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European Asset Protection Orders: the good, the bad and the costly

The European Commission has published a proposal for a "European Account Preservation Order". This will allow courts in one EU member state to freeze a defendant's bank accounts (both cash and securities) in another EU member state pending a decision on the substance of the dispute. The aim of the Order is to assist in the recovery of cross-border debts by ensuring that the defendant's assets remain available to satisfy a judgment - assuming, of course, that the claimant is successful. Whether the Commission's plans will achieve its laudable aim is doubtful. It is, however, beyond doubt that the Commission's plans will impose considerable burdens on banks, the courts and on the UK Government. Are the supposed gains sufficient to justify the costs? The Government will have to weigh the benefits and burdens quickly because the UK has three months to decide whether to opt in to the Commission's proposal or to stand aside.

"European Commission to help businesses and consumers recover cross-border debts" boasts the Commission. This assistance will come, the Commission says, from its proposal for a regulation to create a European Account Preservation Order (EAPO) to facilitate cross-border debt recovery in civil and commercial matters (COM(2011) 445).

This proposal will allow courts in one country to freeze a defendant's bank accounts in another country. An EAPO would be made on the claimant's filing a form at court, without any notice to the defendant. The order would be formally transmitted to the authorities in the country where the defendant's bank accounts are situated, and from there to the bank. The bank would be required immediately to freeze sums up to the amount specified in the EAPO, and to notify the claimant that it had done so. The sums frozen would be held by the bank until the end of the substantive proceedings, thus being available for the claimant as and when it obtained judgment.

The aim of an EAPO is therefore to prevent defendants hiding assets from a deserving claimant during the, often lengthy, course of legal proceedings. The test for obtaining an EAPO does not require the defendant to have any intention to hide its assets; it is enough that enforcement would be substantially more difficult if assets were not frozen. It seems that the Commission intends EAPOs to become a regular tool of cross-border debt collection. But not all claimants are deserving, and so the Commission's proposal builds in some protections for the defendant. The underlying assumption in the proposal is, however, that claimants are worthy and innocent, while defendants are wily schemers, perpetually plotting to evade their obligations.

But can the Commission really achieve the benefits it claims? The Commission contends that business will gain €600 million per year from its proposal. The alchemy required to achieve this figure is discussed in Annex I to this briefing. The best that can be said about it is that the figure is exaggerated.

The UK has a choice whether to opt in to the Commission's proposal. The Government must balance the possible gains from EAPOs against the undoubted costs that will flow from them. In this regard, and even aside from the putative financial gains from EAPOs:

- The uncertainties at the heart of Commission's proposal, particularly over what constitutes a "bank" and a "bank account" and what law applies to various aspects of the proposal, will create uncertainty.

Key Issues

- **Courts in one country would be able to freeze bank accounts in another**
- **Claimants will be able to ask banks if they hold accounts for the defendant**
- **Derivatives contracts may count as bank accounts**
- **Banks can charge for implementation but recovering those charges may be hard**
- **Jurisdiction and the laws governing the procedure are very uncertain**
- **UK consultation on whether to opt in closes on 14 September 2011**

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- The requirement for the Government to ask banks to reveal who holds accounts with them is impracticable.
- The cost, both to UK banks and to the UK government, will be significant, with no obvious means of collecting fees from claimants.
- As the EU's largest banking and financial centre, the UK could be particularly burdened by EAPOs, with a significant impact on the banking industry.
- The requirements and procedures for granting EAPOs are alien to the common law tradition, and offer little protection to defendants.
- The UK already has, in freezing injunctions, a satisfactory way of protecting claimants who need protection. The efficiency of the freezing injunction will be enhanced with the Commission's proposal to amend the Brussels I Regulation to allow ex parte orders to be recognised and enforced in other EU member states.
- If, as looks to be the Commission's aim, EAPOs are granted with minimal requirement for proof that the defendant is actually seeking to evade its debts, EAPOs could actually discourage cross-border purchases by SMEs for fear of the damage an EAPO could do to an SME's business.
- If EAPOs do in practice work efficiently and well, the UK can in practice opt in at a later stage.

These issues are explored further below, but the question for the UK is whether it should take a leap into the unknown by opting in to the Commission's proposal, or whether it should wait and see whether the proposal, as implemented, actually works. The Government has issued a consultation paper asking what it should do. The deadline for responses is 14 September 2011.

Should the UK take a leap into the unknown by opting in to the Commission's proposal, or should it wait and see whether the proposal, as implemented, actually works?

Beyond the supposed financial gains, the Commission's justification for EAPOs rests on the homely anecdotes in the Impact Assessment and in the Commission's FAQs. These are discussed in Annex II to this briefing.

We turn now to the detail of the Commission's proposal.

Who will be able to obtain an EAPO?

In order to obtain an EAPO, a claimant must have a "pecuniary claim" (proposed article 1(2)). For these purposes, a claim is "an existing claim for payment of a specific or determinable sum of money" (proposed article 4(7)). This seems to mean that the claimant must either have a debt claim or have already obtained judgment. A claim for damages in tort may not suffice until it has been quantified in a judgment. A proprietary claim in, for example, fraud is clearly outside the scope of the proposed regulation.

Box 1
The requirements for an EAPO

"An EAPO shall be issued… 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 well founded;

(b) that without the issue of the order the subsequent enforcement of an existent or future title [ie judgment] against the defendant 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 held in the bank account or accounts to be preserved." (proposed article 7(1))

The claim must also be in a civil or commercial matter, excluding insolvency and arbitration, or in a matter of matrimonial property or succession (proposed article 2).

