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Litigation Committee response to the Ministry of Justice consultation on the Proposed EU Regulation creating a European Account Preservation Order (CP 14/2011)

The City of London Law Society ("CLLS") represents approximately 14,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 18 specialist committees. This response in respect of whether the UK should opt in to the Proposed EU Regulation creating a European Account Preservation Order ("EAPO") has been prepared by the CLLS Litigation Committee.

The Committee's view is that the UK should not exercise its power under article 3 of Protocol Number 21 to the Treaty on the Functioning of the European Union to take part in the adoption and application of Commission's proposal regarding an EAPO. For reasons explained below, the Committee considers that the Proposal in its current form is fundamentally flawed.

Instead of opting in to the Proposal at this stage, the Committee considers that the UK should seek to influence the negotiations on the Commission's proposal to the extent that it is able to do so. If those negotiations produce a regulation that fairly balances the interests of creditors and defendants, that does not impose too heavily on banks, and that is workable in practice, the UK should opt in at that stage. However, the UK should not opt in to the Commission's Proposal now in the hope that the negotiations over the Commission's proposal will lead to a satisfactory outcome but with no guarantee that they will in fact do so.

The aspects of the Commission's proposal that concern the Committee include the following:

(1) The criteria for granting an EAPO are set too low. There should be evidence of dissipation or concealment of assets. An EAPO should not be available as a matter of course. If that were so, it would allow claimants in effect to blackmail defendants into payment by the threat of obtaining an EAPO, or by actually obtaining an EAPO, because of the severe consequences to a debtor of being deprived of access to some or all of its bank accounts. This is potentially the case even if there is a bona fide dispute as to whether the debt

is due and the defendant is well able to meet, and intends to meet, any judgment that may be given against it.

(2) The ability of cross-border creditors, but not domestic creditors, to obtain an EAPO could disadvantage domestic creditors. If a debtor has both domestic and cross-border creditors, the risk of the cross-border creditor obtaining an EAPO may induce debtors to pay cross-border creditors first, to the detriment of domestic creditors.

(3) The lack of any obligation on the claimant to give full and frank disclosure to the court increases significantly the risk that EAPOs will be granted inappropriately. The obligation of full and frank disclosure is a vital check on ex parte applications in England and Wales. Given the potential severity of an EAPO, that check should be included in any legislation establishing an EAPO.

(4) Banks should be able to exercise pre-existing rights of set-off or netting with regard to sums subject to an EAPO.

(5) It should be clarified whether a "pecuniary claim", with regard to which an EAPO can be granted, includes a claim for damages or is confined to debt claims. In any event, the amount of an EAPO should not be "the amount of the claim", as under article 18(2) in the Commission's proposal, but rather an EAPO should be in an amount that the court considers, on the evidence before it, fairly represents the claimant's claim.

(6) The defendant's remedy in the event that an EAPO is wrongly made or is made in an excessive amount is, according to recital (15) in the Commission's proposal, to be left to national law (though it is not clear whether this is the national law of the Member State of origin or of enforcement). If the EU is to confer on the courts of each of its member states the ability to freeze bank accounts across the EU, the EU should also specify what the consequences of those courts wrongly freezing accounts should be in order to provide consistency. There is also a risk that where an EAPO is granted, it could confer an immediate security interest, unfairly giving priority over other creditors.

(7) The definition of bank accounts is too wide. EAPOs should be confined to conventional bank accounts and should not extend to financial instruments, such as derivatives. These financial instruments will commonly not be fungible, not be capable of easy realisation and will often be difficult to value. The definition of bank accounts should also expressly exclude clearing systems, which could fall within the current definition.

(8) The presumption should be that a claimant is obliged to put up security in an amount that the court considers appropriate, but not less than the amount of the EAPO, unless the court considers that there are strong reasons why the claimant should not be obliged to do so. Giving the court an apparently unfettered discretion as to whether to require security offers too much scope for national differences in approach, and exposes the defendant to too great a risk.

(9) The sums exempted from the effect of an EAPO under article 32 of the Commission's proposal should include sufficient to enable a defendant to take legal advice as to its rights with regard to an EAPO, to challenge the granting of an EAPO and to defend the substantive claim.

(10) The sums exempted from the effect of an EAPO under article 32 of the Commission's proposal for the living expenses of a natural person and the

normal expenses of a business should be assessed by the court granting the EAPO, applying the law of the Member State of enforcement, by reference to the circumstances of each defendant. It should not be left to the competent authority in the Member State of enforcement to apply a fixed sum to all defendants. This would also prevent the defendant receiving an allowance for each member state in which it has a bank account.

(11) It is difficult to see how the proposals to allow a claimant to identify the defendant's bank accounts could work in a UK context. There is no central register of all UK bank accounts, and it is impracticable for the UK competent authority to ask each of the numerous deposit-takers operating in the UK whether it holds an account for the defendant.

(12) The period of 30 days following the grant of an EAPO within which the claimant must start substantive proceedings is too long. Having obtained a remedy that could have very severe consequences for the defendant, the claimant should be obliged to start proceedings as soon as practicable after the EAPO has been granted, and both the claimant and the court should be obliged to progress the claim with due haste. Similarly, the 30 days allowed to a court under article 34(5) of the Commission's proposal to consider an application by the defendant is too long (and contrasts starkly with the periods allowed under article 21 to consider a claimant's application.)

(13) When it receives an EAPO, a bank will have to check its databases, which might well include more than one, and then take internal steps to freeze any accounts of the defendant. This is bound to take some time. As a result, the obligation on a bank receiving an EAPO to freeze the defendant's accounts "immediately" is impracticable. The obligation should, at most, be to freeze the defendant's accounts as soon as reasonably practicable.

(14) Banks (and, indeed, national competent authorities) should be provided with a ready means to collect from the claimant the costs of freezing an account (eg banks should not be obliged to continue to freeze an account unless paid those costs within a reasonable period of time).

(15) The Commission's aim appears to be the laudable one of helping SMEs recover relatively small debts. As drafted, however, the Commission's proposal may be of greater assistance to experienced litigants who want to exert pressure on an SME than to SMEs themselves. The Committee therefore wonders whether the availability of the EAPOs should in some way be restricted such that it is only available for smaller debts. .

As we have said, the Committee considers that the flaws in the Commission's proposal are such that the UK should not opt in to the Commission's proposal at this stage. The threats to UK businesses and banks arising from the proposal in its current form are such that the UK should not take the risk of opting in to the proposal in the hope that the draft regulation will be sufficiently improved in the course of the legislative process. The UK should only opt in if that legislative process does in fact significantly improve the regulation.

THE CITY OF LONDON LAW SOCIETY
Litigation Committee

Individuals and firms represented on this Committee are as follows:

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