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COMMISSION STAFF WORKING PAPER

Executive summary of the Impact Assessment

Accompanying the document

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

**Creating a European Account Preservation Order to facilitate cross-border debt
recovery in civil and commercial matters**

{COM(2011) 445 final}
{SEC(2011) 937 final}

1. INTRODUCTION

This initiative aims to facilitate cross-border debt recovery by improving access to and the efficiency of the preservation of bank accounts in the European Union. It will contribute to strengthening of the confidence of businesses – particularly SMEs (small and medium enterprises), consumers and families to make full use of the possibilities offered by the Single Market. This is consistent with the Commission's integrated approach to strengthen the recovery of the European economy as set out in the Europe 2020 Strategy for Growth.

1.1. Political mandate and existing instruments

The 2009 Stockholm Programme states that "the European judicial area should serve to support economic activity in the Single Market". It therefore "invites the Commission to put forward appropriate proposals for improving the efficiency of enforcement of judgements in the EU regarding bank accounts and debtors' assets". Accordingly the Commission Action Plan Implementing the Stockholm Programme refers to an initiative for a "Regulation on the attachment of bank accounts". Existing instruments in the area of civil justice do not deal with enforcement.

1.2. Consultation and expertise

In preparation of this initiative, the Commission published a comparative study in 2003 and carried out a public consultation through a Green Paper in October 2006. Empirical data supporting the elaboration of the impact assessment was collected by a further external study and a European Business Test Panel Survey. The Commission also organised a public hearing and several meetings with experts on enforcement. Additional comments were provided by an inter-service group within the Commission. This Impact Assessment was reviewed by the **Impact Assessment Board (IAB)**. The recommendations issued in the IAB's opinion have been accommodated in this revised version of the report as follows: (i) the analysis of the problem has been strengthened by explaining better the stages of cross-border debt recovery and the problems remaining in this area after the revision of Regulation Brussels I, in particular the assumptions underlying the estimates of the economic effects of the measure have been clarified, (ii) the assessment of the baseline scenario has been expanded and the added value of the preferred option highlighted; (iii) the assessment of the impacts has been improved, in particular assessing further sub-options reflecting important elements of the legislative proposal, with specific focus on time-limits as proposed in the new initiative. (iv) Finally the legal concepts have been clarified and a glossary was added in Annex.

1.3. Respect of Fundamental Rights

The impact on fundamental rights was assessed in order to ensure that the proposed schemes fully respect the rights and principles set out in the Charter of Fundamental Rights. The main provisions affected by the Commission initiative are the following: the right to an effective remedy (Article 47 subparagraph 1), the right to a fair trial (Article 47 subparagraph 2), the right to human dignity (Article 1), the right to property (Article 17), the right for family life (Article 7) and the right to data protection (Article 8).

2. PROBLEM DEFINITION

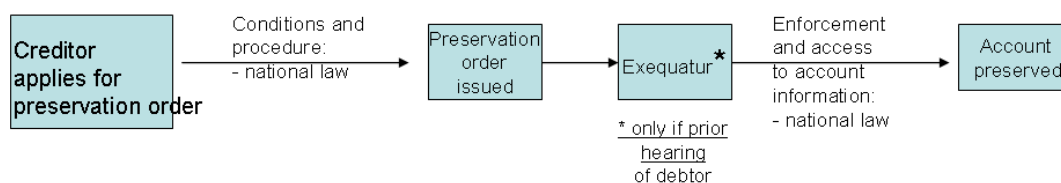
2.1. The problem of cross-border debt recovery

At present, a creditor seeking to recover his debt in another Member State faces significant difficulties. These difficulties arise both, in the context of a) proceedings on the merits in which a court issues a final judgment on the basis of a full analysis of all factual and legal issues involved in the case, and b) proceedings for provisional measures in which a court issues an interim decision such as an order preserving a bank account on the basis of a summary analysis of the case. In line with the political mandate, this initiative focuses on facilitating to obtain provisional measures for preserving a debtor's assets and on improving the efficiency of enforcement of decisions in the European Union. Currently, the internal market enables a debtor to move his funds from one bank account to another almost instantly, thereby making it easy for him to escape enforcement. A creditor, on the other hand, has little chance of blocking a debtor's bank accounts abroad to secure the payment of his claim with the same swiftness. The creditor may also have difficulties to find out the whereabouts of his debtor's account, in particular in cross-border situations. As a result, many creditors are either unable to successfully recover their claims abroad or do not consider it worthwhile pursuing them and write them off.