In addition, the claim must have cross-border implications, but all claims are deemed to do so unless the court seised, the parties and all bank accounts are located in the same country (proposed article 3). The cross-border requirement does, however, mean that EAPOs will not be available for the vast majority of credit card, overdraft and other bulk claims.

What will the requirements for an EAPO be?

The two requirements for obtaining an EAPO are set out in Box 1.

If a claimant already has a judgment, the first of these requirements is automatically fulfilled (proposed article 7(2)), but what the test means before judgment is obtained is less clear. Realistically, however, the threshold will not be high. The Commission's application form (in Appendix I to the proposed Regulation) anticipates the claimant presenting "relevant facts, reasonably corroborated by evidence", but the court cannot test the evidence. Little more than the assertion of the existence of a debt is likely to be enough in most cases.

The second requirement also presents a low hurdle. The test is not that the defendant will conceal assets in order to evade a judgment. The test is not even that the defendant will conceal assets with the result that enforcement of a judgment will harder - that is only one example of the circumstances in which the test might be met. The test is only whether the absence of an EAPO will impede enforcement of a judgment or make enforcement substantially more difficult.

It is self-evident that enforcement of a judgment will be substantially more difficult if the claimant has to search for assets after it has obtained judgment than if the claimant has already frozen the requisite money in a bank account. This might not be the case if the defendant is a large company that, in practice, cannot disappear, but the Commission evidently anticipates that an EAPO will be granted as a matter of routine for any

debt claim against, for example, an SME. This might discourage SME's from buying from other EU countries, rather than encourage cross-border trade. Why would someone in the UK buy from Mr Kaminski in Poland (see Annex II) if any dispute over the quality of his cupboards is likely to mean the freezing of bank accounts when that will not be the case with domestic purchases?

The wrongful grant of an EAPO could cause significant damage to the defendant. As a result, the court issuing an EAPO "may require the provision of a security deposit or an equivalent assurance… to ensure compensation for any damages suffered by the defendant to the extent that the claimant is liable to compensate such damage under national law" (proposed article 12). No guidance is given in the proposed regulation as to when the court should require security - should it be the norm or only in exceptional circumstances? - or the sum in which security should be given. Nor is it entirely clear what national law is referred to, but it is presumably the law of the court granting the EAPO. Thus accounts in member state B could be frozen by courts in member state A, causing the defendant substantial damage in state B, but the defendant will only be able to secure compensation if allowed by the courts of member state A.

What courts will be able to grant an EAPO?

An EAPO can be granted by one of two courts:

- the courts with jurisdiction over the substance of the dispute between the claimant and the defendant or, where more than one court has jurisdiction over the substance, the court in which the claimant has brought or intends to bring proceedings, or
- the member state where a particular bank account is located (proposed articles 6(2) and (3)).

The court with jurisdiction over the substance of the claim can grant an EAPO over any bank account in the EU. Another court can only grant an EAPO over a bank account within its jurisdiction.

There will be a lot of litigation arising from the inter-relation of the Brussels I Regulation and the EAPO regulation.

The issue of whether a court has jurisdiction over the substance of a dispute is often not straightforward. For defendants domiciled in the EU, jurisdiction will be determined by the Brussels I Regulation. If two courts have or may have jurisdiction, the tie-break in the Brussels I Regulation is that the court first seised must go ahead to determine whether it has jurisdiction and, if so, to decide the case; all other courts must await the decision of the court first seised. As a result, parties commonly start pre-emptive proceedings in their favoured court, in order to prevent proceedings from going ahead in the other's preferred venue.

It is possible that one party (X) may have started pre-emptive proceedings against the other party (Y) without Y knowing. If Y then goes to its preferred venue and obtains an EAPO, X may find its bank accounts frozen, but Y may also find the EAPO set aside under proposed article 34(1)(a) because its preferred court turns out not have jurisdiction. Y may have to bear the costs of setting aside the EAPO (proposed article 42), and may also have to pay damages to X if the national law of the court that granted the EAPO gives X a remedy in these circumstances. What is certain is that if EAPOs are used to any significant extent, there will be a lot of litigation arising from the inter-relation of the Brussels I Regulation and the EAPO regulation.

What will the effect of an EAPO be?

An EAPO could have one of a number of legal consequences. For example, an EAPO could confer on the successful applicant a security interest in the bank account frozen, or it could simply freeze the relevant sum without giving the applicant any priority over other creditors. The Commission's proposal does not provide a uniform solution to this issue. Instead, proposed article 33 states that an 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 will be required to inform the Commission what that ranking is.

The effect of an EAPO will, therefore, differ throughout the EU. In England, the "instrument with equivalent effect" is a freezing injunction. A freezing injunction does not confer on the applicant a proprietary interest or any other form of priority over other creditors. A freezing injunction simply ensures that an asset is not moved so that, if the claimant obtains judgment, it can then use conventional means to enforce the judgment against the asset frozen, at which point priorities will be determined. In other member states, the grant of an EAPO could confer an automatic security interest, giving immediate priority over other creditors.

How will an application for an EAPO be made?

The effect of an EAPO might not be uniform across the EU, but the manner of application for an EAPO is intended to be the same in all EU member states. An application must be made on an ex parte basis (ie without notifying the defendant: proposed article 10), and must use the standard form set out in Annex I to the proposed regulation (proposed article 8(1)). Further, an application may be submitted by any means of communication, including electronic (proposed article 8(4)); how this will work in courts that do not have systems to handle applications electronically is not clear.

