



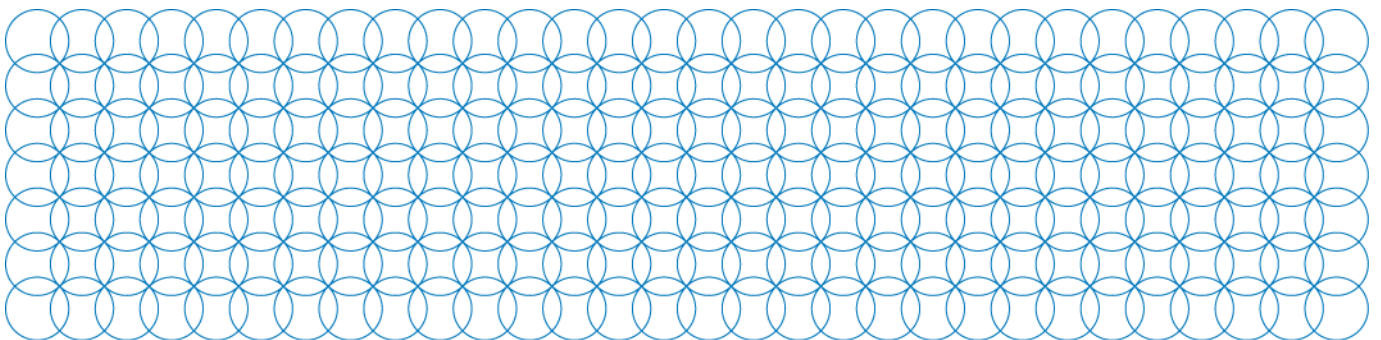
Ministry of
JUSTICE

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?

Consultation Paper CP 14/2011

This consultation begins on 3 August 2011

This consultation ends on 14 September 2011





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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?

A public consultation

A consultation produced by the Ministry of Justice. It is also available on the Ministry of Justice website at www.justice.gov.uk

About this consultation

- To:** This consultation is aimed at individuals and organisations with an interest in the creation of a European Account Preservation Order which will freeze bank accounts in EU cross-border civil and commercial cases.
- Duration:** From 3 August 2011 to 14 September 2011
- Enquiries (including requests for the paper in an alternative format) to:** Eral Knight
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- How to respond:** Please send your response by 14 September 2011 to:
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- Additional ways to feed in your views:** For further information please use the “Enquiries” contact details above.
- Response paper:** A response to this consultation exercise is due to be published by 14 December 2011 at:
<http://www.justice.gov.uk>

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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?

Introduction

1. The European Commission has published a proposed Regulation creating a European Account Preservation Order (EAPO) to facilitate cross-border debt recovery in civil and commercial matters. This consultation paper seeks views on whether it is in the UK's national interests to be a party to this Regulation, i.e. whether the UK should opt in to the proposal or not and/or be party to the forthcoming negotiations. The Commission's proposal can be found at:

http://ec.europa.eu/justice/civil/files/comm-2011-445_en.pdf

This paper also seeks views on specific provisions contained in the proposal which will be used to inform the UK's position on whether it should participate in the Regulation or not. Negotiations will commence in early September.

2. Although in the main this consultation follows the Code of Practice on Consultation issued by the Cabinet Office, the Lord Chancellor and Secretary of State for Justice has decided that a shorter consultation period than the Code provides is appropriate as the UK is required to make a decision as to whether to opt in to the proposals or not, and must make that decision within three months of publication of the proposals.
3. An impact assessment has been completed and indicates that the following groups are likely to be affected:
 - the judiciary;
 - the legal profession;
 - financial institutions holding bank accounts etc. which may be frozen by an order;
 - claimants (whether businesses or individuals) who are seeking a court judgment or other means of confirming their claim (or who have obtained such a confirmation) and wish to obtain an EAPO to freeze the defendant's bank account to the amount of that debt because they believe a defendant is likely to frustrate enforcement.
 - defendants (whether businesses or individuals) who are or will be subject to legal proceedings against them who may find their bank accounts subject to an EAPO.
4. It is probable that the proposals will lead to additional costs for some sectors and individuals. The Ministry of Justice has prepared an impact

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assessment, separate from this consultation. Comments on the impact assessment would be particularly welcome.