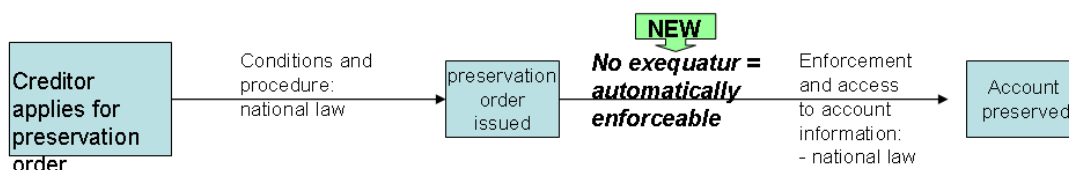
2.2. Different stages of proceedings

Different stages of obtaining and enforcing a preservation order are illustrated in the figure below.

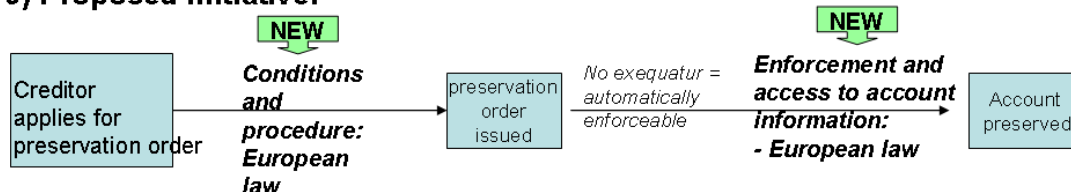
1) Current legal situation:



2) Revision of Brussels I Regulation:



3) Proposed initiative:



In many Member States, the creditor can apply for a provisional measure preserving his debtor's assets already prior to launching proceedings on the merits. If the provisional measure has to be enforced in another Member State than the one where it was issued, the creditor needs to have the decision declared enforceable there (in the so-called *exequatur* procedure). Under the current Regulation Brussels I, *exequatur* can be obtained for provisional measures issued in another Member State, except if they have been issued without a hearing of the debtor (so called *ex parte* orders). With the revision of Regulation Brussels I, the requirement of *exequatur* should be abolished, i.e. decisions given in one Member State, including certain *ex parte* orders, will be automatically enforceable in another Member State. However, enforcement of preservation orders will remain governed exclusively by national law.

2.3. The causes of the current problem

Problem 1: Conditions for issuing preservation orders vary throughout the EU: This makes it more difficult for creditors to obtain a preservation order in some Member States than in others. Differences relate for example to the level of proof required by the court to issue the order (e.g. or to the specific condition that there is a serious risk that the ultimate enforcement of the judgment will be rendered impossible).

Problem 2: Difficulties to obtain information on debtor's bank account: In many Member States it is difficult for a creditor to obtain information about the whereabouts of his debtor's bank account. There are also Member States, where it is not possible to obtain an order obliging the banks to disclose whether the debtor holds an account with them. In other countries however, the enforcement authorities have access to the tax registers. In the area of family maintenance, the Maintenance Regulation establishes a system of administrative assistance to creditors by central authorities which are granted access to information held by public authorities.

Problem 3: Costs of obtaining a preservation order are higher in cross-border cases: The revision of Regulation Brussels I will save creditors about €2,000 as the average cost of *exequatur*. However, cross-border cases currently trigger additional costs. This concerns in the first place the need to involve an additional lawyer licensed to practice in the country where proceedings take place. There are also costs of the translation of documents into the official language accepted by the court or the costs for serving documents across borders.

Problem 4: Differences in national enforcement systems and length of enforcement procedures in Member States: Even in domestic cases it can take between 1 day and more than 30 days in Europe to serve a court decision on debt recovery. In cross-border situations, delays will generally be even longer. Differences in national enforcement systems also result in additional delays for enforcement or even inexecution of decisions. In some Member States, enforcement is carried out by bailiffs acting outside the court system, in others this is done by the court or by a central administrative agency.

2.4. Scale of the problem

Problems of cross-border debt recovery affect in the first place **businesses** which are trading or providing services in other Member States. The scale of the cross-border bad debt that can be potentially secured can be estimated between €1,12 and €2bn on the basis of different sources of data. According to recent Eurobarometer surveys, **consumers** are still reluctant to shop cross-border. 14% of consumers shopping at a distance encountered problems with the

transaction. Over half of them consider that it is difficult to access civil justice in another EU Member State. The monetary value of 'problematic' cross-border **maintenance** claims can be estimated to amount up to €68 million per year. The situation for maintenance creditors will improve to some extent due to the Maintenance Regulation.

2.5. Need for action at EU level

Any new European instrument on the preservation of bank accounts in cross-border situations would be a matter of recognition and enforcement of a judicial decision and it would also eliminate the obstacles to the proper functioning of civil proceedings. It would as such be covered by lit a) and f) of Article 81 TFEU, that also calls for measures particularly when necessary for the proper functioning of the internal market. As regards subsidiarity, the problems (namely cost of proceedings, difficulty to obtain disclosure of debtor's assets and inefficient civil procedural rules) have a clear cross-border dimension and they cannot be adequately attained by Member States alone.

