

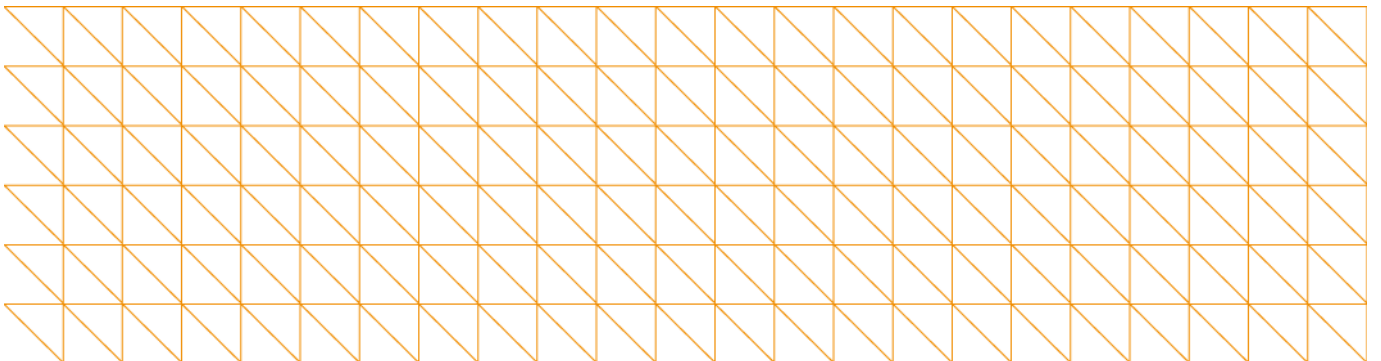


Proposed EU Regulation creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters

Response to public consultation

Response to Consultation CP(R) 1/2012

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Ministry of
JUSTICE

Proposed EU Regulation creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters

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Foreword

This document is the post-consultation report for the consultation paper, '*Proposed EU Regulation creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters - How should the UK approach the Commission's proposal?*' (CP 14/2011) issued on 3 August 2011. This paper covers:

- the background to the exercise;
- a summary of the responses received;
- a detailed response to the specific questions raised in the consultation; and
- the conclusions and next steps following this consultation.

Further copies of this report and the initiation document can be obtained by contacting **Eral Knight** at the address below:

Justice Policy Group
Ministry of Justice
6th Floor,
102 Petty France
London SW1H 9AJ

Telephone: 020 3334 3843

Email: european.policy.unit@justice.gsi.gov.uk

This report and the consultation document are also available online at www.justice.gov.uk

Alternative format versions of this publication can be requested from Eral Knight who can be contacted using the details above.

Executive Summary

The initiation paper "*Proposed EU Regulation creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters - How should the UK approach the Commission's proposal?*" was published on 3 August 2011. It addressed the issue of whether it was in the national interest for the UK to seek to participate in the Commission's proposal.

As the proposal is a matter of civil judicial cooperation, the UK's Protocol to Title V of the Treaty on the Functioning of the European Union applied. This meant that the UK's participation depended upon the UK notifying the EU of its wish to take part in the adoption and application of the proposal (known as opt in) within three months of its publication.

Ministers in the Ministry of Justice decided that with the limited period of time available in which the UK would be required to reach a decision on whether or not to opt in, it was necessary on this occasion to depart from the Code of Practice on Consultation issued by the Cabinet Office. A shorter exercise was therefore conducted between 3 August 2011 and 14 September 2011.

More than 130 people or organisations were contacted and 51 formal responses were received. A list of respondents to the consultation is at Annex A to this paper.

In general, 37 commented specifically on the opt-in, of which 13 recommended that the UK should opt in to the proposal and 24 recommended that the UK should not opt-in. Six of those recommending an opt in and five of those who did not express a firm view raised concerns, some of which were described as significant, which they believed needed to be addressed during negotiations. These responses, together with the issues raised by respondents, were considered carefully before a final decision was made on whether to opt in to the proposals or not. The Government's final decision was made in conjunction with the European Affairs Committee, and Ministers in the Devolved Administrations in Scotland and Northern Ireland.