5. We would welcome responses to the following questions:

- 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?**

The proposed Regulation

Background

6. The European Commission published its proposal on 25 July. The aim of the proposal is to establish a self-standing European procedure for a protective measure to freeze the bank accounts of defendants in cases having cross-border implications. The proposal follows two Green Papers issued by the Commission in recent years. The first, in 2006, was on the attachment of bank accounts. The second dealt with the transparency of debtors' assets and was issued in 2008. At the time of the Green Papers there was uncertainty about whether any attachment procedure would be protective in nature only or might be extended to allow a mechanism for enforcement. This proposal is restricted to protective measures.

The proposal

7. For the purposes of this Regulation, a matter is considered to have cross-border implications unless the court considering the application for an order, all bank accounts to be preserved by the order and the parties are located or domiciled in the same Member State. 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.
8. In cases where an order is sought prior to the initiation of proceedings or before judgment but after proceedings have started, jurisdiction to make the order lies with the courts having jurisdiction for the substance of the matter or where more than one court has jurisdiction the court where the claimant has brought proceedings on the substance or where the claimant intends to bring proceedings. However the courts at the place where the bank account is located can have jurisdiction where the order is to be enforced in that Member State. The same jurisdiction rules apply to a claimant who has already obtained a judgment etc. which is enforceable in the Member State of origin but, if necessary, it has yet to be declared enforceable in the Member State of enforcement.
9. A claimant makes an application to the court with jurisdiction on a standard form without notice to the defendant unless the claimant requests otherwise. If the proceedings on the substance of the claim have not been initiated the claimant must undertake to bring them within

a stipulated period. An order will be issued by a court if the necessary requirements have been satisfied – i.e. that the claim appears to be well founded unless an enforceable judgment etc. has already been obtained; or that without an order enforcement of a 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 his/her 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. A court may require a claimant to provide a security deposit or equivalent assurance to compensate the defendant for any damage suffered.

10. 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.
11. 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.
12. 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.
13. 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.

The purpose of this paper

14. The legal basis for this proposal is Article 81(2) of the Treaty on the Functioning of the European Union (TFEU). This concerns measures in the field of judicial cooperation in civil matters having cross-border implications.
15. As this is a judicial cooperation matter, the UK's Protocol annexed to the Treaty on the Functioning of the European Union will apply. This means that the UK's participation in the revised Regulation will depend upon the UK notifying the EU of its wish to take part in the adoption and application of the proposed Regulation (known as "opt in") within 3 months of the publication. If the UK elects to opt in it will automatically be legally bound by any proposal finally adopted by the Council of Ministers and the European Parliament. If the UK elects not to opt in it will not be legally bound by the Regulation.
16. The primary purpose of this consultation exercise is to seek the views of interested individuals and organisations as to whether it would be in the national interest for the UK to opt in to the proposed Regulation published by the Commission. In view of the deadline laid down in the Protocol, the Government is now seeking views on this issue by 14 September 2011. Views are sought in particular on the potential advantages and disadvantages of the proposal and whether it would provide a satisfactory procedure for the freezing of bank accounts across EU borders.

Devolution

17. The UK consists of three separate jurisdictions: England and Wales, Scotland and Northern Ireland. Responsibility for the law in this area is devolved to each jurisdiction: in Scotland, to the Scottish Government's Justice Directorate and in Northern Ireland to the Department of Justice.

Gibraltar

18. Gibraltar, although a British Overseas Territory, is 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 opt in.

Consideration of the likely effects of the proposals

19. The Government supports measures which make 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. Therefore the Government welcomes, in principle, the Commission's proposal to create an EAPO. In particular it is 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.
20. However the Government recognises that in any such procedure there needs to be a very careful balance between the rights of creditors to recover debts and the provision of adequate protection for defendants. It is also aware of the need to limit any additional burdens on banks and other financial institutions. To that end a number of issues arise which are discussed in this paper.

Scope and Rules on Jurisdiction

Article 1
Subject matter

1. This Regulation establishes a European procedure for a protective measure which enables a creditor to obtain a European Account Preservation Order (hereinafter "EAPO") preventing the withdrawal or transfer of funds held by the debtor in a bank account within the Union.
2. The EAPO shall be available to the creditor as an alternative to existing protective measures in the Member States.

Article 2
Scope

1. This Regulation shall apply to pecuniary claims in civil and commercial matters having cross-border implications as defined in Article 3 whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.
2. This Regulation shall not apply to
 - (a) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, composition and analogous proceedings;
 - (b) social security;
 - (c) arbitration.
3. This Regulation shall not apply to bank accounts which, under the law governing immunity from enforcement of the Member State where the account is located, are exempt from seizure or to systems for the settlement of securities designated by Member States in accordance with Article 10 of Directive 98/26/EC of the European Parliament and of the Council.
4. This Regulation shall apply to matters of matrimonial property, the property consequences of registered partnerships or successions where Union legislation relating to jurisdiction, applicable law and the recognition and enforcement of decisions in these matters is applied.

