JUDICIARY OF ENGLAND AND WALES

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?

Response to Ministry of Justice Consultation Paper CP 14/2011

Introduction

1. A regulation providing for a European provisional measure for the preservation of bank accounts has been under discussion for some time. A Study of the various protective regimes in Europe was prepared by a team under Prof. Burkhard Hess of the University of Heidelberg in December 2003, followed by a Green Paper on the attachment of bank accounts published by the Commission on 24 October 2006. The approach taken by the latter appears from ¶1.2 which states, "Although provisional remedies, which secure the future enforcement of a monetary claim by freezing bank accounts, are today available in all Member States, the current legislation does not ensure that such remedies are recognised and enforced throughout the European Union". A preliminary draft proposal for a regulation was produced by the Commission in March 2011, and a group chaired by Aikens LJ provided observations to the MoJ on behalf of the judiciary by a draft paper of 8 April 2011[1].

2. The proposed Regulation was published on 25 July 2011 (and is significantly different from the draft). The Ministry of Justice Consultation Paper (to which this is a response) was published on 3 August 2011.

3. The legal basis of the proposed Regulation is Article 81(2) of the Lisbon Treaty (the Treaty on the Functioning of the European Union) concerning measures in the field of judicial cooperation in civil matters having cross-border implications. The UK's Protocol applies, and its participation will depend on it notifying the EU of its wish to take part in the adoption and application of the proposed Regulation (i.e. to opt in) within 3 months of the publication.

4. If the UK decides to opt in, it will be bound by any proposal finally adopted by the Council of Ministers and the European Parliament. If it decides not to opt in, it will not be bound by the Regulation, but it will not participate in the negotiations. The UK could however decide not to opt in at the start of

[1] We acknowledge with gratitude the points made in that draft paper, which we have sought to reflect in this paper, though the form of the proposed Regulation is significantly different from the earlier preliminary draft proposal in respect of which the points were made. Some – but not all – of the points made in the draft paper are now incorporated in the proposed Regulation.

negotiations, but (as the Consultation Paper puts it) could request to participate after the Regulation has been adopted.

5. The primary purpose of the consultation is to seek views 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 provisions of the Protocol, the deadline for responses is **14 September 2011**.

6. Views are sought by the MoJ 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.

Overview

7. The purpose of the proposed Regulation is to facilitate cross-border debt recovery by providing a standard procedure by which creditors can obtain orders freezing debtors' bank accounts, which orders will take effect throughout the EU. It appears to be seen in the Explanatory Memorandum as taking forward the existing provisions of the Judgments Regulation[2] by providing a specific European enforcement measure in relation to bank accounts.

8. Importantly, to implement the scheme, there are standard form documents annexed to the proposed Regulation (application form, order, etc[3]) which are to be completed in the specified language. According to ¶3.1.5 of the Explanatory Memorandum, "In order to facilitate the task of the creditor to apply for a European order, the proposed Regulation contains a standard application form with appropriate guidelines for filling it out. The form will be available in all Union languages, thereby reducing the need for translation to a few elements of free text". Detailed comments are not made in this response on the forms.

9. As envisaged by the proposed Regulation, the unique feature of the EAPO is that it will apply to prevent the withdrawal or transfer of funds held by the debtor in a bank account within the EU (Art 1). An "EAPO issued in one Member State … 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" (Art 23). In other words, once served with an order made in one country, a bank in another country will freeze a defendant's bank accounts up to the specified amount[4] without the need for any intermediate judicial step.

10. An EAPO will freeze funds in bank accounts (Art 1) rather than assets generally.

[2] Regulation (EC) No 44/2001 of the Council of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
[3] These were not annexed to the March preliminary draft proposal on which Aikens LJ commented.
[4] Art 21.6

11. The "EAPO shall be available to the creditor as an alternative to existing protective measures in the Member States" (Art 1). Thus it will not affect the existing jurisdiction of the English courts to grant freezing orders. The term "alternative" should be construed to include the use of an EAPO additionally to the grant of a domestic freezing order.

12. According to recital (9), "The scope of this Regulation should cover all civil and commercial matters apart from certain well-defined matters. Notably, this Regulation should not apply in the context of arbitration[5] or insolvency proceedings".

