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Committee on Legal Affairs

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*****I**

DRAFT REPORT

on the proposal for a regulation of the European Parliament and of the Council
on creating a European Account Preservation Order to facilitate cross-border
debt recovery in civil and commercial matters
(COM(2011)0445 – C7-0211/2011 – 2011/0204(COD))

Committee on Legal Affairs

Rapporteur: Raffaele Baldassarre

Symbols for procedures

- * Consultation procedure
- *** Consent procedure
- ***I Ordinary legislative procedure (first reading)
- ***II Ordinary legislative procedure (second reading)
- ***III Ordinary legislative procedure (third reading)

(The type of procedure depends on the legal basis proposed by the draft act.)

Amendments to a draft act

In amendments by Parliament, amendments to draft acts are highlighted in ***bold italics***. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the draft act which may require correction when the final text is prepared – for instance, obvious errors or omissions in a language version. Suggested corrections of this kind are subject to the agreement of the departments concerned.

The heading for any amendment to an existing act that the draft act seeks to amend includes a third line identifying the existing act and a fourth line identifying the provision in that act that Parliament wishes to amend. Passages in an existing act that Parliament wishes to amend, but that the draft act has left unchanged, are highlighted in **bold**. Any deletions that Parliament wishes to make in such passages are indicated thus: [...].

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DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

**on the proposal for a regulation of the European Parliament and of the Council on creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters
(COM(2011)0445 – C7-0211/2011 – 2011/0204(COD))**

(Ordinary legislative procedure: first reading)

The European Parliament,

- having regard to the Commission proposal to Parliament and the Council (COM(2011)0445),
 - having regard to Article 294(2) and Article 81(2)(a), (e) and (f) of the Treaty on the Functioning of the European Union, pursuant to which the Commission submitted the proposal to Parliament (C7-0211/2011),
 - having regard to Article 294(3) of the Treaty on the Functioning of the European Union,
 - having regard to Rule 55 of its Rules of Procedure,
 - having regard to the report of the Committee on Legal Affairs and the opinion of the Committee on Economic and Monetary Affairs (A7-0000/2013),
1. Adopts its position at first reading hereinafter set out;
 2. Calls on the Commission to refer the matter to Parliament again if it intends to amend its proposal substantially or replace it with another text;
 3. Instructs its President to forward its position to the Council, the Commission and the national parliaments.

Amendment 1

Proposal for a regulation

Recital 12

Text proposed by the Commission

(12) The conditions for issuing the account preservation order should strike an appropriate balance between the interests of the creditor to obtain an order when needed and the interests of the debtor to prevent abuse of the order. Consequently, prior to obtaining a judgment enforceable in the Member State where the account is located, the court would have to be satisfied that the creditor's claim *against*

Amendment

(12) The conditions for issuing the account preservation order should strike an appropriate balance between the interests of the creditor to obtain an order when needed and the interests of the debtor to prevent abuse of the order. Consequently, prior to obtaining a judgment enforceable in the Member State where the account is located, the court would have to be satisfied that the creditor's claim *is*

the debtor appears to be well founded and that without the order, the subsequent enforcement of his future judgment *is likely to* be frustrated or made substantially more difficult.

legitimate and that *there is a real and current risk that*, without the order, *the creditor's claim may be impaired, even if only in part, and* the subsequent enforcement of his future judgment *may* be frustrated or made substantially more difficult. *To this end, the creditor should provide sufficient evidence, corroborated by relevant facts, to satisfy the court that the claim is well founded.*

Or. it

Amendment 2

Proposal for a regulation Recital 13

Text proposed by the Commission

(13) In order to ensure the surprise effect of the account preservation order, the debtor *should* not be informed about the application, be heard prior to its issue or notified of the order prior to its implementation by the bank. The debtor should, however, be able to contest the order immediately after it was implemented.

Amendment

(13) In order to ensure the surprise effect of the account preservation order, *it is preferable for* the debtor not be informed about the application *and not to* be heard prior to its issue or notified of the order prior to its implementation by the bank. The debtor should, however, be able to contest the order immediately after it was implemented.

Or. it

Amendment 3

Proposal for a regulation Recital 13 a (new)

Text proposed by the Commission

Amendment

(13a) For the purpose of providing greater legal certainty, the court to which application is made for a preservation order should be able to hear the debtor wherever it considers this necessary in

order to reach a final decision. In order to maintain the surprise effect of the preservation order, courts should be permitted to hear debtors only in exceptional cases.

