EACB comments on the selected provisions of the Commission Proposal for a Regulation creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters

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The EACB is the voice of the co-operative banks in Europe. It represents, promotes and defends the common interests of its 28 member institutions and of co-operative banks in general. Co-operative banks form decentralised networks which are subject to banking as well as co-operative legislation. Democracy, transparency and proximity are the three key characteristics of the co-operative banks' business model. With 4.200 locally operating banks and 63.000 outlets co-operative banks are widely represented throughout the enlarged European Union, playing a major role in the financial and economic system. They have a long tradition in serving 160 million customers, mainly consumers, retailers and communities. The co-operative banks in Europe represent 50 million members and 750.000 employees and have a total average market share of about 20%.
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The European Association of Co-operative Banks (EACB) takes note of the Commission proposal for a Regulation creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters (COM [2011] 445) (the Proposal, the EAPO Regulation), and would like to comment on its selected provisions.

GENERAL REMARKS

Analysing the Proposal from a bank's perspective, the EACB is concerned whether the conditions for obtaining the order for the claimants are not too lenient. We would be concerned about the risk of a significant increase in the number of applications for EAPO, leading to increased obligations and administrative costs for the banks. Thus, it is important to ensure that the creditor has a valid claim against the debtor before preserving the funds, and in this context we would welcome a further definition of what is meant by *'a well founded claim'* as referred to in Art 7(1)(a).It should further be ensured that EAPO is granted only when it is absolutely necessary to secure the interests of the claimant.

It should not be underestimated that the introduction of the second attachment regime, in addition to the already existing national regimes, means additional difficulties and costs for banks. Thus, we strongly believe that banks' costs incurred in relation to the execution of the EAPO should be covered. Moreover, banks should be properly involved in determining the fees due for the execution of EAPOs.

Finally, personal data protection rules should be dully observed. For example, where the claimant does not have the information on the bank account of the defendant, Article 17 allows the claimant to request the competent authority to find out this information instead. This may well have serious impacts on the bank secrecy issues and we would recommend close monitoring of the ongoing debate on the Commission Proposal for a Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation; COM(2012) 11 final).

DETAILED COMMENTS ON THE PROPOSED EAPO REGULATION

Article 4 - *Definitions*

Article 4 of the proposed regulation defines a '*bank account*' as any account containing cash or financial instruments. This definition seems to be quite broad and cover not only payment/current accounts in the strict sense but also securities accounts. The EACB would like to emphasize that preserving financial instruments involves considerable risks, particularly the risk of a price loss, because neither the securities account holder, i.e. the debtor, nor the creditor, can react to changes in the market situation.

Thus, the EACB would recommend including a narrower definition of a bank account and deleting the phrase "*or financial instruments*" from Article 4(1). In effect, the deletion of Articles 4(3) and 26(3), which both refer to *'financial instruments',* and of the reference to 'financial instruments' in Art 4(5), would be also necessary.

Article 7 – *Conditions for issuing an EAPO*

As mentioned above, the EACB would recommend defining further the concept of a *'well founded claim'* as referred to in Art 7(1)(a).

Article 12 – *Security to be provided by the claimant*

The question of whether a security deposit should be provided by the claimant should not be, in our view, left to the discretion of the court. It must be ensured that the applications for an EAPO are not made too liberally by the creditors. In the current proposal for the EAPO

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Regulation, there is nothing that would discourage creditors from applying for EAPO each time they consider that they might have a claim against the debtor, regardless of whether their underlying claim is well founded or how realistic the risk of the subsequent enforcement against the defendant being impeded actually is. The current liberal approach would pose the risk of forum shopping, where those countries where no security is required are especially targeted. Thus, the security deposit or equivalent assurance should be provided by the claimant as a principle, and in any case where the claimant already relies on the competent authority to find out the information about the defendant's account. Equally, the extent of the security deposit or equivalent assurance should not depend on the national law.