The court is required initially to consider an application on paper, and to give a decision within seven calendar days of the application being lodged (proposed article 21(3); the period is three calendar days if the applicant has already obtained judgment (proposed article 21(5)). If the applicant does not provide sufficient evidence or other material to convince a court to issue an EAPO, the court is required to give the applicant the opportunity to complete or rectify its application, unless the application is clearly unfounded (proposed article 9(2)).

The claimant does not seem to have a duty of full and frank disclosure of all material information in the same

way that a party applying to the English courts for a freezing injunction without notice to the defendant has a duty to tell the court all material facts, whether or not helpful to the applicant. The claimant can therefore put its arguments to the court in order to obtain an EAPO, with no automatic consequences for failing to give the court the full picture. This creates a high risk that EAPOs will be granted in inappropriate circumstances.

Only in exceptional circumstances can the court hold an oral hearing, in which case the court must "convene the hearing" within an additional seven days (this presumably means that the hearing must take place within this seven days rather than that the date for the hearing must be set within seven days), and then has another seven days after the hearing to give judgment (proposed article 21(4)).

The court has no discretion whether or not to issue an EAPO. If the requirements for issue are met, the court "shall issue an EAPO" (proposed article 21(1)).

What accounts will be caught by an EAPO?

EAPOs are targeted at bank accounts. For these purposes, a "bank" is defined as "an undertaking the business of which is to receive deposits from the public and to grant credits for its own account" (proposed article 4(2)). Most bank groups will contain entities that receive deposits from the public (though not, perhaps, all investment banks), but they may also contain other affiliates through which securities trading is carried out. Does the definition apply to the group - the economic enterprise as a whole - or to an individual company? Is it necessary for the "bank" to accept deposits from the public in the member state in which the "account" is held? Is a "deposit" for these purposes just a cash deposit, or does it extend to other accounts covered by EAPOs?

The definition of a "bank account" extends beyond what would conventionally be regarded as a bank account (containing cash; in strict legal terms, a debt owed by the bank to its customer). A "bank account" includes an account containing "financial instruments" (proposed article 4(1)). "Financial instruments" are defined by reference to article 4(1)(17) of MiFID (Directive 2004/39/EC), which in turn points to Section C of Annex I of MiFID and which is set out in Box 2. This definition includes transferable securities (eg shares and bonds), money market instruments (eg CDs) and many derivatives (including some physically settled derivatives). The explanation given by the Commission for targeting bank accounts is “their high net value (no need for a realisation of assets)” and “the transferability of funds on bank account (sic)” (Impact Assessment, page 14). Neither of these explanations is applicable to an account holding financial instruments. Why EAPOs should extend to financial instruments is, therefore, obscure even on the Commission’s logic.

A broad range of banking activities could, therefore, be caught by an EAPO - unless significance is accorded to the word "account". If a bank enters into an interest rate swap with a customer, that would not normally be

Box 2
Financial Instruments caught by EAPOs (Section C of Annex I of MiFID.)

(1) Transferable securities;

(2) Money-market instruments;

(3) Units in collective investment undertakings;

(4) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to securities, currencies, interest rates or yields, or other derivatives instruments, financial indices or financial measures which may be settled physically or in cash;

(5) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to commodities that must be settled in cash or may be settled in cash at the option of one of the parties (otherwise than by reason of a default or other termination event);

(6) Options, futures, swaps, and any other derivative contract relating to commodities that can be physically settled provided that they are traded on a regulated market and/or an MTF;

(7) Options, futures, swaps, forwards and any other derivative contracts relating to commodities, that can be physically settled not otherwise mentioned in C.6 and not being for commercial purposes, which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are cleared and settled through recognised clearing houses or are subject to regular margin calls;

(8) Derivative instruments for the transfer of credit risk;

(9) Financial contracts for differences.

(10) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to climatic variables, freight rates, emission allowances or inflation rates or other official economic statistics that must be settled in cash or may be settled in cash at the option of one of the parties (otherwise than by reason of a default or other termination event), as well as any other derivative contracts relating to assets, rights, obligations, indices and measures not otherwise mentioned in this Section, which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are traded on a regulated market or an MTF, are cleared and settled through recognised clearing houses or are subject to regular margin calls.

referred to as a "bank account", still less "an account containing cash or financial instruments which is held with a bank in the name of the defendant" (proposed article 4(1)). Principal to principal transactions may, therefore, arguably be outside the scope of a "bank account", but this, like many of the definitions at the core of the Commission's proposal, is unclear.

The extent of the instruments potentially caught by an EAPO is therefore uncertain. Coupled with the uncertainty over what a "bank" is, there will be considerable ambiguity over the application of an EAPO. This is profoundly unsatisfactory. If obligations are to be imposed on banks with potentially penal or other financial consequences for breach (see below), who and what is subject to the obligation must be spelt out with as much clarity as possible. The proposed regulation is anything but clear.

Identifying bank accounts

When a claimant wants to obtain an EAPO, it must provide the full name of the defendant, the name of the bank where the account is held and the address of the bank's headquarters in the member state where the account is located, plus one or more of the account numbers, the defendant's full address, the defendant's date of birth or national identity or passport number, or the defendant's number in the corporate register (proposed article 16).