Or. it

Amendment 4

Proposal for a regulation

Recital 15

Text proposed by the Commission

(15) This Regulation should provide sufficient safeguards against abuse of the order. In particular, unless the creditor already has a judgment enforceable in the Member State of enforcement, the court should be able to require the creditor to provide security to ensure compensation for any damage suffered by the debtor as a result of an unjustified order. ***The conditions under which the creditor will be liable to compensate the debtor for such damage should be governed by national law. Where the law of a Member State does not provide for a statutory liability of the claimant, this Regulation should not preclude the recourse to measures with equivalent effect, such as the obligation on the claimant to give an undertaking as to damages.***

Amendment

(15) This Regulation should provide sufficient safeguards against abuse of the order. In particular, unless the creditor already has a judgment enforceable in the Member State of enforcement, the court should be able to require the creditor to provide security to ensure compensation for any damage suffered by the debtor as a result of an unjustified order.

Or. it

Amendment 5

Proposal for a regulation Recital 15 a (new)

Text proposed by the Commission

Amendment

(15a) This Regulation should provide for a statutory liability on the part of the claimant for any damage caused to the defendant as a result of proceedings that subsequently prove unfounded. The conditions under which the creditor will be liable to compensate the debtor for such damage should be governed by national law. The compensation for such damage should cover, as a minimum requirement, any loss of earnings and the costs incurred during the proceedings.

Or. it

Amendment 6

Proposal for a regulation Recital 16

Text proposed by the Commission

Amendment

(16) Given that creditors currently face practical difficulties in accessing information on debtors from public or private sources in a cross-border context, the Regulation should establish a mechanism enabling the competent authority in the Member State of enforcement to obtain information **about** the debtor's bank accounts, **either by** obliging the banks to disclose the whereabouts of the debtor's accounts located in that Member State **or by** granting access to information held in registers or otherwise by public authorities or administrations.

(16) Given that creditors currently face practical difficulties in accessing information on debtors from public or private sources in a cross-border context, the Regulation should establish a mechanism enabling the competent authority in the Member State of enforcement to obtain **the** information **required in order to identify** the debtor's bank accounts. **That mechanism should be provided for by Member States under their national law and may involve** obliging the banks to disclose the whereabouts of the debtor's accounts located in that Member State, granting access to information held in registers or otherwise by public authorities or

administrations *or requiring the debtor to state where the account is held and prohibiting him from carrying out any transactions, including withdrawals and transfers, against the account that would cause the amount held therein to fall below the amount due, as specified in the preservation order.*

Or. it

Amendment 7

Proposal for a regulation Article 1 – paragraph 2

Text proposed by the Commission

2. The EAPO shall be available to the creditor as an alternative to ***existing*** protective measures in the Member States.

Amendment

2. The EAPO shall be available to the creditor as an alternative to protective measures ***existing under national law*** in the Member States.

Or. it

Amendment 8

Proposal for a regulation Article 2 – paragraph 4

Text proposed by the Commission

4. This Regulation shall apply to matters of matrimonial property, the property consequences of registered partnerships or successions where Union legislation relating to jurisdiction, applicable law and the recognition and enforcement of decisions in these matters is applied.

Amendment

deleted

Or. it

Amendment 9

Proposal for a regulation Article 3

Text proposed by the Commission

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

Amendment

For the purposes of this Regulation, a matter is considered to have cross-border implications ***where the debtors are domiciled and/or the bank account(s) to be preserved by the order are located in a Member State other than that of the court seised for the purpose of issuing the EAPO.***

Or. it

Amendment 10

Proposal for a regulation Article 4 – point 2

Text proposed by the Commission

2. "bank" means an ***undertaking the business of which is to receive deposits or other repayable funds from the public and to grant credits for its own account;***

Amendment

2. "bank" means: ***(a) a credit institution within the meaning of Article 4(1) of Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast)¹;***

(b) an electronic money institution within the meaning of Article 2(1) of Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions²;

¹OJ L 177, 30.6.2006, p. 1.

²OJ L 267, 10.10.2009, p. 7.