13. By Art 18, where the EAPO was issued on the basis of a judgment, the claimant is able to secure the judgment amount plus any interest and costs specified, and if issued pre-judgment, the amount of the claim plus any interest which has accrued on the claim.

14. There are also provisions intended to enable a claimant to obtain information as to the banks with which the defendant holds accounts. The EAPO does not however entitle a claimant to know the balance in such account/s, though this information may indirectly appear since a bank has to disclose the amount frozen if less than the claim (Art 27).

15. As Prof. Hess pointed out in his Study, the relevant regimes in Europe as regards protective measures, enforcement, attachment, registers, competent authorities, etc, differ widely, and the drafting of the proposed Regulation has to take account of the lack of uniformity. It will be essential to ensure that the proposed EAPO can work in practice, without imposing undue burdens on defendants, courts, banks, and others.

Scope

16. Under the proposed Regulation, an EAPO would be available:

    a. as regards pecuniary claims

    b. in civil and commercial matters: these are broadly as defined as in Art 1 of the Judgments Regulation — however a number of other matters are included, including potentially importantly matrimonial property (Art 2)

    c. which have cross-border implications[6] (Art 3)

    d. before or after judgment[7] (Art 5).

[5] This seems to be a questionable exclusion, since freezing orders can be and sometimes are made by the court in the context of arbitration.

[6] For the purposes of the proposed 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: Art 3. This seems a wide but workable definition: see **paragraph 24 of the Consultation Paper**.

17. A "claim" is defined in Art 4 to mean “an existing claim for payment of a specific or determinable sum of money”. This formulation seems to envisage debt claims. If so, a claim for damages in tort, a claim in constructive trust, and a proprietary claim based on fraud (for example) may fall outside the proposed Regulation until it has been quantified in a judgment. Such claims are in any case arguably best dealt with under the existing English procedure, because they may raise much more complex issues than the kind of relatively straightforward debtor/creditor situation envisaged by the Commission. This is a more narrow view than that expressed in **paragraph 25 of the Consultation Paper.**

18. The essence of the EAPO is that it is to be made in respect of bank accounts, and it is important to be clear what is meant in this regard. As regards the questions raised in **paragraph 27 of the Consultation Paper**:

    a. The term "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 (Art 4): we note that this definition may restrict the availability of an order to the “bank” component of a banking group (this however may be sufficient).

    b. The terms “bank account” and “funds” are defined to include accounts containing cash or financial instruments: the term "financial instruments" is defined in Art 4 to mean a financial instrument within the meaning of point 17 of Article 4(1) of Directive 2004/39/EC (MiFID) which includes a wide range of such instruments. It is unclear why (e.g.) derivative contracts should be covered by the proposed Regulation, or why the definition of funds needs to go beyond “cash” as defined in Art 4[8].

    c. The location of the bank account is important for a number of purposes. By Art 4, the terms "Member State where the bank account is located” means, for a bank account containing cash, the Member State indicated in the account's IBAN”. The International Bank Account Number is a standard reference, but the MoJ should check whether this will suffice as between England, Scotland, etc.

    d. As regards the location of a bank account containing financial instruments, see above under b. The question is referred to “habitual residence” as determined by Article 19 of Regulation (EC) No 593/2008 (Rome I), and is broadly place of central administration, or the location of the relevant branch.

19. The basic conditions for making an order pre-judgment are very similar to those applicable to English freezing orders, namely a “well founded” claim,

[7] The term “enforceable title” rather than “judgment” is used in various places in the proposed Regulation.

[8] The term "cash" means “money credited to an account in any currency, or similar claims for the repayment of money, such as money market deposits”.

and the real risk of the disposal of assets making subsequent enforcement substantially more difficult (Art 7.1).

20. However, the "well founded claim" requirement is deemed to be fulfilled if the claimant is a judgment creditor (Art 7.2), and there is *no* dissipation requirement. This comes close to entitling any unpaid judgment creditor to a freezing order.

The application

Prior to judgment

21. An EAPO may be made "prior to the initiation of judicial proceedings on the substance of the matter against the defendant or at any stage during such proceedings" Art 5).

22. Prior to judgment, the EAPO can only be issued by a court (Art 6).

23. Jurisdiction lies 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 (i.e. the Judgment Regulation rules).

24. However, the courts of the Member State where the bank account is located have jurisdiction to issue an EAPO enforceable in that Member State only (Art 6), (a kind of "local" EAPO).