On 31 October 2011 a Written Ministerial Statement was made to Parliament confirming that the UK would not be opting in to these proposals.

Part 1: Introduction

Background

1. The European Commission's proposal was published on 25 July 2011 with the aim of establishing a self-standing European procedure for a protective measure to freeze the bank accounts of defendants in cases having cross-border implications. A claimant can apply for an order at a number of points – i) prior to the initiation of judicial proceedings on the substance of the matter or at any stage during proceedings; ii) after having obtained a judgment, court settlement or authentic instrument which is enforceable in the Member State of origin but has yet to be declared enforceable in the Member State of enforcement if such declaration is required; or iii) after having obtained a judgment, court settlement or authentic instrument which is enforceable in the Member State of enforcement.
2. Before obtaining an order a claimant must satisfy the court that his claim appears to be well founded unless an enforceable judgment etc. has already been obtained; and that without an order the subsequent enforcement of an existing or future judgment etc. is likely to be impeded or made substantially more difficult including because there is a real risk that the defendant might remove, dispose of or conceal assets in their bank account(s). The existence of a judgment etc. which is enforceable in the Member State of enforcement will be enough to allow the granting of an EAPO in such cases. Applications are to be made on a standard form without notice to the defendant unless the claimant requests otherwise. A court may require a claimant to provide a security deposit or equivalent assurance to compensate the defendant for any damage suffered. Where an application is made prior to the initiation of proceedings if the proceedings on the substance of the claim are not initiated within 30 days of an order (or any shorter deadline given by a court) it is revocable.
3. While it is proposed that claimants when making their application should provide information on the defendant and his/her bank account, it will be possible for them to request that such information be provided by a competent authority of the Member State of enforcement. Member States are required to either oblige all banks to disclose whether a defendant holds an account with them or allow authorities access to such information held by public authorities in any relevant registers or in some other way.
4. The procedural steps and the deadlines that courts, other authorities and banks should meet are provided in the proposal. However not all issues are regulated as some are left to the national law of the Member State of enforcement including the liability of banks, the treatment of joint accounts, whether banks can charge for the process, amounts that are exempt from being frozen and the ranking of creditors.

5. The Commission proposes that exequatur should be abolished for these orders. Exequatur is the term for the procedure by which a court approves a judgment which is enforceable in another Member State for domestic enforcement. That means that a judgment, court settlement etc. will be automatically recognised in other Member States without any need first to be declared enforceable and without any possibility of being refused recognition. The proposal includes a number of safeguards to facilitate the abolition of exequatur. These include limiting the order to the amount of the judgment or claim plus any interest and costs; allowing the defendant to seek a review of the order or to claim exemptions in specified circumstances; or the ability to have the order set aside, suspended or to have enforcement terminated in given circumstances.
6. Where a defendant is a consumer, employee or insured person he/she may apply to a local court to obtain such remedies if neither the court of origin nor the court of enforcement is in the Member State where he/she is domiciled. In addition third parties may raise objections if an order or its enforcement prejudices their rights.
7. In its initial response the Government welcomed, in principle, the Commission's proposal to create an EAPO. It said that it supported measures which made it easier for both businesses and citizens to resolve disputes and enforce judgments across borders. Legal certainty and effective dispute resolution procedures are essential to ensure the internal market works properly. In particular the Government was pleased to see that the Commission's proposal is meant to be an alternative to domestic procedures and is not intended to replace them. As such it provides another tool that creditors may choose if it suits their purpose. However the Government recognised that in any such procedure there needed to be a very careful balance between the rights of creditors to recover debts and the provision of adequate protection for defendants. It was also aware of the need to limit any additional burdens on banks and other financial institutions.

Devolution and Gibraltar

8. The UK consists of three separate jurisdictions: England and Wales, Scotland and Northern Ireland. The Scottish Cabinet Secretary for Justice has responsibility for this matter in Scotland. In Northern Ireland, the Justice Minister has responsibility where the proposal impacts on courts. Gibraltar, although a British Overseas Territory, is also subject to EU Regulations in this field. The UK has responsibility on behalf of Gibraltar for the negotiation of the relevant European instruments, and those instruments are directly applicable in Gibraltar if the UK decides to participate.