Amendment 11

Proposal for a regulation

Article 4 – point 3

Text proposed by the Commission

Amendment

3. "financial instruments" means a financial instrument within the meaning of point 17 of Article 4(1) of Directive 2004/39/EC of the European Parliament and of the Council;

deleted

Or. it

Amendment 12

Proposal for a regulation

Article 4 – point 5

Text proposed by the Commission

Amendment

5. "funds" means cash *or financial instruments*;

5. "funds" means cash;

Or. it

Amendment 13

Proposal for a regulation

Article 4 – paragraph 6 – point a

Text proposed by the Commission

Amendment

(a) *for a bank account containing cash*, the Member State indicated in the account's IBAN;

(a) the Member State indicated in the account's IBAN;

Or. it

Amendment 14

Proposal for a regulation Article 4 – paragraph 6 – point b

Text proposed by the Commission

Amendment

(b) for a bank account containing financial instruments, the Member State where the bank holding the account has its habitual residence as determined by Article 19 of Regulation (EC) No 593/2008 of the European Parliament and of the Council;

deleted

Or. it

Amendment 15

Proposal for a regulation Article 4 – point 7

Text proposed by the Commission

Amendment

7. "claim" means an existing claim for payment of a specific or determinable sum of money;

7. "claim" means an existing claim, ***which has fallen due***, for payment of a specific or determinable sum of money;

Or. it

Amendment 16

Proposal for a regulation Article 6 – paragraph 1

Text proposed by the Commission

Amendment

1. The EAPO shall be issued by a court.

deleted

Or. it

Amendment 17

Proposal for a regulation Article 6 – paragraph 2

Text proposed by the Commission

2. Jurisdiction for issuing the EAPO shall lie with the courts of the Member State where proceedings on the substance of the matter have to be brought in accordance with the applicable rules on jurisdiction.

Where more than one court has jurisdiction for the substance of the matter, the court of the Member State where the claimant has brought proceedings on the substance or intends to bring proceedings on the substance shall have jurisdiction.

Amendment

2. Jurisdiction for issuing the EAPO shall lie with the courts of the Member State where proceedings on the substance of the matter have to be brought in accordance with the applicable rules on jurisdiction.

Or. it

Amendment 18

Proposal for a regulation Article 6 – paragraph 4 (new)

Text proposed by the Commission

Amendment

4. Notwithstanding paragraphs 2 and 3, in respect of claims stemming from a contractual obligation entered into by the debtor as a consumer, for non-commercial purposes that have no bearing on his gainful activities, jurisdiction for issuing an EAPO shall lie with the courts of the debtor's Member State of residence.

Or. it

Amendment 19

Proposal for a regulation Article 7 – paragraph 1

Text proposed by the Commission

1. An EAPO shall be issued in the amount for which it is sought or a part thereof where the claimant submits **relevant facts, reasonably corroborated by** evidence, to satisfy the court of both of the following:

Amendment

1. An EAPO shall be issued in the amount for which it is sought or a part thereof where the claimant submits **sufficient** evidence to satisfy the court of both of the following:

Or. it

Amendment 20

Proposal for a regulation Article 7 – paragraph 1 – point b

Text proposed by the Commission

(b) that without the issue of the order **the subsequent enforcement of an existent or future title against the defendant is likely to be impeded or made substantially more difficult, including because there is the real risk that the defendant might remove, dispose of or conceal assets held in the bank account or accounts to be preserved.**

Amendment

(b) that **there is a real and current risk that**, without the issue of the order, **the creditor's claim may be impaired, either wholly or in part.**

Or. it

Amendment 21

Proposal for a regulation Article 8 – paragraph 2 – point b

Text proposed by the Commission

(b) the name and address of the defendant and, where applicable, the defendant's representative;

Amendment

(b) the name, address, **date of birth and ID details or passport number** of the defendant and, where applicable, the defendant's representative;

Amendment 22

Proposal for a regulation

Article 8 – paragraph 2 – point k (new)

Text proposed by the Commission

Amendment

(k) a declaration to the effect that the information supplied by the claimant in the application for an EAPO is true and complete and that the claimant is aware of the penalties to which anyone knowingly making false and incomplete declarations is liable under the law of the Member State in which the application is made.

Or. it

Amendment 23

Proposal for a regulation

Article 8 – paragraph 4

Text proposed by the Commission

Amendment

4. The application may be submitted in any means of communication, including electronic.

4. The application ***and any supporting documentation*** may be submitted in any means of communication, including electronic.

Or. it

Amendment 24

Proposal for a regulation

Article 10 – paragraph 2 (new)

Text proposed by the Commission

Amendment

In exceptional cases, the court to which the application for an EAPO is made may

ask to hear the defendant if it considers this necessary in order to reach a final decision.