Article 3

Matters having cross-border implications

For the purposes of this Regulation, a matter is considered to have cross-border implications unless the court seised with the application for an EAPO, all bank accounts to be preserved by the order and the parties are located or domiciled in the same Member State.

Article 4 (extract)

Definitions

For the purposes of this Regulation:

1. "bank account" means any account containing cash or financial instruments which is held with a bank in the name of the defendant or in the name of a third party on behalf of the defendant;
2. "bank" means an undertaking the business of which is to receive deposits or other repayable funds from the public and to grant credits for its own account;
3. "financial instruments" means a financial instrument within the meaning of point 17 of Article 4(1) of Directive 2004/39/EC of the European Parliament and of the Council;
4. "cash" means money credited to an account in any currency, or similar claims for the repayment of money, such as money market deposits;
5. "funds" means cash or financial instruments;
6. "Member State where the bank account is located" means:
 - (a) for a bank account containing cash, the Member State indicated in the account's IBAN;
 - (b) for a bank account containing financial instruments, the Member State where the bank holding the account has its habitual residence as determined by Article 19 of Regulation (EC) No 593/2008 of the European Parliament and of the Council;
7. "claim" means an existing claim for payment of a specific or determinable sum of money;

*Article 6
Jurisdiction*

1. The EAPO shall be issued by a court.
2. Jurisdiction for issuing the EAPO shall lie with the courts of the Member State where proceedings on the substance of the matter have to be brought in accordance with the applicable rules on jurisdiction. Where more than one court has jurisdiction for the substance of the matter, the court of the Member State where the claimant has brought proceedings on the substance or intends to bring proceedings on the substance shall have jurisdiction
3. Notwithstanding paragraph 2, the courts of the Member State where the bank account is located shall have jurisdiction to issue an EAPO which is to be enforced in that Member State.

*Article 36
Remedies of the defendant in the Member State of his domicile*

If the defendant is a consumer, employee or insured, he may also address the application for review under Articles 34 and 35 to the competent court in the Member State where he is domiciled to be notified to the Commission in accordance with Article 49.

Commission's proposal – Scope

21. The proposal aims to establish a self-standing European procedure which will enable a creditor to obtain an EAPO which will be a protective order to prevent the withdrawal or transfer of funds held by a defendant in a bank account located in the EU. This procedure is meant as an alternative to existing domestic procedures. It applies to claims for the payment of a sum of money but, in common with other EU instruments in the area of civil judicial cooperation it does not extend to revenue, customs or administrative matters, bankruptcy, social security or arbitration. However, it will apply to matters of matrimonial property, the property consequences of registered partnerships or successions where they are covered by EU legislation.
22. The scope is limited to cases having cross-border implications. For the purposes of this Regulation, a matter is considered to have cross-border implications unless the court considering the application for an order, all bank accounts to be preserved by the order and the parties are located or domiciled in the same Member State.

Commission's proposal - Jurisdiction

23. Under Article 6 in cases where an order is sought prior to the initiation of proceedings or before judgment but after proceedings have started, jurisdiction to make the order will lie either with the courts having jurisdiction for the substance of the matter or where more than one court has jurisdiction the court where the claimant has brought proceedings on the substance or where the claimant intends to bring proceedings. However the courts at the place where the bank account is located can have jurisdiction where the order is to be enforced in that Member State. The same jurisdiction rules apply to a claimant who has already received a judgment etc. but, if necessary, it has yet to be declared enforceable in the Member State of enforcement.

Government's preliminary assessment

24. In general the Government can support the scope of this proposal. In particular it welcomes the restriction to cases having cross-border implications as this complies with the terms of Article 81 of the Treaty on the Functioning of the European Union. It is interested to hear from those responding to this consultation how effective the definition as drafted is likely to be.
25. It believes that the scope which applies to "pecuniary claims" (Article 2) which can be for either "specific or determinable" sums (Article 4(7)) is wide enough to capture both claims for a specific sum of money as well as unliquidated claims (such as for damages) and this will increase the added value of the instrument.
26. The Government notes the inclusion within scope of matters of matrimonial property, the property consequences of registered partnerships or successions in any adopted EU Regulations in these areas. Given that the United Kingdom has not opted in to the proposals on these subjects it will want to explore how this provision will work for the UK if the UK remains out of any adopted instruments.
27. The Government is particularly interested to hear from those responding to the consultation how effective the definitions relating to types and place of accounts (as set out under Article 4) and the distinctions between cash and financial instruments are, in terms of the types of cases likely to fall within the scope of this proposal.
28. Jurisdiction provisions are considered by the Government to be an important feature in the protections afforded to defendants under the procedure. A defendant should be able to challenge an order as easily as possible – that means ideally being able to approach a court in their Member State. In many cases the courts with jurisdiction to consider the