The EACB would recommend the following amendments to Article 12:
"Security to be provided by the claimant
Before issuing an EAPO, the court ~~***may***~~ ***should*** *require the provision of a security deposit or an equivalent assurance by the claimant* ***at the level appropriate*** *to ensure compensation for any damage suffered by the defendant* ~~***to the extent the claimant is liable to compensate such damage under national law***~~
2(new) Always where the application for EAPO contains the request for obtaining account information pursuant to Article 12 of this Regulation, the court shall require the provision of a security or equivalent assurance by the claimant at the level appropriate to ensure compensation for any damage suffered by the defendant.
3(new) The liability of the claimant for the damage suffered by the defendant shall not be dependent on the existence of fault on the side of the claimant".

Article 17 – *Request for obtaining account information*

One of the conditions that the EACB has been calling for in the run up to the Commission's current proposal for the EAPO Regulation is that it should be an obligation for the claimants applying for the EAPO to provide precise and detailed information on the defendant and the defendant's bank account that is to be subject to the preservation order. Thus, we are concerned about the approach taken by the Commission in Article 17, where as an exception to Article 16 it is envisaged that where the claimant does not dispose of all the account information required, he can still apply for the EAPO and request that the competent authority of the Member State of the enforcement of the EAPO obtains such information for them. This could mean banks being under the obligation to incur all the efforts and costs of searching for the defendant's account for the benefit of the claimant in a private dispute. This would be particularly difficult if the information provided by the claimant was very limited because the Regulation does not specify what is meant by *"the claimant does not dispose of all account information required pursuant to Article 16".* In particular, it is not clear whether having only one of the information elements listed in Article 16 would suffice to apply for EAPO in line with Article 17. All this would encourage the claimants, faced with no risks or burdens of their own, to carelessly apply for EAPOs in the context of their private claims without further reflection. As a minimum, we would recommend that in all cases where the claimant does not dispose of all account information, he provides a security or equivalent assurance (c.f. our comments on Article 12 above).

We would also propose the following amendment to Paragraph 2 of Article 17:
"2. The application shall include all information available to the claimant about the defendant and the defendant's bank accounts, ***and should at least include the full name of the defendant, the defendant's full address, the account number or numbers, and the name of the bank with which the defendant holds one or several accounts to be preserved as well as the address of the bank's headquarters in the Member State where the account is located".***

Article 28 – *Preservation of several accounts*

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Under Art 28(1), in case where EAPO covers several accounts held by the defendant with one and the same bank, the bank may implement the EAPO only up to the amount specified in the order. From the text of the Proposal we deduce that it shall be the bank that will be responsible for deciding which of the accounts should be preserved and how to split the amount between them. The Commission's proposal provides no criteria as to how those choices should be made, posing for the banks a risk of undue liability for making the choice in one or another way.

The EACB would recommend specifying in Article 28(1) the criteria according to which banks are to split the amount between several accounts.

In addition, it should be ensured that, in case where one or more EAPOs or equivalent orders have been issued covering several accounts held by the defendant in different banks, the banks are duly informed as soon as the funds exceeding the amount stipulated in the EAPO are released as provided for in Article 28(2).

2. Where one or more EAPOs or equivalent protective orders under national law have been issued covering several accounts held by the defendant with different banks, whether in the same or in different Member States, the claimant shall have a duty to effect the release of any amount specified therein which exceeds the amount stipulated in the EAPO. Such release shall be effected within 48 hours following the receipt of the first bank's declaration pursuant to Article 27 showing such excess. The release shall be effected through the competent authority of the respective Member State of enforcement. ***All the banks involved should be immediately informed about the release****".*

Article 30 – *Costs relating to the banks*

The costs and efforts for banks, resulting from a number of searching and reporting obligations imposed under this new Regulation should not be underestimated. The EACB has serious reservations concerning the provisions of Article 30(1), according to which a bank can only seek payment or reimbursement of its costs if it is entitled to payment or reimbursement in respect of orders with equivalent effect which are issued under national law. The payment or reimbursement of the costs actually incurred by the third-party debtor is made contingent, for no plausible reason, upon the law of the Member State in which the EAPO is enforced. The Commission does not provide any further explanation for this provision in its proposal[1].