Or. it

Amendment 25

Proposal for a regulation Article 11 – paragraph 1

Text proposed by the Commission

1. *Where the competent court considers that it cannot issue the EAPO without additional evidence, it may admit such evidence in the form of written statements of witnesses or experts.*

Amendment

1. The competent court ***shall use the most appropriate means of taking evidence that are available under national law.***

Or. it

Amendment 26

Proposal for a regulation Article 11 – paragraph 2

Text proposed by the Commission

2. The court shall admit oral testimony only where the court deems it necessary. ***Where the claimant, a witness or an expert is not domiciled in the same place as the competent court, the court shall admit evidence in the form*** of video conference or other communication technology where such technology is available.

Amendment

2. The court shall admit oral testimony only where the court deems it necessary, ***and may, for this purpose, make use*** of video conference or other communication technology where such technology is available.

Or. it

Amendment 27

Proposal for a regulation Article 12

Text proposed by the Commission

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**.

Amendment

Before issuing an EAPO, the court **shall** require the provision of a security deposit or an assurance by the claimant **that will** ensure compensation for any damage suffered by the defendant to the extent the claimant is liable to compensate such damage under **Article 12a**.

Or. it

Amendment 28

Proposal for a regulation Article 12 – paragraph 2 (new)

Text proposed by the Commission

Amendment

The competent court may exempt the claimant from the requirement to provide a security deposit or an assurance in accordance with paragraph 1 if it considers this superfluous on account, in particular, of the creditor's financial status.

Or. it

Amendment 29

Proposal for a regulation Article 12 a (new)

Text proposed by the Commission

Amendment

Article 12a

Claimant's liability

1. The claimant shall be liable for any damage caused to the defendant as a result of the setting aside or modification of an EAPO, the suspension of the enforcement of an EAPO or the claim being deemed unfounded during proceedings on the substance of the matter.

2. The courts of the Member State in which the EAPO was set aside or modified shall establish the extent of the damage referred to in paragraph 1.

Or. it

Amendment 30

Proposal for a regulation Article 14 – paragraph 1

Text proposed by the Commission

1. In cases referred to in Article 5(2), *where the claimant has obtained a judgment or court settlement, that claimant may request that* the court which issued the judgment or court settlement *also issue an EAPO.*

Amendment

1. In cases referred to in Article 5(2), *jurisdiction for issuing an EAPO shall lie with* the court which issued the judgment or court settlement.

Or. it

Amendment 31

Proposal for a regulation Article 14 – paragraph 2

Text proposed by the Commission

2. Where the claimant has obtained an authentic instrument, *that claimant may request that* the competent authority in the Member State where the authentic instrument has been drawn up *and designated for this purpose by each*

Amendment

2. Where the claimant has obtained an authentic instrument, the competent authority in the Member State where the authentic instrument has been drawn up *shall be competent for issuing an EAPO in respect of the debt specified in that*

Member State also issue an EAPO.

instrument.

Or. it

Amendment 32

Proposal for a regulation

Article 15 – paragraph 2 – point b

Text proposed by the Commission

(b) the name *and* address of the defendant and, where applicable, the defendant's representative;

Amendment

(b) the name, address, ***date of birth and ID details or passport number*** of the defendant and, where applicable, the defendant's representative;

Or. it

Amendment 33

Proposal for a regulation

Article 15 – paragraph 2 – point d

Text proposed by the Commission

(d) the information on the account(s) in accordance with Article 16, unless a request for obtaining account information is sought pursuant to Article 17;

Amendment

(d) the information on the account(s) in accordance with Article 16, ***including the name and address of the bank with which the debtor holds one or several accounts,*** unless a request for obtaining account information is sought pursuant to Article 17;

Or. it

Amendment 34

Proposal for a regulation Article 15 – paragraph 2 – point i (new)

Text proposed by the Commission

Amendment

(i) a declaration to the effect that the information supplied by the claimant in the application for an EAPO is true and complete and that the claimant is aware of the penalties to which anyone knowingly making false and incomplete declarations is liable under the law of the Member State in which the application is made.

Or. it

Amendment 35

Proposal for a regulation Article 15 – paragraph 3

Text proposed by the Commission

Amendment

3. The application may be submitted in any means of communication, including electronic.

3. The application ***and any supporting documentation*** may be submitted in any means of communication, including electronic.

