgment is likely to be impeded or substantially more difficult without such an order (i.e. because the defendant may dissipate its assets).

#### **“Section 2” EAPO**

A “Section 2” EAPO is available when a claimant already has a judgment from the courts of an EU Member State which is directly enforceable in the EU Member State where enforcement is intended to take place. A “Section 2” EAPO would be available from either the court that issued the underlying judgment, or where the bank account is located.

#### **What are the requirements of a “Section 2” EAPO?**

The only requirement which a claimant must meet in order to obtain a “Section 2” EAPO is that he has a judgment which is directly enforceable in the EU Member State in question. It is not necessary to show that enforcement may be difficult or that there is any risk of dissipation of assets.

#### **Impact of the EAPO**

The introduction of the EAPO would have far-reaching consequences, particularly for defendants and financial institutions and those who may be served with an EAPO.

Under the EAPO the definition of “bank account” extends to accounts holding financial instruments such as transferable securities, options, futures, swaps and other derivatives as well as units in collective investment undertakings. Therefore, an extensive list of financial services entities may have to administer EAPOs. If the UK Government opts-in, financial institutions should formulate a procedure for the implementation of an EAPO to ensure compliance with the court order.

It is also important to note that the EAPO seems significantly weighted in favour of the claimant. Unlike the position under English law, there is no requirement for a claimant to give full and frank disclosure (which may undermine the claimant’s case) at the time of his application. As such, defendants may be denied a crucial safeguard if a court is later found to have wrongly granted an EAPO. However, this possibility is at least partially offset by the fact that, before issuing an EAPO, the court may require the provision of a security deposit or an equivalent assurance by the claimant to ensure compensation for any damage suffered by the defendant to the extent the defendant is liable to compensate such damage under national law. However, this is not a mandatory requirement. In addition, in respect of a “Section 2” EAPO, there is no requirement that the claimant show any risk of dissipation of assets.

For parties served with an EAPO, the consequences may be severe as the order can cover a wide range of assets throughout the European Union.

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## Will the UK Government opt-in?

The deadline for the Government's decision on whether or not the UK will opt-in was 24 October 2011. An announcement as to this decision is expected shortly, with many commentators suggesting the UK Government is likely to do so. However, should the Government not opt-in, they could still decide to implement the EAPO at a later stage.

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