Part 2: Summary of Responses

9. There were 51 formal responses to the consultation including from a number of members of the Lord Chancellor's Advisory Committee on Private International Law. The responses can be aggregated to the following groups:
- 2 were from the academic sector (3.9%);
 - 6 were from the public sector, including from Government departments or bodies (11.8%);
 - 7 were from the banking sector (13.7%);
 - 8 were from members of the judiciary or judicial representative bodies (15.7%);
 - 16 were from legal practitioners or representative bodies of the legal profession (31.4%);
 - 7 were from other professional bodies/representative bodies (13.7%);
 - 3 were from the enforcement sector (5.9%) and
 - 2 were from the advice sector (3.9%)
10. Not all respondents chose to answer all questions. The questions posed were as follows:
- Q1. Is it in the national interest for the Government, in accordance with Protocol 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice annexed to the Treaty on the Functioning of the European Union, to opt in to negotiations on the Commission's proposed Regulation? Please explain the reasons for your decision.**
- Q2. What are your views on the specific issues raised in this paper concerning the proposal being made by the European Commission?**
- Q3. Do you agree with the impact assessment? If not, please explain why.**
- Q4. Are there any other specific comments you may wish to make?**

Part 3: Responses to specific questions

Question 1

Is it in the national interest for the Government, in accordance with Protocol 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice annexed to the Treaty on the Functioning of the European Union, to opt in to negotiations on the Commission's proposed Regulation? Please explain the reasons for your decision.

11. Of the 51 responses 37 commented specifically on the opt-in. Of these, 13 suggested that the UK should opt in to the proposal. Respondents thought that the proposal would help to improve legal certainty and therefore the working of the internal market by ensuring that creditors have a swift and effective recourse to recover debts. Some thought that existing national procedures were complex and expensive so cross-border judgments were more likely to be written off. A single European procedure which did not affect existing domestic procedures was thought to lead to improved cash flow which would benefit UK businesses. Five of those recommending an opt in were from Scotland. It was mentioned that the introduction of such a procedure would be of particular benefit to Scotland where, unlike England and Wales, it is not possible to obtain an extra-territorial freezing order.
12. However, for six of those recommending an opt in the responses were not without reservation. All of these expressed concerns about the effect of the procedure, particularly on defendants. For some the decision to opt in was that it was better, on balance, to have the increased influence on the negotiations. One respondent could understand why the Government would decide not to opt in if it did not believe it had sufficient comfort that necessary amendments would be made during the negotiations.
13. Similar concerns were raised by five of the 14 respondents who chose not to express a preference on the question of the opt in.
14. Amongst the 24 recommending that the UK should not opt in to the proposal there was support for the objective and a recognition of the benefits that a properly drafted Regulation in this area might bring. However such support was outweighed by significant concerns about a failure to obtain a sufficient balance between the rights of creditors to recover debts and safeguards to defendants. In particular there was widespread concern that the threshold for obtaining an order was too low, that there is no requirement for the claimant to provide any security to compensate a defendant for losses suffered from the wrongful grant of an order, and that there should be more discretion for courts when deciding whether to issue an order or the amount for which it should be granted. Given the apparent ease with which an order might be obtained fears were expressed about the possible dangers posed to companies which were in the process of restructuring or rescue where the freezing of a bank account could undermine the rescue and make insolvency more likely. Other concerns were raised about the burdens the proposal is likely to place on both the Government and banks, in particular through the provisions of access to information on bank accounts.

Question 2

What are your views on the specific issues raised in this paper concerning the proposal being made by the European Commission?

15. Most respondents referred in some way to the issues that had been raised in the Government's consultation paper under this question. The responses have been broken down in relation to each of these issues:

Safeguards for defendants

16. While many respondents supported the aims of the European Commission's proposal, the majority were concerned that it favours claimants to the detriment of safeguards for defendants. This was thought to be demonstrated in a number of ways.
17. The tests that should be applied before an order can be granted were criticised by many of those responding to the consultation. A repeated concern was that orders would be too easy to obtain. 14 thought that there had to be a real risk of dissipation of assets while 17 wanted creditors to be obliged to make a full and frank disclosure of all the circumstances relevant to their application, including facts which might not support such an application. The ease with which it was perceived that orders could be obtained led seven respondents to fear that the introduction of EAPOs could tip businesses in the process of restructuring into insolvency. Some thought that the process could be used maliciously by some creditors to do just that. This led five respondents to say that rather than help cross-border trade, this proposal would actually discourage companies from trading. For another five respondents one way of solving this problem was to ensure that companies in the process of restructuring were excluded from the scope of the proposal.
18. The other test for an order is to have a "well-founded claim". While this is similar to the test for an English freezing order where there should be "a good arguable case", seven respondents believed that the text needed to define better what a well-founded claim should be. There were fears that different courts in different Member States would apply different standards.
19. While two respondents were happy with the way the proposal deals with enforceable judgments, three thought that an order should not be granted to enforceable judgments unless the creditor could prove the risk of dissipation of assets.
20. Four respondents thought that leaving the provision on security by creditors to national law would lead to a problematic inconsistency between the way the courts of different Member States applied the procedure. While three respondents thought that security should not be mandatory, 18 thought it should. A further six of those responding wanted courts to be able to hold hearings involving defendants in appropriate circumstances. This linked with a feeling from a number of others that courts should have more discretion in the process, including in the amount that could be granted for an order. Seven saw a specific

need for a court to control the amount claimed for damages. Many wanted to see the same kind of discretion in the area of exemptions with courts, rather than competent authorities, being able to make decisions on a case by case basis. At the very least, seven respondents wanted to ensure that legal expenses could be one of the criteria on which exemptions could be granted.

21. In terms of jurisdiction, one respondent thought that it would be difficult for courts in the country of enforcement to deal with applications for orders while five thought that the proposed text would lead to confusion and satellite litigation. However, wherever the order was granted nine respondents believed that all defendants, and not just those perceived to be most vulnerable, should be able to apply to a local court to challenge the order. Three supported the proposed text.
22. The concerns about a perceived lack of safeguards for defendants led seven respondents to oppose the abolition of exequatur. Exequatur is the procedure by which a court approves a judgment or order which is enforceable in another Member State for domestic enforcement. In effect it converts a foreign judgment or order into one which the beneficiary of the judgment or order can then go on to enforce as if it was a national judgment or order. Abolition of exequatur in this procedure would mean that an EAPO issued in one Member State would be automatically recognised in another without the possibility by the courts in the Member State of enforcement to refuse recognition.

Scope

23. With regard to the scope of the proposal, many respondents thought that the inclusion of securities and financial instruments would make the procedure more unclear, confusing and complex. Issues such as the inclusion of trust funds would lead to uncertainty for banks in identifying the beneficiaries of bank accounts. As a result 14 respondents thought it would be easier to either better define what securities or financial instruments were to be covered or just exclude them from scope in favour of accounts where the funds could be easily realised.
24. Five respondents were concerned about the inclusion of payment clearing systems within scope; another five saw difficulties with the ways damages might be included.
25. A number of practical issues also raised significant concerns. These included the time limits with which authorities and banks would be expected to comply; what level of costs could be recovered and at what point in the process; how banks will be able to identify the correct account; and the protection for banks for liability claims. In this area 13 respondents believed that the proposal should clearly allow banks to continue to apply the set-off procedures known under English law. Many others were concerned about the effects on third parties.

Information on bank accounts

26. While five respondents believed that the provisions on obtaining information on bank accounts (in particular Article 17) would be useful and possible if bank records were up to date (three saying that the powers already existed in Scotland), 13 expressed significant concerns about the expense, burden, delay and difficulties that would arise for both national authorities and banks. Seven respondents thought that the text raised data protection issues while two others were concerned about the possibility of fishing expeditions, abuse and fraud.

Question 3

Do you agree with the impact assessment? If not, please explain why.

27. Comments were made on the impact assessment by 13 respondents. Of those, seven agreed with the conclusions that UK participation was likely to lead to increased costs for the Government (through competent authorities) and banks in processing orders, including in having to comply with the disclosure of information provisions. One respondent thought that other work in the area of information sharing and provision would help ensure compliance with these requirements.
28. Four respondents thought that the potential for extra costs had been understated because the likely relative ease with which EAPOs would be obtained might encourage significant use. This was considered to have an impact on defendants, the justice system and on banks. One respondent thought that the benefits of the proposal had been overstated and another thought that more analysis was needed to ensure that the effects of the proposal did not fall disproportionately upon one group in society.

