EUROPEAN COMMISSION

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Dear President,

I would like to thank the German Bundesrat for its detailed Opinion on the Commission 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}.

In reply to the main issues raised in your Opinion, the Commission would like to offer the following clarifications.

The Commission has assessed the impact of its initiative on fundamental rights in order to ensure that the proposed schemes fully respect the rights and principles set out in the Charter.

The draft Regulation strikes a fair balance between the interests of creditors to have at their disposal a simple, swift and low-cost means to secure payment of their debt pending a judgment on the merits, and the interests of debtors to be adequately protected against abusive preservation orders.

The latter is achieved by tightening the conditions of issue, allowing the court to require a security deposit from the creditor – whilst the liability of the creditor for any damage caused to the debtor may be triggered under national law- and by strengthening the remedies (e.g. choice of the court and time limits for appeal are important elements of protection of the debtor). However, the tighter the conditions, the more difficult it will become for creditors to obtain a preservation order.

Furthermore, the Commission has given close consideration to simplification while drafting the legislative proposal. The intention is to ensure that the text is clear and the procedure sufficiently simple, that it will be user friendly and may not require the assistance of a lawyer.

However, the Commission would like to emphasise that a certain level of detail is a pre-condition for creating an independent, uniform judicial procedure which does not need to systematically refer to national law. Let me point out that national legislation is not necessarily less complex given the diversity of national enforcement procedures which currently act as an obstacle to cross-border debt recovery. The Commission's initiative specifically aims at facilitating cross border debt recovery by creating an independent, uniform judicial procedure applicable in all Member States.

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The Regulation is limited to matters having cross-border implications as defined in Article 3. This provision refers to cross-border cases in a "negative" way by defining which matters do not contain cross-border aspects. This approach is directly inspired by the Hague Convention on choice of court agreements.

The Commission would also like to provide some additional remarks regarding the Bundesrat's comments on some individual provisions of the Proposal:

Article 6(2) offers the claimant two alternative fora, as it will depend on the circumstances of the case which jurisdiction is more advantageous. In practice it is often most convenient to sue directly at the place of enforcement even though cases are conceivable where jurisdiction of the specialized court appears preferable. Accordingly, it is advisable to allow the creditor to apply for a preservation order also to a court in the Member State where the bank account is located. The risk of conflicting judgments should be avoided by means of Article 20 of the proposal which provides for a system of communication and cooperation between the court seized on the preservation order and the court on the merits of the case.

The preservation order will be issued in an ex parte procedure, i.e. without the prior hearing of the debtor (article 10). This will allow the "surprise effect" of the measure to be preserved. An explicit provision on this is necessary: in many Member States the protective order is issued in ex parte procedure, but in other countries the court has discretion on this matter. Without such provision, the practices in Member States would diverge widely. The proposal also includes provisions ensuring sufficient balancing elements of debtor protection in the ex parte procedure. The claimant can, however, request that the procedure be inter partes. Any further exception formulated in an abstract way would risk receiving a wide interpretation in courts currently not used to ex parte orders and would therefore be counterproductive.

Article 7 stipulates two main conditions for issuing the order: 1) existence of a claim, 2) risk that without the order, subsequent enforcement would be frustrated. These conditions correspond to the approach in the majority of Member States, although they may not be defined precisely in the same terms by national law. As it would be extremely difficult to agree on common objective criteria for assessing that these conditions are met, it is advisable to let the appreciation of individual cases to the discretion of the court.

Article 12 provides that the court has discretion to require that the claimant provides security to ensure compensation to any damage caused to the defendant. During the preparation of the proposal, the Commission considered including an obligation to provide security in the proposed Regulation. However, it was felt that the combination of this rule with others (e.g. liability, duty to disclose adverse facts) would deter the creditor from making use of the preservation order. Moreover, the discretionary rule gives courts more flexibility in dispensing with the security requirement. The current rule also seems to be in line with the law in a majority of Member States.

Article 17 sets out a system for the disclosure of debtor's bank accounts. Such information is requested by Article 16 of the proposal for the purpose of completing the application form. Member States have the choice between two models: either obtaining information from banks directly, or providing access to public registers. The latter is inspired by Article 61 of the Maintenance Regulation. The Commission does not see any inconsistency in referring to this mechanism since it operates efficiently in Nordic countries. Furthermore a maintenance

creditor may be willing to apply for a European preservation order, as it was explained in a case study of the impact assessment report referred to above.

The Commission shares the view of the Bundesrat that the issue of time limits is difficult but necessary. The Regulation provides for specific time limits at different stages of the procedure. This is deemed important in order to ensure the efficiency of the provisional measure as well as for the debtor's protection. The time limits were discussed and agreed as appropriate with the group of private experts (representing banks, courts, bailiffs and lawyers from different Member States). Article 44 provides an "escape clause" for those exceptional situations in which this is not possible –this needs to be justified- but it would not be acceptable that a Member State systematically derogates from the established time limits.

Similarly, the issue of banks' liability for implementing the order (Article 26) is a sensitive one. The bank served with the order is obliged to implement it immediately by blocking an amount corresponding to the amount of the order. Funds exceeding that amount must be left at the free disposal of the defendant. This limitation ensures that the measure is proportional.

Furthermore, the Commission has taken note with interest of the suggestions of the Bundesrat on Article 28 (preservation of several accounts). The technical amendments to the standard forms in Annexes will also receive careful examination when they are discussed with the Union legislators.

Article 24 dealing with service of the order on the bank distinguishes between two situations. If the court is situated in the same Member State as the bank (Article 24(2)), service is governed by national law. If service has to be effected across borders (Article 24(3)), this has to be done in accordance with Regulation (EC) No 1393/2007 – except that they are transmitted from the court of origin or claimant directly to the authority of enforcement which in turn serves it to the bank or to the defendant.

Article 27 provides that within three working days the bank has to issue a declaration on whether the order has preserved sufficient funds in the form set out in Annex III. The declaration has to be sent to the competent authority from which the order was received and the competent authority has to transmit it in turn to the person/institution from which it received the order under Article 24(3)(a) (i.e. either the claimant or the issuing court in another Member State). This would normally not apply to the situation referred to Article 24(2) where domestic law applies.

Similarly to Article 24, Article 25 distinguishes between service on the defendant domiciled in the same Member State as the competent authority –governed by national law- and cross-border service with the Member State of origin or another Member State than the State of enforcement –governed by the Service of Documents Regulation. The Commission has taken note that a clarification is needed as to the role of the competent authorities in such cases.

Finally, Article 5(2) and Section 2 of the proposal cover situations in which the applicant already has a title enforceable in the Member State of enforcement where the bank account is located. The application of the European procedure in this situation can have added value, e.g. to determine where the defendant has assets and where it is therefore worth launching enforcement proceedings or to secure funds in Member States where enforcement procedures are slow. Under Section 2 and Article 14, the applicant will obtain a preservation order automatically upon application without having to fulfil any further conditions. This includes

the risk of dissipation of assets by the defendant. The reason for this is that the claimant is already entitled to fully recover the amount set out in the title; a fortiori he is entitled to a preservation order. This approach is in line with Article 47 of the Brussels I Regulation (EC) No 44/2001 which provides that the declaration of enforceability carries with it the power to proceed to any protective measures. Accordingly there is no more need for a provision corresponding to Article 9 (examination of the application) in this case.

I hope that these clarifications address the issues raised in the detailed Opinion of the Bundesrat, and I am looking forward to continuing our political dialogue on this and other matters.

Yours faithfully,

Maroš Šefčovič
Vice-President