25. The application has to be made using the form in Annex 1 (Art 8). There is provision for additional evidence where the court considers it necessary. The form states that it is not mandatory for the claimant to be represented by a lawyer (see also Art 8.2(b)). We think it would be clearer if there was a separate form for the pre- and post-judgment situation.

26. Under English procedure, an applicant for a freezing order has to give an undertaking to the court to pay any damages the defendant may suffer as a result of the order having been made without justification. A safeguard in this form is not included under the proposed Regulation. However, 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 claimant is liable to compensate such damage under national law (Art 12). Under English procedure also, the court has discretion whether or not to require security (c.f. **paragraph 35 of the Consultation Paper**). The question of the circumstances in which the undertaking will be enforced, and in particular whether the court has a discretion, is not addressed in the proposal. That should also be a matter for the court granting the order.

27. There are three other points (the first two of which also apply to post-judgment applications) which call for comment:

a. Although the court has to examine whether the requirements for making the order are met (Art 9), there is no duty of full and frank disclosure requirement imposed on the applicant[9]. This is a potentially significant omission — this requirement has been the means by which the English courts have sought to exclude unmeritorious applications (a failure to disclose relevant information may result in the order being discharged regardless of the strength of the claim). The key point to recognise is the great damage that can be done if bank accounts are frozen without proper justification.

b. The *ex parte* procedure (Art 10) should be modified. A simple recognition that a claimant is entitled to make the application *ex parte* should suffice. (The present wording does not enable the court as opposed to the claimant to give the defendant the opportunity to be heard if the circumstances justify it.)

c. Where an application for an EAPO is made prior to the initiation of proceedings, the claimant is to initiate proceedings within 30 days of the date of issue of the order or within any shorter time period set by the issuing court (Art 13). The default period is much too long. To avoid abuse, proceedings need to be commenced in proper form by the time of the order, or very shortly afterwards.

After judgment[10]

28. The term "enforceable title" rather than "judgment" is used in the heading of this part of the proposed Regulation. This appears to be a reference to the position e.g. in France where the term has a slightly broader meaning than judgment, including for example notarial acts granting authority to enforce, and title issued by a bailiff in the event of non-payment of a cheque.

29. Under Art 14.1, the claimant may seek the order from the court that issued the judgment (the additional reference in the provision to "court settlement" is a settlement approved by the court: see Art 4).

30. However, Art 14.2 provides that: "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" (italics added). This is problematic:

a. The term *authentic instrument* is defined in Art 4. It is not a term used in English law, but may signify a document which in some countries

[9] This is not provided by the declaration on the application form by which the applicant declares that the "information provided is true to the best of my knowledge and is given in good faith".

[10] The term "enforceable title" rather than "judgment" is used in various places in the proposed Regulation. This appears to be a reference to the position e.g. in France where it has a slightly broader meaning than judgment, including for example notarial acts granting authority to enforce, and title issued by a bailiff in the event of non-payment of a cheque.

puts a claim beyond doubt so as to justify treating it in the same way as a judgment (see above as to France).

b. The claimant may request that the *competent authority* in the Member State where the *authentic instrument* has been drawn up also issue an EAPO: the competent authority for these purposes has to be notified by the Member State to the Commission under Art 48.1(a), but there is no further definition. There is a list of "courts or competent authorities" in Annex II of the Judgments Regulation, and so far as England and Wales is concerned, this is the High Court (or in the case of a maintenance judgment, the Magistrates' Court).

c. It is unclear whether the term *competent authority* would include non-courts in other Member States, but there would be obvious objections to an order which was not granted by a court. Only a court of law should have the power to impose a freezing order, which must be regarded as a judicial act which affects the rights and liabilities of citizens of Member States.

31. Unlike at the pre-judgment stage, there is no dissipation requirement. Under Art 15 of the proposal, the claimant need only declare that the "judgment has not yet been complied with". We note that this would encourage the use of Europe-wide freezing orders routinely whenever judgment has been obtained, and even before the expiry of the time allowed for payment of a judgment (see above as to the great damage that can be done if bank accounts are frozen without proper justification). We agree with the last sentence of **paragraph 34 of the Consultation Paper** (dissipation requirement to apply to post-judgment orders).