But what if a prospective claimant does not know where its defendant banks? The Commission offers a solution, but a solution that will place huge burdens on banks and the UK Government. Under proposed article 17, a claimant would be able to ask the authorities of each EU member state to provide details of any accounts held by the defendant. The authorities must use "all appropriate and reasonable means available" in that member state to obtain the information. As far as the UK is concerned, the trail might stop at that point because the Government cannot currently compel banks to provide account details of its customers. But proposed article 17(5) goes on that the methods of obtaining information under national law shall be either access to a central register of bank account information or obliging banks to disclose whether the defendant holds an account with them.

Unlike some EU member states, the UK has no central register of bank accounts. The UK must, therefore, employ the second of the Commission's two methods, ie it must compel a bank to disclose whether someone holds an account with that bank. The Commission's proposed regulation does not itself impose this obligation on banks, and so the UK Government would have to pass legislation for that purpose. All the Commission's proposed regulation says is that once a member state has obtained the information from a bank, it must serve the EAPO on the bank.

As a result, under the Commission's proposal the Government will receive requests from courts in other EU member states for bank account information, and will have to contact every bank operating in the UK to ask whether the defendant has an account with that bank. The FSA publishes a list of banks operating in the UK, which includes well over 200 banks authorised to accept deposits in the UK (on top of this, there is another almost 50 building societies). Even with a fee as low as £50 per bank, this would cost the claimant well over £10,000, which might come as a shock to the claimant, especially as the Commission considers that the average amount frozen by EAPOs will be €20,000 (see Annex I to this briefing). It is hard to see this as an efficient or sensible mode of business, even if the Government already had an infrastructure that could handle these requests.

Can it really be intended that the UK authorities must ask 200 plus banks whether they hold an account for the defendant?

Even if a claimant could restrict its request for information to the far smaller number of high street banks, at which the vast majority of defendants will hold their accounts, that would place considerable, and unfair, burdens on those banks. EAPOs should not expose banks to costly fishing expeditions by claimants to find out where a defendant holds its bank accounts.

How will an EAPO be served?

An EAPO must be transmitted from the court making the order to the bank that is to freeze the defendant's accounts. If the bank is in the state whose courts have granted the EAPO, service on the bank is effected in accordance with national law (proposed article 24(2)). If the bank is in another member state, service must be effected in accordance with the EU's Service Regulation (1393/2007/EC), as adapted by proposed article 24(3). This requires the "competent authority" in the state whose court granted the EAPO to serve the necessary documents on the competent authority in the other state. The documents must include a translation or transliteration of the order, which, as the Commission acknowledges, will impose costs on the claimant. A translation is required to be done by a "person qualified to do translations in one of the Member States" (proposed article 47(3)).

Once the competent authority in the member state in which the bank is located has received the documents, it must take all steps necessary to effect service within three working days of receipt (proposed article 24(3)(c)), far quicker than service is usually effected under the Service Regulation. Once the authority has taken these steps, it must draw up a certificate of service.

The Commission acknowledges in the Impact Assessment that this will impose costs on the member states, but argues that these will be limited to training and similar start-up costs. That might be so for member states with established systems of bailiffs but it will not be the case for jurisdictions, such as England & Wales, with no such systems. For jurisdictions like England, the costs will be higher and will continue. Member states can charge for their services, but how these charges will be recovered is not clear (see below).

What must a bank receiving an EAPO do?

When a bank receives an EAPO, it is not given any time to locate accounts held by the defendant. An EAPO must be implemented "immediately" (proposed article 26(1)) or, if service is outside business hours, immediately at the beginning of the next business day (proposed article 26(2)). This assumes that banks have a single database in which to check whether a defendant holds accounts with them and, if so, and to freeze those accounts. Particularly in the light of the banking mergers of recent years, this is often not the case. Checking even a single database inevitably takes some time; checking multiple databases can take considerably longer.

Implementation of an EAPO is not confined to any accounts specified in the EAPO but extends to other accounts identified by the bank as being held by the defendant. No explanation is given as to what a bank should do if an EAPO specifies an account number but the account holder for that account denies that the account has anything to do with the defendant.

A bank receiving an EAPO must freeze the defendant's accounts "immediately".

Sums up to the amount specified in the EAPO must be frozen. Where the account contains financial instruments, their value is to be determined by the market price on the day of implementation (proposed regulation 27(3)). The market risk is, therefore, placed on the claimant. So, for example, an out of the market option might have a value on the day of implementation, but that value will inexorably diminish as the exercise date nears (assuming it stays out of the money). It is also not clear what the bank must do if a sum becomes payable on a financial instrument or an option exercisable. Does the payment also need to be frozen or is can it be paid to the defendant even though the payment will inevitably reduce the value of the instrument, though perhaps not below the value of the EAPO? Can an option be exercised?

Where the account is in a different currency, the bank "shall convert the amount by reference to the official exchange rate on the date of implementation" (proposed article 27(4)). What the "official exchange rate" might be is not explained. In any event this does not, presumably, require the bank actually to convert the account (though the wording is ambiguous) but only to do a theoretical conversion to ensure that it is not freezing too much. Funds exceeding the amount specified in the EAPO must remain at the disposal of the defendant (proposed article 26(1)), though how this works for, say, a derivatives contract is obscure.