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substance of a case will be in the same Member State as the defendant but where that is not so, in principle the Government welcomes the flexibility under Article 6 which allows the courts in the place where the bank account is located to have jurisdiction. However there will need to be clarification of how this will work in practice, for example where there are challenges to jurisdiction if more than one court is seised. In addition the Government welcomes the ability of more vulnerable defendants such as consumers to challenge orders in the courts of their Member State of domicile (under Article 36) where this is different to the Member State with jurisdiction under Article 6.

Safeguards for defendants and abolition of exequatur

Article 7
Conditions for issuing an EAPO

1. An EAPO shall be issued in the amount for which it is sought or a part thereof where the claimant submits relevant facts, reasonably corroborated by evidence, to satisfy the court of both of the following:
 - (a) that the claim against the defendant appears to be well founded;
 - (b) that without the issue of the order the subsequent enforcement of an existent or future title against the defendant is likely to be impeded or made substantially more difficult, including because there is the real risk that the defendant might remove, dispose of or conceal assets held in the bank account or accounts to be preserved.
2. Where the claimant has already obtained a judgment, court settlement or authentic instrument for the payment of a sum of money against the defendant which is enforceable in the Member State of origin and entitled to recognition in the Member State of enforcement under the applicable instruments of Union law, the condition set out in paragraph 1 (a) shall be deemed to be fulfilled.

Article 10
Ex parte procedure

The defendant shall not be notified of the application or be heard prior to the issue of the EAPO, unless the claimant requests otherwise.

Article 12
Security to be provided by the claimant

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.

Article 13

Initiation of proceedings on the substance

Where an application for an EAPO is made prior to the initiation of proceedings on the substance, the claimant shall initiate such proceedings within 30 days of the date of issue of the order or within any shorter time period set by the issuing court, failing which the order shall be revocable in accordance with point (b) of Article 34(1) or Article 35(2).

Article 14

Competence for issuing the EAPO

1. In cases referred to in Article 5(2), where the claimant has obtained a judgment or court settlement, that claimant may request that the court which issued the judgment or court settlement also issue an EAPO.
2. Where the claimant has obtained an authentic instrument, that claimant may request that the competent authority in the Member State where the authentic instrument has been drawn up and designated for this purpose by each Member State also issue an EAPO.
3. The claimant may address the application for an EAPO directly to the authority in the Member State of enforcement which that Member State has designated as competent for issuing the order and notified to the Commission in accordance with Article 48 (hereinafter "the issuing authority").
4. With regard to proceedings for issuing an EAPO as referred to in this Section, Article 10 shall apply.

Article 18

Amount of the EAPO

1. Where the EAPO was issued on the basis of a judgment, court settlement or authentic instrument enforceable in the Member State of origin, the claimant shall be able to secure the amount set out in the EAPO as well as any interest and costs specified therein.
2. In all other cases, the claimant shall be able to secure the amount of the claim as well as any interest which has accrued on the claim.

Article 19

Information about pending applications in other courts

1. When applying for an EAPO, the claimant shall disclose whether he or she has seized any other court with an application for an EAPO or an

equivalent protective measure under national law against the same defendant and aimed at securing the same claim.

2. The claimant shall inform the court seized with the application for an EAPO about any other EAPO or protective measure under national law issued pursuant to the application referred to in paragraph 1. In this case, the court or issuing authority may refrain from issuing an additional order where it considers that the measures already granted sufficiently protect the claimant's interests.

*Article 23
Abolition of exequatur*

An EAPO issued in one Member State pursuant to Article 6(2) and Article 14(1) shall be recognised and enforceable in other Member States without the need for a declaration of enforceability and without any possibility of opposing its recognition.