3. OBJECTIVES

The general objectives of the initiative are to facilitate the recovery of cross-border claims for citizens and businesses, particularly SMEs, to increase confidence of traders, to improve payment morale of debtors, to reduce the risks involved in cross-border trade and to improve the efficiency of enforcement of judgements. The specific objective is to increase effectiveness of the procedure for cross-border enforcement by enabling creditors to obtain preservation orders or bank attachments on the basis of the same conditions irrespective of the country where the competent court is located, allowing creditors to obtain information on the whereabouts of their debtors' bank accounts, reducing costs in cross-border situations, and increasing awareness that a European procedure is available.

4. RETAINED POLICY OPTIONS

Option A: Status quo after revision of Regulation Brussels I. Under this option, the Commission would not take any action in addition to the proposal for a revision of Regulation Brussels I adopted in December 2010.

Option B: Creation of a European Account Preservation Order. This option would create a new European procedure with protective effect, which would supplement existing remedies under national law without requiring EU Member States to modify their national law on civil procedure or their enforcement systems. The European procedure would regulate the procedure for issuing the preservation order for bank accounts as well as rules for its implementation by the bank holding the account targeted.

Option C: Harmonising national rules for the preservation of bank accounts. This option would harmonise the national rules of civil procedure for the preservation of bank accounts in cross-border cases by way of a European directive.

5. EVALUATION OF POLICY OPTIONS AND IMPACT ASSESSMENT

5.1. Option A: Status Quo after revision of Regulation Brussels I (if adopted)

(a) Objectives to achieve: Maintaining the status quo would have no effect on the problems identified and would not contribute to achieving the specific policy objectives outlined above.

(b) Economic impact: Under the status quo, there are 60% more companies applying for provisional measures preserving a debtor's bank account in domestic than in cross-border cases¹. This means that companies make less use of the possibility to secure payment of their debts by way of preservation orders in cross-border transactions than in domestic cases and, as a result, write off more cross-border than domestic debt. This amount can be quantified at between €441 Mio and €800 Mio². The difficulties of cross-border debt recovery are putting off companies, in particular SMEs, and consumers from making full use of the Single Market. As a result of the revision of Regulation Brussels I, it is expected that the number of companies taking advantage of preservation orders in a cross border situation would increase around by 10% compared to the current situation, leading to the increase of the debt preserved corresponding to estimated €68-120 Mio.

(c) Fundamental rights: The Status quo would not contradict the requirements of the Charter of Fundamental Rights of the European Union since the Charter only requires Member States to respect the rights set out therein when they are implementing Union law and the process of enforcement of civil judgment is currently not covered by EU instruments.

(d) Views of Stakeholders: There have been no requests to keep only the status quo.

5.2. Option B: European Account Preservation Order

a) Effectiveness to achieve policy objectives: Option B achieves the **general policy objective** to facilitate the recovery of cross-border claims for citizens and businesses by making it easier to obtain a preservation order securing the recovery of cross-border debt. It achieves **the specific policy objectives** to a significant extent. It will allow a creditor to use an efficient and uniform European procedure under the same conditions in all Member States of the EU – e.g. without a prior hearing of the debtor, thereby safeguarding the surprise effect of the measure, to obtain information about the whereabouts of his debtor's accounts without having to pay the services of private debt collecting or investigation agencies. It will reduce lawyer's costs and translation costs. Costs of banks and bailiffs will be made more transparent by obliging Member States to fix a single fee for their respective services. It will enable a creditor to obtain and enforce a preservation order more quickly by introducing time-limits for certain key steps of the procedure.

b) Economic impact: Option B would have a positive economic impact and contribute to reducing the overall amount of the €5bn bad debt. It would enable companies to secure the recovery of **additional bad debt of between €373Mio and €600Mio** per year, thereby increasing the **overall level of bad debt secured** by preservation orders from €79 Mio - €1.2 bn to **between €1.12 bn and €2bn per year** over the time. **An estimation of cost savings for**

¹ Difference between 11.6% of companies applying for a bank attachment cross-border and 19.2% applying for it domestically.