If a single bank has, say, a currency account and a financial instruments account each of which exceeds the amount of the EAPO, there is no indication as to who chooses which account is to be frozen. The only guidance is that the "bank shall implement [the EAPO] up the amount specified" (proposed article 28(1)), which indicates that the bank must choose - the bank cannot consult the defendant, who will not know about the EAPO at the time. The basis upon which the bank should make its decision is not clear, nor whether the bank could have any liability to either the claimant or the defendant if it freezes assets that decline in value. Can a defendant later switch frozen accounts?

Within three working days of the receipt of an EAPO, the bank must inform both the competent authority and the claimant (how?) whether and, if so, in what amount the defendant's assets have been frozen. If the claimant has served EAPOs or equivalent orders (eg an English freezing injunction) on a number of banks, and the total sum frozen exceeds the amount specified in the EAPO, the claimant must release the excess within 48 hours of discovering that an excess had been secured (proposed article 28(2)). The claimant therefore has a choice as to which assets it retains. The release must be effected through the competent authority in the state where the bank is located - more work for the Government. Will the claimant be liable to the defendant if it fails to release accounts in time?

If a bank fails to comply with an obligation with regard to an EAPO, the bank's liability is governed by national law (proposed article 26(5)). The Commission's proposal does not say whether this means the national law of the country in which the relevant bank account is located or the national law of the court making the EAPO, but it is presumably the former. In England, a bank has no liability to the claimant in the tort of negligence (*Customs & Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181), but a deliberate failure to comply with the order could constitute contempt of court, punishable by a fine or other punishment. If a bank freezes an account it should not have frozen, it will undoubtedly be liable to the account holder.

If the rights of a bank or other third party are prejudiced by the grant of an EAPO (eg it cannot exercise set-off rights), it can "raise objections" with either the court that granted the EAPO or the court for the state in which the bank account is situated (proposed article 39). The proposed regulation does not say what the court hearing the "objections" can do, but presumably the court can vary or waive the EAPO if it agrees that the bank's rights, or the rights of anyone else, are being prejudiced. The basis upon which the court is to make this decision is not clear, but since the effect of an EAPO is a matter of the national law of the place of the account, it is presumably that law that must be applied. Far better to provide, as freezing injunctions do, that an EAPO does not prejudice a bank's pre-existing rights.

It is unclear whether the right to raise "objections" extends to asking for greater clarity as to what an EAPO means - does it require a bank to freeze this "account" or that? is the person served a bank? For clarification to avoid possible liability, a bank or other third party may have to go to the court that granted the EAPO. Further, the ambiguity in the proposed regulation is such that different courts could reasonably take different approaches to the regulation, and might feel it necessary to refer questions to the Court of Justice of the European Union. What approach the CJEU would take is anyone's guess, but it seldom acts with haste.

What protection does a defendant receive?

The first a defendant is likely to find out about an EAPO is when it tries to draw on a bank account only to find that it cannot do so. An EAPO must be served on a defendant "without undue delay" but only after service on the bank and after the bank has declared whether and to what extent it holds funds (proposed article 25(1)). The bank has three working days to make this declaration (proposed article 27(1)).

If a defendant wishes to challenge the order, it must apply for a "review" of the decision to grant an EAPO within 45 days of the day when the defendant was "effectively acquainted" with the contents of the EAPO and was able to react (proposed articles 34(1) and (2); the defendant can apply later if circumstances have changed (proposed article 40)). The application for a review must be made on a standard EU form (proposed article 34(3)), and is intended to be dealt with by the court on paper alone since there is no provision for an oral hearing.

The court has 30 calendar days from service of the defendant's application on the claimant to give its response (proposed article 34(5)), a leisurely timetable when compared to the haste with which courts must deal with the claimant's application. This presumably reflects the Commission's view of the relative merits of claimants and defendants. Unlike the claimant's application form, the defendant's review form does not even seem to contemplate that the defendant will provide evidence, though a defendant must surely be able to do so.

Unless the defendant is a consumer, an employee or an insured, the application for review must be made to the court that granted the EAPO; these protected species can apply to the courts of the EU member state in which they are domiciled (proposed articles 34(3) and 36). In addition to protecting these supposedly weaker parties by allowing them recourse to their local courts, the principal exception to the general rule that an application for review of an EAPO must be made to the court that granted the order is where the claimant fails to issue substantive proceedings within the 30 day time limit in proposed article 13. In that case, the defendant can instead apply to the courts in the state where the relevant bank account is situated (proposed article 35(2)). This provision, the provisions protecting weaker parties and the provisions about third parties' objections could bring about a situation of a court in one country setting aside an EAPO made by a court in another. There is, however, nothing to say that a claimant cannot immediately apply to the original court for another EAPO. What should third countries do?

The grounds upon which an EAPO can be set aside are that the EAPO fell outside the scope of the proposed regulation (eg it relates to bankruptcy or arbitration), the court that granted the EAPO had no jurisdiction to do so, the criteria for granting an EAPO were not met, or the claimant has not started substantive proceedings within 30 days (proposed articles 13 and 34(1)). The application form also allows a defendant to request that the claimant be ordered to provide security or a higher sum by way of security.

Can a defendant pay for food and shelter?

The proposed regulation also introduces the concept of "amounts exempt from enforcement", which are to be determined by reference to the law of the location of the bank account (proposed article 32). These amounts are those necessary "to ensure the livelihood of the defendant and his family… or to ensure the possibility to pursue a normal course of business" (proposed article 32(1)).