*Article 32
Amounts exempt from enforcement*

1. Where the law of the Member State of enforcement so provides, the amounts necessary, to ensure the livelihood of the defendant and his family, where the defendant is a natural person, or to ensure the possibility to pursue a normal course of business, where the defendant is a legal person, shall be exempt from the enforcement of the order.
2. Member States shall inform the Commission about the rules applicable under their national law in these situations, including which amounts or types of receivables held in a bank account are exempt.
3. To the extent that the amount referred to in paragraph 1 can be determined without the provision of additional information by the defendant, the competent authority of the Member State of enforcement shall determine that amount, upon receipt of the EAPO and inform the bank that that amount must be left at the disposal of the defendant following implementation of the order.
4. In determining the amount referred to in paragraph 1, the competent authority shall apply the law of the Member State by which it is designated, even if the defendant is domiciled in another Member State.

Article 34

Remedies of the defendant in the Member State of origin

1. Where the EAPO was issued pursuant to Section 1 of Chapter 2, the defendant may apply for
 - (a) a review of the EAPO on the grounds that the requirements for its issue set out in Articles 2, 6 and 7 were not met ;
 - (b) a review of the EAPO on the grounds that the claimant has failed to initiate proceedings on the substance of the matter within the time limit referred to in Article 13;
2. With the exception of a review pursuant to paragraph 1(b), the application for a review shall be made promptly, in any event within 45 days from the day the defendant was effectively acquainted with the contents of the order and was able to react.
3. The application for a review shall be addressed to the court which issued the order. The application shall be submitted using the form set out in Annex IV and by any means of communication, including electronic.
4. The application shall be served on the claimant in accordance with the applicable rules on the service of documents.
5. Where the review is justified on one of the grounds laid down in paragraph 1, the court shall give its decision setting aside or modifying the EAPO accordingly, within 30 calendar days at the latest from the service of the application to the claimant.
6. The decision to set aside or modify the order shall be immediately enforceable notwithstanding any appeal under article 37, unless the court decides, in order to protect the claimant's interests, that its decision will only be enforceable after it has become final.
7. The decision will be immediately served on the bank or banks concerned which shall immediately upon receipt implement the decision by unblocking the amount preserved fully or partially. It will also be immediately served to the claimant in accordance with the applicable rules on the service of documents.

Article 35

Remedies of the defendant in the Member State of enforcement

1. Where the EAPO was issued pursuant to Sections 1 or 2 of Chapter 2, the defendant may request that
 - (a) enforcement of the order be limited on the grounds that certain amounts in the account are exempt from enforcement under the law of the Member State where the account is located and those amounts have not or not correctly been taken into account by the competent authority pursuant to Article 32;
 - (b) enforcement of the order be terminated on the grounds that
 - (i) a judgment has been given in the Member State of enforcement which dismisses the claim the enforcement of which the claimant is seeking to secure with the order; or
 - (ii) the bank account preserved is exempt from enforcement under the law governing immunity from enforcement of the Member State where the account is located.
2. Where the order was issued pursuant to Section 1 of Chapter 2, the defendant has the right to request the order be set aside on the grounds that the claimant has failed to initiate proceedings on the substance of the matter within the time limit referred to in Article 13.
3. Where the order was issued pursuant to Section 2 of Chapter 2, the defendant may request that
 - (i) the order be set aside on the grounds that the judgment, court settlement or authentic instrument has been set aside in the Member State of origin;
 - (ii) the enforcement of the order be suspended on the grounds that the enforceability of the judgment, court settlement or authentic instrument has been suspended in the Member State of origin.
4. With the exception of a review pursuant to paragraph 2, the application for a review shall be made promptly and in any event within 45 days from the day the defendant was effectively acquainted with the contents of the order and was able to react.
5. The application shall be addressed to the competent courts of the Member State of enforcement notified by the Member States pursuant to Article 49. The application shall be submitted in paper form or by any other means of communication, including electronic using the form set out in Annex IV.

6. The application shall be served on the claimant in accordance with the applicable rules on the service of documents.
7. If the application is justified, the court shall give its decision setting aside or modifying the EAPO accordingly, within 30 calendar days at the latest from the service of the application to the claimant.
8. The decision to set aside or modify the order shall be immediately enforceable notwithstanding any appeal under Article 37, unless the court decides, in order to protect the claimant's interests, that its decision will only be enforceable after it has become final.

Article 38
Right to provide alternative security

1. The competent authority of the Member State of enforcement shall terminate the enforcement of the EAPO if the defendant provides to that competent authority a security deposit of the amount specified in accordance with paragraph 2, or equivalent assurance, including bank guarantee, as an alternative means to safeguard the rights of the claimant.
2. The EAPO shall specify the amount of the security necessary to terminate enforcement of the order.