Or. it

Amendment 36

Proposal for a regulation Article 16 – point a

Text proposed by the Commission

Amendment

(a) ***the*** full name ***of the defendant,***

(a) ***where the defendant is a natural person, his*** full name, ***date of birth and national identity or passport number,***

Or. it

Amendment 37

**Proposal for a regulation
Article 16 – point a a (new)**

Text proposed by the Commission

Amendment

(aa) where the defendant is a legal person, the number of that legal person in the business register,

Or. it

Amendment 38

**Proposal for a regulation
Article 16 – point c – point iii**

Text proposed by the Commission

Amendment

(iii) where the defendant is a natural person, his date of birth or national identity or passport number, or

deleted

Or. it

Amendment 39

**Proposal for a regulation
Article 16 – point c – point iv**

Text proposed by the Commission

Amendment

(iv) where the defendant is a legal person, the number of that legal person in the business register.

deleted

Or. it

Amendment 40

Proposal for a regulation Article 17 – paragraph 1

Text proposed by the Commission

1. Where the claimant does not dispose of all the account information required pursuant to Article 16, that claimant may request that the competent authority of the Member State of enforcement obtain the **necessary** information. Such request shall be made in the application for an EAPO.

Amendment

1. Where the claimant does not dispose of all the account information required pursuant to Article 16, that claimant may request that the competent authority of the Member State of enforcement obtain the information **required in order to identify the debtor's bank account(s)**. Such request shall be made in the application for an EAPO.

Or. it

Amendment 41

Proposal for a regulation Article 17 – paragraph 2

Text proposed by the Commission

2. The application shall include all information available to the claimant about the defendant and the defendant's bank accounts.

Amendment

2. The application shall include all information available to the claimant about the defendant and the defendant's bank accounts. **The claimant shall specify the Member State in which the debtor holds the bank account(s) in respect of which a preservation order is being requested, and shall duly substantiate the application.**

Or. it

Amendment 42

Proposal for a regulation Article 17 – paragraph 5

Text proposed by the Commission

5. *The methods of obtaining information under national law to be provided to the Commission pursuant to Article 48 shall be one of the following:*

Amendment

5. *Member States shall make provision under their national law for one of the following means of obtaining the information required in order to identify the creditor's bank account(s):*

Or. it

Amendment 43

Proposal for a regulation Article 17 – paragraph 5 – point a

Text proposed by the Commission

(a) *the possibility to oblige* all banks in their territory to disclose whether the defendant holds an account with them.

Amendment

(a) *an obligation on* all banks in their territory to disclose whether the debtor holds an account with them;

Or. it

Amendment 44

Proposal for a regulation Article 17 – paragraph 5 – point b a (new)

Text proposed by the Commission

Amendment

(ba) the possibility of obliging the defendant to state where the account is held and prohibiting him from carrying out any transactions, including withdrawals and transfers, against the account that would cause the amount held therein to fall below the amount due, as specified In the EAPO.

Amendment 45

Proposal for a regulation Article 19 – paragraph 1

Text proposed by the Commission

1. When applying for an EAPO, the claimant shall disclose whether he or she has seized any other court with an application for an EAPO or an equivalent protective measure under national law against the same defendant and aimed at securing the same claim.

Amendment

1. When applying for an EAPO, the claimant shall disclose whether he or she has seized any other court with an application for an EAPO or an equivalent protective measure under national law against the same defendant and aimed at securing the same claim. ***The claimant shall provide details of any earlier applications for an EAPO that were rejected.***

Or. it

Amendment 46

Proposal for a regulation Article 19 – paragraph 2

Text proposed by the Commission

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

Amendment

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

Or. it

Amendment 47

Proposal for a regulation Article 20

Text proposed by the Commission

Amendment

Communication and Cooperation between courts ***deleted***

1. Where the courts of a Member State are seised with an application for an EAPO and the courts of another Member State are seised with proceedings as to the substance, those courts concerned may cooperate in order to ensure proper coordination between the proceedings as to the substance and the proceedings relating to the EAPO.

2. The court seised with the application for an EAPO may seek information from the other court referred to in paragraph 1 on all relevant circumstances of the case or require the claimant to obtain such information, such as the risk of dissipation of assets by the defendant or any refusal of a similar measure by the court seised as to the substance. Such information may be sought directly or through the contact points of the European Judicial Network in civil and commercial matters established by Decision 2001/470/EC.