The Commission views decisions as to how much a defendant should be allowed to spend as an administrative, rather than a judicial, matter. Each member state is required to inform the Commission of the "amounts or types of receivables held in a bank account [that] are exempt" (proposed article 32(2)). The state authority responsible for effecting service of an EAPO on a bank must then inform the bank of the "amount that must be left at the disposal of the defendant following implementation of the order" (proposed article 32(3)). As a result, a bank will receive an EAPO, but also a covering letter saying that the EAPO does not apply to a certain amount of money in the account or to certain types of receivable.

It is right that an EAPO should not operate to starve a defendant into submission by denying him or her the ability to buy food or pay housing costs. Similarly, a company should not have its business shut down by an EAPO. However, for English freezing orders, this is a matter for the judge, not for a bureaucrat. The English courts have decided that the money available should be sufficient to cover "ordinary, recurrent expenses in maintaining the subject of the injunction in the style of life to which he is reasonably accustomed" (*TDK v Videochoice* [1986] 1 WLR 141, 146B). "[T]he purpose of a freezing injunction is not to interfere the defendant's ordinary business or way of life" (*Halifax v Chandler* [2001] EWCA Civ 1750 at [18]), not least because at the stage at which freezing injunctions are granted, the defendant has not been found liable to the claimant. The judge will decide on an appropriate amount, initially in the light of the full and frank disclosure given by the claimant and subsequently in the light of the defendant's evidence.

The scheme for EAPOs will be very different, probably because it is designed for jurisdictions with established systems of bailiffs to handle service of court documents and related matters. The authority charged with serving an EAPO on the banks will pick a figure, presumably derived from a table or similar, and it will then be for the defendant to apply to the court if the defendant considers the sum granted insufficient. The application must be made on paper to the courts in the state where the bank account is situated (indeed, if a defendant has accounts frozen in, say, Germany and France, the defendant will be granted both the German and the French living allowances). Whether the traditionally broad and discretionary approach of the English courts will meet the standards of the proposed regulation is doubtful.

English freezing injunctions also make allowance for the defendant to take legal advice about the injunction and the claim against the defendant. EAPOs do not

contemplate this. As a result, if all a defendant's bank accounts have been frozen, a defendant may have to choose between paying for legal advice and paying the rent.

What if the EAPO should not have been granted?

If an EAPO should not have been granted (eg because the court that granted the order did not have jurisdiction to do so or the claimant loses the substantive claim), the EAPO will be set aside. By that time, however, the defendant could have suffered considerable damage. The defendant's ability to recoup any damage is not covered by the proposed regulation because the Commission has left it to national law (proposed recital (15)). But which national law: the law of the court that granted the EAPO or the law of the court in which the relevant bank account is situated?

Proposed article 12 provides that the court making the EAPO can require the claimant to provide a security deposit or similar to ensure compensation for any damage suffered by the defendant. This would suggest that it is the law of the court granting the EAPO that determines a defendant's claim for damages. Against that, however, the effect of an EAPO is governed by the law of the place where the bank account is situated, which might suggest the contrary. Either way, it should be clear which national law applies. Indeed, since the Commission is proposing EU-wide measures to allow courts to grant EAPOs in order to protect potential claimants, it seems strange that the Commission is not also proposing EU-wide protection against abuse for potential defendants.

English law does not impose legal liability on a party who wrongly obtains a freezing or other interim injunction. Instead, the court requires the applicant to undertake to pay the defendant such compensation as the court considers that the applicant should pay. Proposed recital (15) states that the regulation does not "preclude recourse to… the obligation on the claimant to give an undertaking as to damages." It appears therefore that the aim is for courts, like those in England & Wales, to grant EAPOs subject to an undertaking in damages, but how the mechanics of this would operate is not clear.

Who pays the costs?

None of the Commission's plans will come cheap. Proposed article 30(1) provides that a bank is only entitled to seek payment or reimbursement of costs incurred in implementing an EAPO or providing information regarding bank accounts if banks can charge in respect of equivalent orders under their national laws. Some EU member states regard it as part of the civic duty of a bank to provide information and to freeze accounts without charge. Other jurisdictions, such as England & Wales, allow banks to charge for implementing freezing injunctions. However, where charges are permitted, they will not be related to a bank's actual costs but rather each member state must determine in advance what the fee will be (proposed article 30(2)).

What is lacking from the Commission's proposal is any means for a bank to secure payment of any fees to which it is entitled. The Commission's proposal does not even say who is liable for the fees - the member state in which the account is situated, the member state that granted the EAPO, or the claimant - but it is presumably the claimant. If so, how does the bank secure payment from the claimant? If the claimant does not pay voluntarily, does the bank have to sue the claimant (perhaps getting its own EAPO)? There is no suggestion that a bank can stop freezing an account after a certain period if it is not paid.

The position of a member state that has to implement an EAPO is the same. In England, courts usually only take steps after the relevant fees have been paid. The Commission's proposal allows fees to be charged (proposed article 31), but there is again no suggestion that a member state can decline to send an EAPO to a bank, or demand account information from banks, unless it has first been paid. Member states could, like banks, be left with huge numbers of small debts that it is impracticable to collect. The solution would be to require the member state whose court has made the EAPO to collect all overseas fees and for banks and member states to be able to ignore EAPOs until they have been paid.

The UK's position

The Commission's proposal will now enter the EU's labyrinthine legislative procedures, involving the Commission, the member states and the European Parliament, as well as the state that holds the presidency of the EU (Poland until the end of 2011, followed, for six months at a time, by Denmark, Cyprus, Ireland and Lithuania). The Commission reports widespread support for its previous papers on this subject, which suggests that something is likely to emerge from the legislative process; when is anyone's guess.