Commission's proposal

29. The conditions for issuing an EAPO are set out in Article 7. The claimant must satisfy a court that his/her claim appears to be well founded (unless an enforceable judgment etc. has already been obtained) and that without an EAPO enforcement of a 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 their assets. 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. A creditor must make his/her application 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 (Article 12). Where an application is made prior to the initiation of proceedings if the proceedings on the substance of the claim is not initiated within 30 days of an order (or any deadline given by a court) it is revocable.
30. Any order granted can be only up to the amount of the judgment or claim plus any interest and costs (Article 18). Where there may be different orders to secure the one claim the claimant must inform the court which

will then decide whether those other orders sufficiently protect the claimant's interests (Article 19).

31. A defendant can apply for a review of an order in the Member State of origin on the grounds that the conditions for its issue were not met or because the proceedings on the substance of the matter were not initiated within the specified time. In the Member State of enforcement the defendant can request that enforcement be limited on the grounds that certain amounts that are exempt from being frozen have not been properly taken into account. The defendant can also request enforcement be terminated because a judgment has dismissed the claim or that the account is exempt from seizure. In addition, the defendant can request the order be set aside as the claimant has failed to initiate proceedings in the given time. The defendant can also request the order be set aside or enforcement of the order be suspended on the grounds that the judgment, court settlement or authentic instrument has been set aside or suspended respectively. Enforcement of an order can be terminated on the grounds that the defendant provides a security deposit for the amount specified or equivalent assurance.
32. In the light of these procedural requirements the Commission proposes (under Article 23) that an EAPO issued in one Member State shall be recognised and enforced without the need for a declaration of enforceability and without any possibility of opposing its recognition. By doing this the so called exequatur procedure for recognition and enforcement of judgments will be abolished.

Government's preliminary assessment

33. The Government recognises that there needs to be a very careful balance between the rights of creditors to recover debts and the provision of adequate protection for defendants. It is aware that the question of the rights of the defendant is particularly sensitive in this field as the freezing of bank accounts is a measure which has far reaching consequences and it is proposed that there should be automatic mutual recognition of orders. It therefore wants to ensure that the safeguards for the defendant are effective and that recourse to them is as easy as possible.
34. It welcomes the requirement of tests that need to be applied under Article 7 before an order can be issued but queries whether the real risk that the defendant might remove, dispose of or conceal assets should be the only reason, rather than one of the reasons, that an EAPO is granted for well founded claims. It also wonders whether the same test should have to be applied to applications for an EAPO where the claimant has a judgment, court settlement etc. enforceable in the Member State of enforcement.
35. It also welcomes the specific safeguards for defendants such as that only the amount of the claim together with any interest or costs should be capable of being frozen; that certain amounts should be exempt from

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execution of the order to ensure the defendant has access to sums reasonably required for living or business purposes; and the remedies that are available. However it notes that the proposal does not make it mandatory for a claimant to provide security to ensure compensation for loss to the defendant, although a court can require a creditor to pay a security deposit or an equivalent assurance. Comments on the adequacy of the proposed safeguards and views on whether a creditor should provide security would be welcome from those responding to the consultation, particularly in the light of the suggestion that *exequatur* should be abolished.

The effect on banks

*Article 26
Implementation of the EAPO*

1. A bank served with a EAPO shall implement it immediately upon receipt by ensuring that the amount specified therein is not transferred, disposed of or withdrawn from the account or accounts designated in the order or identified by the bank as being held by the defendant. Any funds exceeding the amount specified in the EAPO must remain at the disposal of the defendant.
2. Where the order is served outside business hours, it shall be implemented immediately after the beginning of the following business period.
3. Where the funds in the account designated in the EAPO pursuant to paragraph 1 consist of financial instruments, their value shall be determined by reference to the relevant market rate applicable on the day of implementation.
4. Where the currency of the funds held in the account is not the same as that in which the EAPO was issued, the bank shall convert the amount by reference to the official exchange rate of the day of implementation.
5. The bank's liability for any failure to comply with the obligations set out in this Article shall be governed by national law.