32. Further, although Art 21 appears to envisage the possibility[11] of an oral hearing post as well as pre-judgment, the provisions as to *ex parte* procedure and evidence are not applied to the post-judgment situation. It appears to be assumed that post-judgment, the position is more or less automatic, which gives rise to the risk identified in the previous paragraph. The practice in England and Wales is almost always for an oral hearing to take place even if the party applying for the order is a judgment creditor (see below).

33. A further issue arises as regards the courts in England and Wales which would be authorised to grant an EAPO (this has to be notified to the Commission under Art 48.1(d) — there are strong arguments for continuing present practice by which freezing injunctions are granted by the High Court.

Provisions applying to applications both before and after judgment

34. ***Provision of information as to bank accounts*** Under English procedure, the order is *served by the claimant* on the bank or other third party with which the defendant known to hold assets. Information as to the defendant's assets is

[11] In "exceptional circumstances": see below.

ordered to be given by the defendant himself (though there is jurisdiction to to make an order directly against the bank or other third party[12]).

35. The proposed Regulation recognises that a claimant may not have details of a defendant's bank/bank accounts. It seeks to meet this by providing that the "claimant may request the competent authority of the Member State of enforcement to obtain the necessary information" (Art 17.1). The "Member State of enforcement" is defined to mean the "Member State in which the bank account to be preserved is located" (Art 4). The claimant must make that request in the application form. The court issues the EAPO and transmits it to the "competent authority[13]" (Art 17.3). The "competent authority shall use all appropriate and reasonable means available in the Member State of enforcement to obtain the information" (Art 17.4).

36. This envisages a completely different system from the current one in England and Wales. So far as we are aware, there is no "competent authority" for the enforcement of orders here that could undertake the task.

37. There are two ways of obtaining information provided for in Art 17.6. But unlike what we understand the position to be in some EU member states, the UK has no central register of bank accounts. So only the first is available, which is the "possibility to oblige all banks in their territory to disclose whether the defendant holds an account with them". This appears to envisage an enquiry by the "competent authority" on all banks authorised here, which would presumably require legislation to implement.

38. ***Points on Art 21***:

    a. By Art 21.1, the grant of an EAPO is mandatory if the requirements of the proposed Regulation are met — the court should have a *discretion* to refuse the order (e.g. in cases of delay etc).

    b. The order is issued in a standard form (translated into the language of the Member State of enforcement "where necessary" (Art 24.3(b)(ii): we would think that for practical reasons it will however often be necessary).

    c. Art 21 refers to circumstances where an "oral hearing is deemed necessary due to exceptional circumstances". The practice in England and Wales is always for an oral hearing to take place (save in very exceptional cases in which the order may be granted by a judge by phone). Such an order would not be made on a paper application since an oral hearing gives the court some opportunity to properly appraise the application.

[12] See CPR 31.7

[13] By Article 4, ""Competent authority" means the authority which the Member State of enforcement has designated as competent for the obtainment of necessary information on the defendant's account pursuant to Article 17, the service of the EAPO pursuant to Articles 24 to 28 and the determination of the amounts exempt from execution pursuant to Article 32".

d. This is a different issue from that of how *evidence* is placed before the court. As Art 11 seems to recognise, an application for a freezing order is most unlikely to involve oral, as opposed to written, evidence.

e. The timescale for making the order is unreasonably long if there is a genuine risk of dissipation (issue within 3 days of application, if hearing, then within 7 calendar days and order within 7 calendar days after the hearing has taken place at the latest).

39. ***Service*** A crucial aspect of the scheme is service of the EAPO, particularly on the bank or banks concerned:

a. Where the EAPO is granted by a court in the Member State of enforcement, service on the bank takes place under national rules (Art 24.2). Where the court is in another country, service is to be effected be effected in accordance with Regulation (EC) No 1393/2007 (the Service Regulation).

b. It is envisaged that the authority responsible for service in the country where the order was made shall send it to the "competent authority" in the Member State of enforcement, which will serve it on the bank or banks within three days (which may be too slow to stop the dissipation happening in some cases). The position may be different in Member States with established systems of bailiffs to handle service of court documents and related matters, but we are unclear what machinery would be used to effect such service in England and Wales.

c. The bank issues a declaration to the "competent authority" and the claimant in a standard form in the form of Annex III.

d. Similar issues arise as regards service on the defendant under Art 25.