Or. it

Amendment 48

Proposal for a regulation Article 26 – paragraph 3

Text proposed by the Commission

Amendment

3. Where the funds in the account designated in the EAPO pursuant to paragraph 1 consist of financial ***deleted***

instruments, their value shall be determined by reference to the relevant market rate applicable on the day of implementation.

Or. it

Amendment 49

Proposal for a regulation Article 26 – paragraph 4

Text proposed by the Commission

4. Where the currency of the funds held in the account is not the same as that in which the EAPO was issued, the bank shall convert the amount by reference to the official exchange rate *of* the day of implementation.

Amendment

4. Where the currency of the funds held in the account is not the same as that in which the EAPO was issued, the bank shall convert the amount by reference to the official exchange rate *applying on* the day of implementation *in the Member State in which the account is located*.

Or. it

Amendment 50

Proposal for a regulation Article 27 – paragraph 3

Text proposed by the Commission

3. The bank may transmit its declaration by *secured* electronic means of communication.

Amendment

3. The bank may transmit its declaration by electronic means of communication, *provided that they are secure within the meaning of Articles 16 and 17 of Directive 95/46/EC*.

Or. it

Amendment 51

Proposal for a regulation Article 28 – paragraph 1

Text proposed by the Commission

1. **Where the EAPO covers several accounts held by the defendant with one and the same bank**, the bank shall implement *it* only up to the amount specified therein.

Amendment

1. The bank shall implement **the EAPO** only up to the amount specified therein. **Where the defendant holds several accounts at one and the same bank, the bank shall act fairly and in good faith in preserving the amount owed, so as to cause the least possible harm to the defendant.**

Or. it

Amendment 52

Proposal for a regulation Article 30 – paragraph 1

Text proposed by the Commission

1. A bank shall only be entitled to seek payment or reimbursement of the costs incurred by the implementation of the EAPO or of an order pursuant to Article 17(4)(a) **where it is entitled to such payment or reimbursement in respect of orders with equivalent effect which are issued under national law.**

Amendment

1. A bank shall only be entitled to seek payment or reimbursement of the costs incurred by the implementation of the EAPO or of an order pursuant to Article 17(4)(a).

Or. it

Amendment 53

Proposal for a regulation Article 30 – paragraph 3

Text proposed by the Commission

3. Member States shall communicate to the Commission in accordance with

Amendment

deleted

Article 48 whether banks are entitled to recover their costs and, if so, the amount of the fee pursuant to paragraph 2.

Or. it

Amendment 54

Proposal for a regulation Article 39

Text proposed by the Commission

A third party has the right to raise objections against the EAPO before the courts of the Member State of origin *or of enforcement insofar as the order or its enforcement prejudices their rights.*

Amendment

A third party has the right to raise objections against the EAPO before the courts *in accordance with the national law* of the Member State of origin.

Or. it

Amendment 55

Proposal for a regulation Article 39 – paragraph 2 (new)

Text proposed by the Commission

2. A third party has the right to raise objections against the enforcement of an EAPO before the relevant national authority in accordance with the national law of the Member State of enforcement.

Amendment

Or. it

EXPLANATORY STATEMENT

1. Introduction

At present there are a number of EU instruments that are designed to facilitate the recovery of unpaid debts. They include: the European Small Claims Procedure, the European Order for Payment procedure and the European enforcement order for uncontested claims. Even though these instruments make it easier for judgments on cross-border debt recovery to be recognised, much remains to be done as regards transitional measures.

It is estimated that each year some 2.6% of the annual turnover of EU companies is lost in unpaid debts. This is because the fragmentation of national rules on debt recovery enables debtors to transfer or move their money easily from a bank account in one Member State to another.

As evidenced by the Commission report¹, four main shortcomings of the current situation can be identified:

- the conditions for issuing orders preserving assets in bank accounts under national law vary considerably between Member States²;
- it is impossible, in many Member States, for a creditor to obtain information about the whereabouts of his debtor's bank account;
- the costs of obtaining and enforcing an account preservation order in a cross-border situation are generally higher than in domestic cases;
- the differences between, and duration of, national enforcement procedures constitute a serious problem for debtors.

In order to address these issues, the proposal for a regulation under consideration introduces a new legal instrument of a protective nature called a European Account Preservation Order (EAPO), which a creditor may use as an alternative to national procedures. According to estimates by the Commission, by using the proposed measure companies will be able to recover up to EUR 600 million in unpaid debts³.

¹ See: Report on the proposal for a regulation (COM(2011)445, p.3).