*Article 27
Declaration by the bank*

1. Within 3 working days following receipt of the EAPO, the bank shall inform the competent authority and the claimant using the form set out in Annex III, whether and to what extent funds in the defendant's account have been preserved. The competent authority shall transmit the declaration to the person or authority having requested the service pursuant to Article 24(3)(a) within 1 working day.
2. Where the account balance is sufficient to cover the amount specified in the EAPO, the bank shall not disclose the balance of the defendant's account.
3. The bank may transmit its declaration by secured electronic means of communication.
4. The liability of the bank for failure to comply with this obligation shall be governed by national law.

Article 29
Preservation of joint and nominee accounts

Accounts, which are not exclusively held by the defendant or accounts held by a third party on behalf of the defendant or accounts held by the defendant on behalf of a third party, according to the bank's records, may be preserved only to the extent they are able to be preserved under the rules of national law governing the account to be notified to the Commission in accordance with Article 48.

Article 30
Costs relating to the banks

1. A bank shall only be entitled to seek payment or reimbursement of the costs incurred by the implementation of the EAPO or of an order pursuant to Article 17(4)(a) where it is entitled to such payment or reimbursement in respect of orders with equivalent effect which are issued under national law.
2. Fees charged for the implementation of the EAPO or of an order pursuant to Article 17(4)(a) shall correspond to single fixed fees which are determined in advance by the Member State where the account is located and which respect the principles of proportionality and non-discrimination.
3. Member States shall communicate to the Commission in accordance with Article 48 whether banks are entitled to recover their costs and, if so, the amount of the fee pursuant to paragraph 2.

Article 32
Amounts exempt from enforcement

1. Where the law of the Member State of enforcement so provides, the amounts necessary, to ensure the livelihood of the defendant and his family, where the defendant is a natural person, or to ensure the possibility to pursue a normal course of business, where the defendant is a legal person, shall be exempt from the enforcement of the order.
2. Member States shall inform the Commission about the rules applicable under their national law in these situations, including which amounts or types of receivables held in a bank account are exempt.
3. To the extent that the amount referred to in paragraph 1 can be determined without the provision of additional information by the defendant, the competent authority of the Member State of enforcement shall determine that amount, upon receipt of the EAPO and inform the

bank that that amount must be left at the disposal of the defendant following implementation of the order.

4. In determining the amount referred to in paragraph 1, the competent authority shall apply the law of the Member State by which it is designated, even if the defendant is domiciled in another Member State.

Article 33
Ranking of competing creditors

The EAPO confers the same rank as an instrument with equivalent effect under the law of the Member State where the bank account is located. Member States shall inform the Commission about the equivalent instruments and the rank conferred by those instruments in accordance with Article 48.

Commission's proposal

36. The Commission proposes that banks should implement orders immediately upon receipt or, if received outside of business hours, immediately at the start of the next business period. A bank should then declare within three working days whether and to what extent the account has been preserved. The value of financial instruments or any funds in a currency other than that in which the order was issued will be determined by reference to the relevant market or official exchange rate applicable on the day of implementation (Article 26). A number of issues are left to the application of the national law of the Member State of enforcement including the liability of banks when complying with the obligations of implementing the orders and sending necessary declarations (Articles 26 and 27), the treatment of joint accounts (Article 29), whether banks can charge for the process (Article 30), amounts that are exempt from being frozen (Article 32) and the ranking of creditors (Article 33).
37. Where banks are able to seek payment or reimbursement of the costs incurred by the implementation of the EAPO there should be single fixed fees which are determined in advance by the Member State where the account is located and which respect the principles of proportionality and non-discrimination (Article 30).

Government's preliminary assessment

38. The Government understands the advantages of leaving as many matters as possible to national law as this should minimise the administrative burdens on banks by ensuring that they do not have to apply the laws or practices of countries with which they are not familiar.

The more that this procedure is aligned with domestic procedures the easier it will be for banks, courts and the legal profession to administer.

39. It is aware that in England and Wales courts can order reasonable costs to be paid to banks for provision of their services when freezing an account but that this is decided on a case by case basis. It welcomes the fact that banks will be able to seek payment of their costs for such services but notes that only single fixed fees will be allowed under this proposal. It also notes that the proposal does not clarify whether separate fees can apply if more than one account needs to be frozen.
40. The Government is also aware that the proposal does not mention other issues such as any general liability of banks to defendants and whether a creditor should provide undertakings to meet any possible liability incurred regarding an EAPO. The proposal is also silent on whether accounts held by an EU bank outside of the EU might be affected and recognises that there needs to be a provision to ensure banks are notified when an order ceases to have effect. It will be particularly interested in the views of banks and other financial institutions about the provisions directed to them.