The costs of the Commission's scheme are obvious and considerable; the gains are not.

The UK's position is different from that of most member states, except Ireland and Denmark. Other member states will be bound automatically as and when the Commission's proposal passes into law. However, because of the treaty basis for the Commission's proposal, the UK will only be bound if it opts in to the proposal within three months of Commission's proposal being formally presented to the Council (Protocol 21 to the Treaty on the Functioning of the European Union). As a result, the UK has until around late October 2011 to decide whether to opt in to the proposal. If the UK does not opt in, but considers the end result of the legislative process satisfactory or if it sees that it operates well in practice, it can in practice opt in at a later date.

England & Wales already has an established system for freezing a defendant's bank accounts and other assets where a claimant needs that protection. EAPOs would supplement rather than replace that system, but the issue for the UK is whether the possible gain is worth the

undoubted costs, difficulties and uncertainties involved - at least, until it can be seen how the Commission's scheme works in practice.

To a potential claimant, any help in persuading the defendant to pay might be welcome. But any potential gain must also be balanced against the cost to the banking industry and the taxpayer, as well as the position of and effect on defendants. The costs of the Commission's scheme are obvious and considerable; the gains are not.

Annex I
Calculation of the Commission's €600 million gain to business

The Commission calculates that EAPOs will generate an additional the €600 million a year for business. The Commission derives this figure from statistics in its European Business Test Panel survey on *Commercial disputes and cross-border debt recovery*, carried out in July and August 2010, and other surveys by the Commission (see Impact Assessment, page 21ff). The Commission's calculation is as follows:

(a) Of the 5 million companies operating in the EU's single market, 20% (or 1 million) have been involved in commercial disputes of a cross-border nature.

(b) 11.6% of companies involved in cross-border trade (or 116,000 companies) have applied for a freezing order of any sort, as against 19.2% which have used freezing orders in a domestic context.

(c) Of applications for cross-border freezing orders, 53.3% succeeded (or 61,828 companies), as against a 64.8% success rate in a domestic context.

(d) The average amount of a cross-border freezing order was €20,000, resulting in €1,236,560,000 being frozen in cross-border cases (116,000 x 53.3% x €20,000).

(e) If the introduction of EAPOs increased the number of applications for cross border freezing relief by half, to 17.4% of companies involved in cross-border trade (or an additional 58,000 companies), and 53.3% of those were successful in freezing an average of €20,000, that would secure an additional €618,280,000, or just over €600 million.

There are many flaws in the Commission's logic. These flaws include:

- The Commission's press release claims that €600 million a year could be saved by the measures, and its calculations lead duly to the €600 million figure (though the Impact Assessment does not in fact state a time period). The questions about the level of cross-border disputes from which this figure is derived were not, however, about disputes over a period of one year, but about disputes over a period of five years (questions 10a and 17 of the EBTP survey). The figure for any potential annual gain should, therefore, immediately be divided by five.
- The statistical reliability of the Commission's figures is doubtful because of the low numbers who responded to its survey. For example, the figure of 53.3% as the success rate for obtaining a bank attachment order is based on a question answered by only 30 companies. Of those 30 companies: sixteen were granted a bank attachment order by the court; none was refused an order; in two instances, the case was settled before going to court; in five instances, the case was settled out of court; in six instances the case is still unresolved; and there was an unspecified outcome in the one remaining case.
- The Commission's question in its survey does not distinguish between those who obtained a bank attachment order before liability had been established and those who did so in order to enforce a judgment they had already obtained.
- The figure of a 53.3% success rate in obtaining a bank attachment order relates only to obtaining the order from a court. It does not indicate whether the result of the order was to secure any sums in a bank account or to secure ultimate payment for the claimant.
- The Commission assumes that all those who secure an EAPO will, first, serve it on a bank that holds an account containing the requisite funds and, secondly, succeed on the merits. That will not be so. Court orders cannot generate money that is not there, and some claimants lose their cases.
- The Commission assumes that the existence of EAPOs will lead to a 50% rise in the number of parties obtaining cross-border bank attachment relief, bringing it closer to the figure for domestic cases. This is guesswork. The availability or otherwise of bank attachment orders is only one of the many reasons that people chose not to litigate in cross-border cases. To suggest that an EAPO can secure this sudden rise is implausible. EAPOs may languish largely unused, like the EU's Small Claims and Order for Payment procedures.

The figure of €600 million a year in additional debts paid to business is, therefore, exaggerated at best. On the Commission's own figures, that number should be divided by five, and it should be divided further still, to a point of near invisibility. The Commission reports that €55 billion is written off in bad debts each year by European companies. The effect of EAPOs is unlikely to be even a drop in that ocean.

Annex II
The Commission's justification for EAPOs - rain in Spain

The Commission is increasingly fond of fireside stories to illustrate the gains that, it says, will flow from its proposals. This time, the Commission alights upon a Mr Kaminski, who owns a small Polish furniture company. Mr Kaminski sells 300 cupboards to a Spanish retailer at €150 each, with payment of 20% upfront and the balance on delivery in Spain. Needless to say, the devious retailer turns out to have a habit of not paying its suppliers, and fails to pay Mr Kaminski the balance due. Mr Kaminski approaches his local lawyers in Poland, only to be advised that he needs to seek an account preservation order in Spain under Spanish law. The Polish lawyer is not familiar with Spanish law, and so tells Mr Kaminski that he will need to hire an international law firm in Spain at considerably higher rates (in the Commission's vocabulary, "international" is a synonym for needless expense, while local means cheap).