Question 4

Are there any other specific comments you may wish to make?

29. This question was answered by 12 respondents. Issues raised that are not covered elsewhere in this response to the consultation include a need to make clearer the procedure and definitions in the proposal, including what constitutes a bank account; clarification of the inclusion of building societies and trusts; and that mandatory legal representation should be considered because of the draconian nature of the procedure. There were also concerns about ensuring that banks and others involved in the process receive adequate and timely fees for their work. One respondent also thought that the proposed Regulation should make clear that claimants could still use domestic procedures in situations where, for example, they wanted to freeze assets other than bank accounts. Another suggested where any competent authority for England and Wales should be sited.
30. More widely than the current proposal there were calls for the ability to convert an EAPO into an order that can be enforced and that it would be useful to have a procedure that could be used for non-conviction based asset recovery. As an alternative to the current procedure one respondent suggested that it would be better to have a proposal which would improve access to existing domestic systems from creditors in other Member States. There were also calls for an intra-UK freezing order procedure.

Part 4: Conclusion and next steps

31. In the light of the significant concerns raised in the consultation about the likely effect of the application of this proposal if it was adopted as drafted, the Government decided that it was not in the UK's interests to opt in at this stage. This decision was confirmed to Parliament by way of a Written Ministerial Statement on 31 October 2011.
32. Although the Government has decided that the UK should not opt in to the proposal now, it intends to participate fully in the negotiations with the hope that sufficient changes will be made to enable a post-adoption opt in.

Consultation co-ordinator contact details

If you have any comments about the way this consultation was conducted you should contact Sheila Morson on 020 3334 4498, or email her at:

sheila.morson@justice.gsi.gov.uk.

Alternatively, you may wish to write to the address below:

**Ministry of Justice
Consultation Co-ordinator
Better Regulation Unit
Analytical Services
7th Floor, 7:02
102 Petty France
London SW1H 9AJ**

The consultation criteria

The seven consultation criteria are as follows:

1. **When to consult** – Formal consultations should take place at a stage where there is scope to influence the policy outcome.
2. **Duration of consultation exercises** – Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
3. **Clarity of scope and impact** – Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
4. **Accessibility of consultation exercises** – Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
5. **The burden of consultation** – Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
6. **Responsiveness of consultation exercises** – Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
7. **Capacity to consult** – Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

These criteria must be reproduced within all consultation documents.

Annex A – List of respondents

1. Allen and Overy
2. Association of Chartered Certified Accountants (ACCA)
3. Bank of England
4. Berwin Leighton Paisner
5. British Bankers' Association (BBA)
6. Child Maintenance and Enforcement Commission (CMEC)
7. Citizens Advice
8. City of London Law Society Financial Law Committee
9. City of London Law Society Litigation Committee
10. Civil Court Users Association
11. Clifford Chance
12. CLS Bank
13. Commercial Bar Association
14. Committee of Scottish Clearing Banks
15. Council of Circuit Judges
16. Euroclear
17. Faculty of Advocates
18. Financial Markets Law Committee
19. Herbert Smith
20. Hogan Lovells
21. Home Office
22. HSBC
23. Information Commissioner's Office
24. Insolvency Lawyers Association
25. Insolvency Practitioners Association
26. Institute of Chartered Accountants of England and Wales
27. Institute of Chartered Accountants of Scotland

28. International Association of Restructuring, Insolvency and Bankruptcy Professionals
29. Judiciary of England and Wales
30. Judiciary of Northern Ireland
31. Law Society of Scotland
32. Linklaters
33. Lloyds Banking Group
34. Lord Chancellor's Advisory Committee on Private International Law (a number of separate responses from members)
35. Money Advice Trust
36. Mr Justice Norris
37. R3
38. Registers of Scotland
39. Scottish Court Service
40. Scottish Procurator Fiscal
41. Senior Master of England and Wales
42. Shergroup
43. Simmons and Simmons
44. Walker Love
45. William Cameron
46. Yuill Kyle

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