Disclosure of account information

Article 17

Request for obtaining account information

1. Where the claimant does not dispose of all the account information required pursuant to Article 16, that claimant may request that the competent authority of the Member State of enforcement obtain the necessary information. Such request shall be made in the application for an EAPO.
2. The application shall include all information available to the claimant about the defendant and the defendant's bank accounts.
3. The court or issuing authority shall issue the EAPO pursuant to Article 21 and transmit it to the competent authority in accordance with Article 24.
4. The competent authority shall use all appropriate and reasonable means available in the Member State of enforcement to obtain the information referred to in paragraph 1. Once that information is obtained, the competent authority shall serve the EAPO on the bank in accordance with Article 24.
5. The methods of obtaining information under national law to be provided to the Commission pursuant to Article 48 shall be one of the following:
 - (a) the possibility to oblige all banks in their territory to disclose whether the defendant holds an account with them.
 - (b) access by the competent authority to the information referred to in paragraph 1 where that information is held by public authorities or administrations in registers or otherwise.
6. Information referred to in paragraph 4 shall be adequate for the purpose of identifying the defendant's account or accounts, relevant and not excessive and be limited to
 - (a) the defendant's address,
 - (b) the bank or banks holding the defendant's account or accounts,
 - (c) the defendant's account number or numbers.

Commission's proposal

41. A claimant is required to provide information on the defendant and his/her bank account or accounts to enable the bank or banks to identify the defendant. However the claimant can, under Article 17, request that the competent enforcement authority of the Member State of enforcement use all appropriate and reasonable means to obtain this information. Member States must ensure that there is a mechanism to either oblige banks in the territory to disclose whether the defendant holds an account with them or to allow the competent authorities to access account information held in registers or otherwise by public authorities or administrations.

Government's preliminary assessment

42. The Government recognises the value to creditors of such information being available but wants to explore further the options for providing the information, especially bearing in mind the likely burden on banks, the extra costs for the State and data protection considerations for defendants. It would be interested to hear from those responding to this consultation in what ways such information might be provided in the UK.

Conclusion

The Government recognises the potential added value of an instrument in this area which creditors can choose to use in appropriate cases. As such it may be a useful tool that will facilitate the workings of the internal market. This consultation paper highlights issues about scope and jurisdiction, the safeguards for defendants, the effect on banks and the disclosure of information. However the Government will welcome comments on any aspects of the proposal and will consider carefully the views of those consulted.

Questionnaire

We would welcome responses to the following questions set out in this consultation paper.

- 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?**

Thank you for participating in this consultation exercise.

About you

Please use this section to tell us about yourself

Full name	
Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
Date	
Company name / organisation (if applicable):	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box	<input type="checkbox"/> (please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

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?

Contact details / How to respond

Please send your response by 14 September 2011 to:

**Eral Knight
Ministry of Justice
International Directorate
6th Floor
102 Petty France
London SW1H 9AJ**

**Tel: 020 3334 3843
Email: european.policy.unit@justice.gsi.gov.uk**

If you are replying from Scotland, please copy your response to:

Sharon Bell
Accountant in Bankruptcy
1 Pennyburn Road
Kilwinning
KA13 6SA

If you are replying from Northern Ireland, please copy your response to:

The Consultation Co-ordinator
Civil Policy and Tribunals Reform Division
Northern Ireland Courts and Tribunals Service
Laganside House
23-27 Oxford Street
Belfast BT1 3LA

e-mail: policyandlegislation@courtsni.gov.uk

Extra copies

Further paper copies of this consultation can be obtained from the Ministry of Justice and it is also available on-line at <http://www.justice.gov.uk/index.htm>.

Alternative format versions of this publication can be requested from: Eral Knight, Tel: 020 3334 3843, Email: european.policy.unit@justice.gsi.gov.uk

Publication of response

A paper summarising the responses to this consultation will be published within three months of the closing date of the consultation. The response paper will be available on-line at <http://www.justice.gov.uk/index.htm>.

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Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry.

The Ministry will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

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Impact Assessment

A partial impact assessment has been included as a separate document to this consultation exercise.

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.

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Consultation Co-ordinator contact details

Responses to the consultation must go to the named contact under the How to Respond section.

However, if you have any complaints or comments about the consultation **process** you should contact the Ministry of Justice consultation co-ordinator at consultation@justice.gsi.gov.uk.

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

**Better Regulation Unit
Corporate and Access to Justice Analytical Services
7th Floor, Pillar 7:02
102 Petty France
London
SW1H 9AJ**

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