

European Account Preservation Orders – a useful tool for creditors or a step too far against debtors?



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On 14 May 2014 the EU Regulation 655/2014 came into force and will apply from 18 January 2017 establishing a European Account Preservation Order (EAPO) procedure that will allow a creditor to freeze a debtor's bank accounts anywhere in the EU, except for Denmark and the UK which have opted out.

The purpose of the regulation is to adopt a legal instrument which establishes a new procedure allowing, in cross border cases, for the preservation, in an efficient and speedy way, of funds held in bank accounts thereby avoiding the need for recourse to national protective measures which may prove cumbersome and time consuming.

When will the Regulation apply?

The Regulation applies to cross border cases only, where the debtor's bank accounts are in different EU Member states to that where the application is made or where the applicant is domiciled.

The Regulation will not apply to the preservation of accounts maintained in the Member State where the application is made if the creditor's domicile is also in that member state, in such a case the creditor will need to make one application for a Preservation Order in relation to accounts maintained in other member states and a second application for national measures.

An EAPO will be available for claimants both pre and post judgement but will not apply where insolvency proceedings have commenced against the debtor.

Where a creditor applies for a Preservation Order prior to obtaining a judgement, the Court with which the application is lodged should have to be satisfied on the basis of the evidence submitted that the creditor is likely to succeed on the substance of his claim against the debtor.

Also the creditor should be required, in all situations, including when he has already obtained judgement, to show that his claim is in urgent need of judicial protection and that without the EAPO the enforcement of the existing or a future judgment maybe impeded because there is a real risk that by the time the creditor is able to have the existing or a future judgement enforced, the debtor may have dissipated, concealed or have disposed of his assets at under value. It will be up to the Courts to assess the evidence submitted by the creditor to support the existence of such a risk.

EAPO applications are made without notice being given to the debtor and the debtor is not to be heard before the making of the EAPO.

Safeguards

In light of the fact that the EAPO is given without the debtor being given any notice, the regulation provides for safeguards as a way to prevent abuse of the order.

Safeguards introduced include a requirement for the creditor to provide security in certain circumstances, and a provision that the creditor shall be liable for damage caused to the debtor by the EAPO where the creditor is at fault.

The Court will have discretion as to the level of the security to prevent abuse of the Order, however, where the application for an EAPO is made before the creditor has obtained judgement, the provision of security should be the rule, otherwise it will be at the discretion of the Court.

Obtaining account information

Where the creditor has obtained an enforceable judgement against the debtor but does not know the name/address or details of the debtor's account he may request, in his application for the Preservation Order, that the information authority of the member state of enforcement obtain the information necessary to allow the bank(s) and the debtor's account(s) to be identified.

The above request can also be made where the creditor has obtained judgment which is not yet enforceable, the amount to be preserved is substantial in the circumstances and the creditor has filed with the court sufficient evidence that there is an urgent need for the account information as without it there is a risk that the subsequent enforcement of the creditors claim will be jeopardised. For pre judgement EAPO applications applicants will have to provide details of the bank accounts.

Time limits for Courts to decide whether to issue an EAPO

The Regulation sets out strict time limits within which Courts shall have to decide on whether to issue EAPO's. The Court must issue its decision within 10 working days of the application being made, however where a creditor has already obtained judgement, the court must issue its decision within 5 working days of the making of the application. There is however provision for the deadlines to be extended for specific purposes, for example, where the creditor must provide security or where the Court decides that an oral hearing of the creditor is necessary.

For creditors this Regulation will of course be a welcome development, a speedy way to ensure funds held in accounts in other EU member states will be available to enforce a judgement obtained either before or after the application for an EAPO, however there is a risk that this will be open to abuse and potential injustice; debtors could find their accounts frozen and their business financially paralysed without being given an opportunity to be heard by the Court.

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