How much easier it would be, the Commission impliedly asks, if there were a single procedure with a standard application form for an EAPO, allowing Mr Kaminski to freeze accounts in Spain and thereby to obtain satisfaction of his rights. In its FAQs, the Commission bemoans the "complex and lengthy procedures for recovering a debt in another country, resulting in higher costs for businesses trading across EU borders." An EAPO will give more certainty to creditors that they could recover their debts, increasing confidence in the single market.

A nice story, but real life would not be so simple for Mr Kaminski. The first question for Mr Kaminski would be what courts have jurisdiction over his claim against the Spanish retailer. In the absence of an express jurisdiction agreement, this is the Spanish courts (articles 2(1) and 5(1)(b) of the Brussels I Regulation), with the result that Mr Kaminski must go to Spain in order to obtain an EAPO (article 6(2) of the Commission's proposal). Mr Kaminski will therefore need Spanish lawyers come what may in order to bring proceedings. Mr Kaminski's recourse to his local lawyers was always forlorn.

If all goes smoothly for Mr Kaminski, he will obtain an EAPO and serve it on a bank that holds an account of the retailer containing the €36,000 owed to Mr Kaminski (on learning about EAPOs, would not a conniving retailer move its accounts offshore?). Having done this, Mr Kaminski must then pursue his claim against the retailer to judgment. Mr Kaminski must deal with whatever defences the retailer offers - that the cupboards were not to specification, were not of the requisite quality, were late, or whatever. Only once Mr Kaminski has surmounted these hurdles, with the help of his Spanish lawyers, will he be able to obtain judgment and then to enforce his judgment against the sum frozen by the EAPO.

The availability of an EAPO will not therefore enable Mr Kaminski to avoid "complex and lengthy procedures for recovering a debt in another country" of which the Commission complains. With or without an EAPO, Mr Kaminski must do whatever is required by Spanish law and procedure in order to obtain judgment on the merits. To be fair, Mr Kaminski will know at the outset of the proceedings whether he has frozen sufficient money to meet the debt due to him. If he has not secured the amount of the debt, he might decide to abandon his claim in Spain in order to avoid adding legal costs to the bad debt.

In its Impact Assessment, the Commission argues that because the procedures for obtaining an EAPO will be the same across the EU, Mr Kaminski's Polish lawyers could obtain the EAPO for him without the need for international lawyers in Spain or, perhaps, Mr Kaminski could even apply on his own.

This is fanciful. Even if the Polish lawyers' grasp of Spanish was sufficient, only the boldest, or most foolhardy, of lawyers would trespass on another's legal system. Not only do many issues remain ones of national, Spanish, law and practice (eg the consequences of losing the claim, the priority afforded by an EAPO under Spanish law and the need for security), but Mr Kaminiski will need Spanish lawyers for his subsequent substantive proceedings. It would be folly not to use them to apply for the EAPO. It is the Polish lawyers who are supernumerary, not the Spanish lawyers.

Mr Kaminski would be similarly brave to contemplate applying for an order himself, without any legal assistance. If, however, parties were themselves to reach for EAPOs as the first step in seeking to collect debts before taking legal advice, it would inevitably increase the risk of EAPOs being granted in inappropriate cases and of abuse.

If Mr Kaminski does succeed in freezing the amount of the debt, this might bring pressure on the retailer to reach an early settlement of the debt rather than to string out proceedings. Alternatively, the retailer might choose to prolong the case in order to show Mr Kaminski that his success in obtaining in EAPO is only one battle in the war, and hope to use delay to persuade Mr Kaminski to accept less than his due. The funds frozen are already lost to the retailer - why should the retailer make life easy for Mr Kaminski?

This all assumes that Mr Kaminski really is the good guy. What if the cupboards were in fact sub-standard? Is it fair to require the retailer to put up security for Mr Kaminski's claim? What if the retailer needs the money to pay its staff? Freezing its accounts might put the retailer out of business, leaving other creditors unpaid. Debtors should pay what they owe, but should not be placed under undue pressure to pay when there is a genuine doubt as to whether a debt is actually due. The Commission's proposal includes some protections for defendants but they are far from bullet-proof.

The reality is that EAPOs will not make much difference to SMEs like Mr Kaminski. To sue a counterparty, it will in most cases remain necessary to go to the courts in the domicile of that counterparty. It is there that the counterparty is likely to have its bank accounts. Whatever procedures are available in the counterparty's domicile to freeze bank accounts

will, in most cases, suffice. If, as the Commission argues (Impact Assessment, page 15), it is difficult to obtain the relevant order in Spain, a directive requiring a change in Spanish law would suffice. Even under the Commission's proposal, an EAPO will supplement, rather than replace, any local equivalents.

The Commission's cast of characters extends beyond Mr Kaminski to Marion from Manchester and her runaway husband, Belgian Françoise and her non-appearing German laptop, and others. But the bottom line is that, in most cases, the creation of an EU infrastructure for EAPOs is unlikely to offer most claimants any real practical help.

The reality may therefore be that EAPOs go the same way as the European Order for Payment and the European Small Claims Procedures, ie legislation that is largely unused. But the fact that something might prove of no value is not a reason to wave it through the legislative procedures without proper scrutiny.