² Writs of attachment are not a 'universal' concept in the legal system of the Union. On the contrary, there are several transitional measures in the various legal systems, ranging from general instruments, such as injunctions (Ireland) or orders (Denmark), to special instruments such as the Garnishment Order (Malta). In this regard, see the comparative analysis of national procedures for obtaining an order of attachment, by the CSES in a study commissioned by the European Commission and published in 2011: 'Study for an Impact Assessment on a Draft Legislative Proposal on the Attachment of Bank Accounts' (pages 70-85).

³ See Commission's impact assessment on the proposal for a regulation (p. 35), available through the following link: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2011:0937:FIN:EN:PDF>.

2. Rapporteur's position

2.1. Scope.

Your rapporteur welcomes the legal uniformity applied by the Commission in the exclusions from the scope of the proposal, which largely correspond to those of Regulation Brussels I, such as family law, social law and arbitration.

However, he proposes excluding matrimonial property regimes and successions from the scope of the proposal (see Amendment 8). In your rapporteur's view, such a broad extension of the scope would require a specific impact assessment. Moreover, these areas do not appear to fall within the main objectives of the proposal, which, as the Commission points out, seeks to facilitate *'the recovery of cross-border claims for citizens and businesses (...) and improve the efficiency of enforcement of judgments in civil and commercial matters concerning cross-border disputes'*¹

2.2. Definitions.

To define the scope of the regulation, your Rapporteur considers it necessary to clarify and simplify the proposed text with regard to the definition of 'matters having cross-border implications'. It is, in fact, essential to provide a suitable definition of the concept of 'cross-border dispute'. To that end, your rapporteur proposes that the criteria which define the cross-border dimension of the matter be tightened up by reversing the presumption. Accordingly, a matter will be considered to have cross-border implications only if the debtors are domiciled and/or the bank accounts to be preserved by the order are located in a Member State other than that of the court seised for the issuing of the EAPO (see Amendment 9).

Your rapporteur does not think it is advisable to include 'financial instruments', as defined in Article 4(1)(17) of Directive 2004/39/EC (see Amendments 11, 12 and 14²) in the definition of 'bank account'. These instruments would include, amongst others, cash and marketable securities, money market instruments, units in an undertaking for collective investment, options and financial derivatives for the transfer of credit risk. In your rapporteur's view, the precautionary freezing of financial instruments poses risks that are different from the freezing of 'traditional' bank deposit accounts. Indeed, the value of financial instruments is subject to change due to fluctuations in market rates. Therefore, including financial instruments in the scope of the EAPO could have negative repercussions on both debtors and creditors.

Your rapporteur is of the opinion that the definition of 'claim' given in Article 4(7) of the proposal should be expanded in order to specify its nature. To that end, a reference to liquidity and collectability requirements will help to determine whether the claim is well-founded and would avoid discrepancies in the interpretation of the nature of the claim for which the court is required to issue the EAPO (see Amendment 15).

¹ Explanatory Memorandum of the Commission proposal COM(2011)445, p. 4.

² The amendment proposes deleting paragraph 3 of Article 26, which governs the implementation of the EAPO with regard to financial instruments (see Amendment 48).

Lastly, with the aim of increasing the legal certainty of the text, your rapporteur considers it appropriate to clarify the definition of 'bank', making a distinction between credit institutions and electronic money institutions (see Amendment 10).

2.3. Procedure for obtaining an EAPO

Ex parte procedure

In order to ensure that the measure is as effective as possible, the proposal provides for a 'surprise effect' at the implementation stage of the EAPO. The aim is to prevent debtors from withdrawing or transferring amounts held in other bank accounts in a state different from that of the procedure. To that end, the EU procedure is available even before an enforcement order has been obtained in the Member State where the debtor is located¹ and the EAPO can be issued in an *ex parte* procedure, i.e. without having first heard the debtor².

Although it is vital that the surprise effect be safeguarded by the use of the *ex parte* procedure for the issuance of an EAPO, your rapporteur takes the view that the wording of the provision should be revised in order to strike a fair balance between the rights of the creditor and those of the debtor. The proposal, in fact, appears to be overly biased in favour of the claimant and does not offer the necessary safeguards to mitigate the potentially draconian nature of the EAPO.

In view of the above analysis, your rapporteur would welcome the introduction of a provision whereby, in exceptional and duly justified cases, the court seised would have the right to summon the defendant in order to obtain further information³, to enable a more accurate assessment to be made of the merits of the application (see Amendments 3 and 24).