<u>Effect of the EAPO</u>

40. Upon service, the accounts designated in the order or "identified by the bank as being held by the defendant" are frozen, though funds in excess of the amount specified in the EAPO remain at the disposal of the defendant (Art 26). The EAPO does not however entitle a claimant to know the balance in such account/s, though this information may indirectly appear since a bank has to disclose the amount frozen if less than the claim (Art 27).

41. Art 26 provides for conversion into the EAPO currency where different from the currency of account, and we assume that this is intended to be a notional conversion for calculation purposes. There may be difficulties with the provision in Art 26.1 for the valuation of financial instruments on the day of implementation of the EAPO since the market value will likely fluctuate over time.

42. It is proposed in Art 28 that the claimant be under a duty to effect the release of amounts frozen where the total amounts frozen across several accounts

exceeds the amount stipulated in the EAPO. Given the limitations on disclosure of balances, careful study will be required to ensure that the claimant is in a position to comply with this proposed duty.

43. Complex legal issues can arise where accounts in the names of third parties are alleged to include funds belonging beneficially to the defendant, or where accounts held in the defendant's name hold funds belonging beneficially to third parties in whole or in part. Art 29 (Preservation of joint and nominee accounts) proposes that this is referred to the rules of national law. A simpler approach would be to limit the EAPO's operation in the first instance to accounts in the defendant's name.

44. The issue of the ranking of competing creditors is dealt with in Art 33 by providing that 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. English law has always been very clear that a freezing order does not grant a claimant any preference over other creditors and gives the claimant no proprietary interest in any assets that are the subject of a freezing order, because to do so would amount to an interference with the existing law of bankruptcy and insolvency.

45. It may be that the bank's right of set off recognised under English law and procedure is preserved under this provision in Art 33.

Protection of the defendant

46. Because of the potentially drastic effect of a freezing order, the practice in the English courts has been to exercise caution in the grant of such orders. Points have been made above in the context of lack of any requirement of full and frank disclosure by the claimant, the absence of an undertaking in damages (though the claimant may be required to give security for the order), and the necessity for a hearing.

47. A crucial point is that the freezing order should not prejudice the livelihood or business of the defendant, and that he should not be impeded from defending himself:

    a. Art 32.1 recognises this by providing that, "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".

    b. However Art 32.3 appears to leave a dispute in this respect to be settled by the "competent authority" by providing: "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".

c. Though the defendant has a right to ask the court of the Member State of enforcement to review this decision under Art 35, the matters in b. above are matters properly to be determined by the court and not by an administrative authority. The experience in England and Wales is that because a defendant can bring this issue before a judge on very short notice, disputes as to (e.g.) living expenses tend to be the subject of agreement.

d. A significant omission appears to be in relation to the defendant's legal costs: practice in England and Wales is that he is permitted to draw down the account to provide for the expenses of legal representation. Again, the amount and the question of conditions attached should be for the court.

48. It is essential that a defendant has a right to have the EAPO reviewed, and provision is made in Arts 34 to 37 and Art 40[14] accordingly. There are important points arising in this regard, not least as to which country's court has the relevant powers. Apart from providing proper protection to the defendant, there is the possibility of conflicting judicial decisions. The scheme works as follows. The court with primary jurisdiction is that which granted the order. In brief:

a. If the defendant is a consumer, employee or insured, he may address the application for review to the competent court in the Member State where he is domiciled (Art 36).

b. Otherwise, there is a right under Art 34 to apply to the court which issued the order; this appears to apply only to the case of a pre-judgment order (and if this is correct, it appears to be an omission); there is a standard form in Annex IV[15]; there is no express provision for a court hearing, which may be essential: the court has to give its decision within 30 days, which is far too long in a case of urgency.

c. In the case of both pre- and post-judgment orders, there are more limited powers of review given to the courts of the Member State of enforcement (e.g. where the claimant fails to issue substantive proceedings within the 30 day time limit in proposed article 13); the same standard form is to be used, and again there is no express provision for a court hearing, and again the court has to give its decision within 30 days (Art 35).