The result of the current proposal is that banks in the Member States where under national law they are not entitled to payment or reimbursement of the costs in respect of orders equivalent to EAPO, will have to bear the EAPO processing costs themselves or cross-subsidise these through income from other services or other lines of business. This in turn is likely to lead to distortion of competition in Europe. This is because the expected outcome of the proposal is that banks, as third-party debtors, will have to comply with many more account preservation orders in the future; this extra work will mean extra costs. Unlike the creditors and debtors, banks, as third-party debtors, have no influence over the execution of the enforcement measure. They merely have to comply with and implement the measures, with each account preservation measure imposing costs on them.

Further, the foreseeable substantial differences across the EU in the level of payment or reimbursement of costs which a third-party debtor is entitled to would undermine the EU's declared aim of this legislative proposal, which is achieving a level playing field.[2] The result would be regulatory arbitrage. Banks in the Member States where there is no possibility for recovery of costs would be at a serious competitive disadvantage, as they would need to face

[1] see second bullet point of section 3.1.5, *Legal element of the proposal – Other provisions*
[2] see first bullet point of the final paragraph of section 1.2, Grounds and objectives of the proposal:
"More specifically, the proposal aims at
• Enabling creditors to obtain account preservation orders on the basis of the same conditions irrespective of the country where the competent court is located;"

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most likely higher number of orders, and will not be able to seek payment or reimbursement of their costs.

In light of the above comments it is therefore a strong recommendation from the EACB to provide for appropriate payment or reimbursement of costs for banks in all Member States. Such a provision would be in fact in line with the recommendations made previously by the European Parliament[3].

In addition, whilst the requirement that the recovery of costs must be proportionate and nondiscriminatory (Article 30(2)) is in our view logical, the concept of the determination in advance by Member States of single fixed fees is contrary to the freedom of contract and the free competition on prices. Any fees charged for the implementation of the EAPO should be determined at national level, in cooperation with the banking industry and in line with actual costs.

Finally, it should be made clear in Article 30 who the banks, as third-party debtors, can seek payment or reimbursement of their costs from. The EACB considers that it should be from the claimant, who initiates the EAPO and who may obtain reimbursement of the related costs from the defendant under compensation rules. This amendment of Article 30 would also help prevent "fishing expeditions", i.e. speculative applications for the issue of an EAPO, if creditors risk no financial consequences of careless applications.

The EACB would like to suggest amending Article 30 as follows:
"*Article 30*
Costs relating to the banks
1. A bank shall ~~***only***~~ *be entitled to seek* ***from the creditor*** *payment or reimbursement of the costs incurred by the implementation of the EAPO or of an order pursuant to Article 17(4)(a)* ~~***where it is entitled to such payment or reimbursement in respect of orders with equivalent effect which are issued under national law.***~~
2. Fees charged for the implementation of the EAPO or of an order pursuant to Article 17(4)(a) ***shall be in line with cost and*** ~~***correspond to single fixed fees which are determined in advance by the Member State where the account is located and which***~~ *respect the principles of proportionality and non-discrimination.*
~~***3. Member States shall communicate to the Commission in accordance with Article 48 whether banks are entitled to recover their costs and, if so, the amount of the fee pursuant to paragraph 2.***~~

Article 38 – *Right to provide alternative security*

According to Article 38, the competent authority of a Member State of enforcement shall terminate the enforcement of the EAPO if the defendant provides a security deposit specified in the EAPO. In such case, it should be ensured that the bank holding the account (as the third party debtor) is duly informed as soon as the competent authority terminates the enforcement of the EAPO.

---ENDS---

[3] EP report of 14 April 2011 stated that "… *such costs … should reflect the actual costs incurred …*"[3] In paragraph 5 of its opinion of 5 October 2010[3], the EP's ECON Committee also argued in favour of payment or reimbursement of costs: "*5. Emphasises that banks and other institutions should have costs covered for services, but these should be a true reflection of necessary and actual costs;…"*

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