• *Conditions for granting the order*

In order to balance the rights of debtors and those of creditors, your rapporteur is of the view that the conditions for granting the EAPO need to be tightened up and be more specific⁴. Accordingly, the amendment to letter (b) of the first paragraph provides a broader definition of a condition for applying for an EAPO. According to the relevant amendment, a creditor whose claim is at risk of being impaired, either wholly or in part, may apply for an EAPO (see Amendments 1 and 20). At the same time, the wording has been tightened up by the use of the criterion of 'sufficiency' with regard to the necessary supporting evidence for claims (see Amendment 19) and 'tangibility' and 'current risk' in the case of impairment (see Amendments 1 and 20).

• *Application for an EAPO*

Your rapporteur proposes increasing the information that debtors have to supply when filling in an application form for an EAPO (see Amendments 21, 23, 32, 33 and 35) and making that information more specific. Along the same lines, a subsequent amendment introduces the requirement for creditors to accompany the EAPO application with a declaration certifying

¹ Article 5 (Availability)

² Article 10 (Ex parte procedure)

³ The adversarial principle is one of the fundamental principles of the legal systems of the Member States.

⁴ See Article 7 of the proposal.

that the information provided in the application is true and complete and that they are aware of the penalties to which anyone knowingly making false and incomplete declarations is liable under the law of the Member State in which the application is made (see amendments 22 and 34).

- ***Evidence***

Your rapporteur takes the view that the criteria governing the evidence that may be admitted in the procedure should be tightened up and be more specific. He does not consider it appropriate to use written statements of witnesses or experts. National provisions governing the definition of 'expert' differ in individual national legal systems; this raises the serious risk of fraudulent evidence being given. For that reason, your rapporteur proposes regulating the methods for gathering evidence under national law and deleting from the text the option of using expert witness statements (see Amendments 25 and 26).

- ***Creditor liability***

In order to encourage a 'responsible' use of the procedure, your rapporteur is of the view that creditors should be held liable for any damage caused to defendants as a result of the revocation or amendment of an EAPO, the suspension of the enforcement of an EAPO or the claim being deemed unfounded during proceedings on the substance of the matter (see Amendments 5 and 29). Likewise, your rapporteur proposes making it compulsory for creditors to provide a security deposit or a sufficient guarantee to compensate for any damage suffered by debtors further to the enforcement of an EAPO that is subsequently revoked (see Amendments 4, 27 and 28).

2.4. Information on bank accounts and costs relating to the procedure

Your rapporteur is of the view that the information referred to in points (iii) and (iv) of Article 16 of the proposal, namely the date of birth, national identity or passport number or number of the legal person in the business register, should always be communicated in order to raise the level of information necessary for the identification of the debtor's account, thus increasing the level of protection of the latter's rights (see Amendments 36, 37, 38 and 39). Such a provision may also enable the debtor's account to be identified more quickly and reliably.

As regards the provisions of Article 17 of the proposal, in keeping with the opinion expressed by the European Data Protection Supervisor¹, and in order to avoid disclosing information that is not relevant, such as the disclosure of bank secrets, your rapporteur proposes to limit the request for, and obtaining of, information on the defendant's bank account to that which is genuinely necessary for the purpose of identifying the defendant and his or her accounts (see Amendments 40 and 50) and to make the information requested more specific (see Amendment 41). At the same time, among the means the competent authority has of obtaining information, your rapporteur takes the view that the defendant should be required to state where the account is held and be prohibited from carrying out any transactions, including withdrawals and transfers, against the account that would cause the amount held therein to fall

¹ See Opinion of the European Data Protection Supervisor, Official Journal of the European Union, C 373/4 (21/12/2011).

below the amount due, as specified on the EAPO (see Amendments 6 and 44).

The Commission proposal stipulates that the payment or reimbursement of costs incurred by the banks in implementing the EAPO is to be governed by national law (Article 30(1)). In the light of the differences in individual national legal systems, a provision of this kind is likely to discriminate against those banks for which there is no provision for such reimbursement. Indeed, it is undeniable that the proposed procedure will involve the use of human and economic resources, the burden of which cannot be ignored given that a private, rather than public, interest is being pursued here. For that reason your rapporteur considers it appropriate for Article 30 to lay down explicit, harmonised provisions for the payment of the costs incurred by banks at the enforcement stage of the EAPO (see Amendment 52).