49. The need to apply to the court making the order in order to discharge/vary it may be onerous for some defendants who fall outside the consumer, etc,

[14] This gives both parties the right to apply to the court making the order for variation, revocation, etc.
[15] This form however covers all situations, and lacks clarity.

exception, e.g. small businesses. See in this respect **paragraph 28 of the Consultation Paper.**

Concluding points

50. In explaining how the EAPO might work, the Commission cited[16] the examples of a small Polish furniture company owed money by a retailer in Spain, a Belgian student who has not had delivery of a computer ordered online from a German shop, and a woman in England owed maintenance by her husband in Portugal who is about to move to a non-EU country. In each case, it says that these people would be in a much better position to find out about the other person's bank accounts, recover what is owed to them, and reduce the cost of, or cut out altogether, lawyers.

51. As described in the examples, these are plainly meritorious cases, and reasonable steps to protect the rights of such persons are to be supported and welcomed.

52. The question as to whether the UK should opt in must however be considered on the basis of the likely effect of the proposed EAPO system as a whole. Not all potential users will be meritorious, and some will try to abuse the system. The crucial point is that under the proposed system, a claimant in one country will be able to obtain an order freezing the bank accounts of a defendant in another country, before proceedings have been begun, let alone the claim proved. This will happen without notice to the defendant, who will first learn of the order when he is unable to operate his bank account. Unless he is falls within the consumer exception, he will have to seek redress in the court of the claimant's country. The setting up of such a system constitutes a very substantial step.

53. As appears from the detailed points set out above, there are concerns arising from the operation of the proposed EAPO. The system appears to be designed to minimise court supervision, with the use of standard forms, the suggestion being that hearings may not be necessary. This could work in a simple case where the claim is undisputed. However, even in such case, the making of a freezing order must in our view be treated as a judicial act: it is one which affects the rights and liabilities of the parties directly involved, as well as those of the account-holding bank, and even in a simple case, the freezing of the account may affect other third parties, such as other creditors etc. The more complicated the case, the more potentially serious the consequences. There is also the possibility of abusive applications for freezing orders.

54. It is important therefore that adequate steps are taken to protect all parties, including defendants. As regards the latter, we have mentioned in particular the lack in the proposed Regulation of any requirement of full and frank disclosure by the claimant, the absence of an undertaking in damages (though, rightly, it is stipulated that the claimant may be required to give security for the order), and the fact that a court hearing is not treated as a requirement. It

[16] Frequently Asked Questions, 25 July 2011.

is not possible in our view to contemplate making such an order on the basis of a form filled in by the claimant, because the court needs carefully to examine the facts to ascertain that the case is a proper one for an order, and thereafter to exercise supervision as appropriate.

55. The position is different where the claimant has established the claim by obtaining a judgment. However, in such a case the proposed Regulation does not require the claimant to show a risk that the defendant will try to avoid paying by dissipating the money in his accounts. Under the proposal, the claimant need only declare that the "judgment has not yet been complied with". There can however be reasons why a judgment is not immediately satisfied. If this proposal is adopted, then judgment creditors are likely to use the EAPO more or less as a matter of course.

56. The other main concern is as to the structure that would be required to operate the system. The proposed Regulation recognises that a claimant may not have details of a defendant's bank/bank accounts. It seeks to meet this by providing that the claimant may request the "competent authority" of the Member State in which the relevant bank account is located to obtain the information. This envisages a completely different system from the current one in England and Wales, where the claimant must obtain the information, usually by an order directed at the defendant. So far as we are aware, there is no "competent authority" for the enforcement of orders here that could undertake the task. Service of the order on the bank is also to be made by the "competent authority", which has other functions as well, including in relation to fixing the amount which the defendant is to be allowed from the account for living expenses.

57. The question whether it is in the national interest for the Government to opt in to negotiations on the Commission's proposed Regulation is therefore not straightforward. If the UK does not opt in, it will not participate in the negotiations for an EAPO, and will not be able effectively to make the points set out above and by other respondents. Persons in the UK who could benefit from the making of an EAPO will be excluded. On the other hand, if the UK does opt in, it will be bound by the Regulation as ultimately adopted, with the disadvantages mentioned above, to the extent that they have not been resolved in the negotiations. No doubt, commercial and financial institutions and those directly concerned may well have views as to the practicality of the proposed Regulation, which have yet to be expressed. In the circumstances, we do not think that it would be helpful or proper for the judiciary at present to express a view on this question.

The Master of the Rolls
Lord Justice Moore-Bick
Mr Justice Peter Smith
Mr Justice Blair

11 September 2011