² Estimate on the basis of sample of bank institutions was €1.12bn – €678 Mio making €440 Mio and the second estimate was €2 bn – €1.2 bn making €800 Mio.

companies currently involved in cross-border trade would be in **the range of €1,9Mio to €149Mio annually**³. Option B will benefit in particular **SMEs** and it is likely to encourage more companies and consumers to make full use of the possibilities offered by the Single Market. The availability of an effective sanction in case of non-payment (in addition to the increase in the amount of the claim already provided by the Late Payment Directive) is also likely to improve the payment behaviour of debtors. The increase in the number of preservation orders risks having a negative economic impact on **banks** where they are currently not allowed to charge a fee for implementing the measure.

c) Social impact: Option B together with the implementation of the Maintenance Regulation is expected to allow maintenance creditors to recover a notable proportion of claims from recalcitrant debtors.

d) Impact on Member States: Implementation costs are considerably lower than the alternative option of harmonising national rules. Costs of familiarising the judges and enforcement officers should be small and would be one-off costs. Member States whose judicial system is currently comparatively slow might incur higher implementation costs to comply with the procedural deadlines. Option B will respect Member States legal traditions.

e) Fundamental rights: Option B would improve the right of the creditor to an effective enforcement of his debts. At the same time, the new procedure would ensure that the rights of the debtor are safeguarded in full compliance with the requirements of the Charter of Fundamental Rights, notably by granting prompt and adequate remedies against the preservation order and by ensuring that amounts necessary to ensure his livelihood will be exempt from execution. The instrument should ensure that the debtor's personal data is fairly and lawfully processed, the purpose of processing this data is restricted to the sole purpose of preserving the amount of the claim, the debtor's data is not kept for longer than is necessary and that the debtor has a right to recourse against the processing of his data.

f) Views of stakeholders: A large majority of stakeholders and the European Parliament call for developing specific European instrument for cross-border debt recovery.

5.3. Option C: Harmonisation of national rules on the preservation of bank accounts

(a) Objectives to achieve: This option would also partly achieve the policy objectives set out above, albeit to a lesser extent than Option B. However, Option C would not allow national procedures to coexist with the harmonised "European" procedure.

(b) Economic impact: Option C would have a slightly different economic impact than option B. While it would align the conditions of issue of preservation orders, e.g. ensuring that throughout the Union, preservation orders could be obtained under the same conditions, eventually differences between the procedures would continue to persist if the harmonisation instrument (e.g. by way of a Directive) did not deal with all detailed aspects of the procedural law of the Member States. Consequently, option C would not achieve the same degree of uniformity as a self-standing European procedure established by a Regulation would. The remaining differences between Member States' national procedural and enforcement law are likely to continue to require the involvement of a lawyer licensed to practice in each of the

³ This assumes that companies can save an average of 10h in lawyers' fees per cross-border case which amounts on an EU average to €2.410 per case. This amount is multiplied with the estimated current number of cross-border preservation orders per year of between 34.000 and 61.828.

Member States in which the preservation order is to be obtained and/or enforced. This would not allow for the same cost reduction under option C than under option B. Option C is therefore likely to have a less positive economic benefit on **SMEs** which are less likely to have in-house legal departments and are generally more sensitive to legal costs than large companies.

(c) Member States: Option C would require Member States to implement the rules harmonised by the directive into their national law. Option C would therefore be more costly to implement and be more intrusive into national legal traditions.

(d) Fundamental rights: Option C would have a positive impact on the right of the creditor to an effective enforcement. Compliance with the requirements of the Charter concerning the protection of the defendant would equally be required.

6. COMPARING THE OPTIONS

Key: ++ = very positive impact; 0=no or neutral impact; - - = very negative impact.

Policy options	Effectiveness to reach objectives	Economic impact	Impact on Member States	Fundamental Rights
Option A: Status Quo after revision of Regulation Brussels I	0	0	0	0
Option B: European Account Preservation Order	++	++	1)implementing costs - 2) legal traditions 0	+
Option C: Harmonisation of national rules for preservation orders	+	+	1)implementing costs -- 2) legal traditions --	+

In conclusion, option A fails to address efficiently the policy objective, since the current obstacle of divergent criteria for obtaining bank preservation orders and their effects within national legal systems still remains. Option C does not ensure the same economic and social benefit as option B and would be unnecessarily intrusive for national legal systems. Option B offers the most comprehensive solution, and therefore **option B** is the preferred option.

Sub-options of option B have been considered as follows: First, the European procedure would enable the creditor to obtain a preservation order normally without a prior hearing of the debtor (*ex parte*), thereby safeguarding the surprise effect of the measure. Second, the court having jurisdiction on the merits of the case should be also competent to issue preservation orders. It will need to be determined whether additional courts are competent to deal with the objections of the debtor against the order – i.e. the courts of the debtor’s domicile. Third, provisions would allow the creditor to obtain information on the whereabouts of his debtor's account: Either a disclosure order issued by the court would oblige all banks

located in a given Member State to check if the debtor holds an account with them and, or the court or the enforcement authorities would get direct access to existing public registers containing the necessary information. Lastly as regards time-limits, the European procedure would require no slower implementation than for national measures, or it could introduce specific time limits – e.g. for issuing the order, for serving it on the bank and the debtor, or for deciding on an application for review by the debtor.