



c/o Bank of England
Threadneedle Street
London
EC2R 8AH

Telephone: (+44) (0)20 7601 3918
Fax: (+44) (0)20 7601 5226

Email: fmlc@bankofengland.co.uk
Website: www.fmlc.org

13 April 2011

Mr Eral Knight
Head of Civil Justice Team
Human Rights and International Directorate
Ministry of Justice
6th Floor
102 Petty France
London
SW1H 9AJ

Eral.Knight@justice.gsi.gov.uk

Dear Eral

Proposal for a Regulation on the Freezing of Bank Accounts in the European Union

Thank you very much for your email seeking the comments of the Financial Markets Law Committee ("FMLC" or "the Committee") on the European Commission's proposed draft Regulation on the Freezing of Bank Accounts in the European Union.

In general, the FMLC welcomes the proposals set out in the draft Regulation. European Freezing Orders will make it easier and clearer for pre-trial attachment and post-trial enforcement to be achieved in a more predictable way. While it is inevitable that there will be differences between the jurisdiction and law in each of the Member States, FMLC considers that draft Regulation achieves a welcome balance between the courts issuing and enforcing a European Freezing Order. However, although the FMLC welcomes the majority of the proposals for change, there are several issues of legal uncertainty that the Committee wishes to draw to the Ministry's attention at this stage.

The Committee notes that arbitral proceedings have been excluded from the scope of the draft Regulation. It is not the role of the FMLC to comment on matters of policy and the Commission may have good reasons for the exclusion of arbitration. However, the Committee notes that a European-wide freezing order in aid of the arbitral process may in some circumstances be useful and important.

While jurisdictional uncertainty may currently arise from the fact that an applicant may have a number of choices of possible fora in which to lodge his application, the FMLC considers that the European Commission's proposed amendments to the Brussels I Regulation (EC/44/2001) will largely address the uncertainties surrounding exclusive jurisdiction clauses thereby removing a key jurisdictional

uncertainty. However, until the amendments to Brussels I take effect, the uncertainties surrounding exclusive jurisdiction clauses will affect European Freezing Orders because, if a European Freezing Order is sought from a court at the same time or shortly before proceedings are commenced, the status of that order may not be clear if in due course proceedings are transferred to another court.

The proposed time limits and methods of service proposed in the draft Regulation will make the process to obtain an order a long one, which may risk making European Freezing Orders an ineffective tool in some cases. Against this, the *ex parte* procedure in Article 10 appears to preclude a defendant from making submissions even if given informal notification. Additionally, the process appears only to envisage legal systems which use bailiffs for enforcement purposes and is unlikely to work as efficiently where there is no similar bailiff system.

The Ministry will be aware that there is currently no national register or database in the UK that would allow an applicant to identify from one source every bank account held by a person, which seems to be envisaged in the reference to "competent enforcement authority" in Article 16. As UK law stands, an applicant would have to obtain and serve individual court orders on each of the banks in the UK in order to identify a particular account, which would make the *in rem* order proposed in the draft Regulation less effective than current English freezing orders under which the claimant himself can be required to provide information about his or her bank accounts and other assets. The Ministry may therefore wish to consider options for facilitating obtaining account information under Article 16 in the UK, including how this process would be funded.

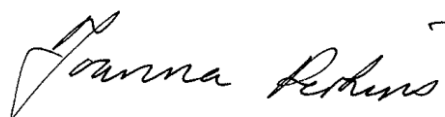
The FMLC considers that the proposals for dealing with joint and nominee accounts in Article 25 (i.e. making them attachable only to the extent they are attachable under the law governing the account) do not adequately address the current legal uncertainty in this area. Indeed, footnote 28 acknowledges that the legal issues linked to the attachment of joint and nominee accounts raise complicated questions of law and that the solutions differ widely within Member States. The FMLC considers that the Ministry should look to take up the Commission's suggestion for a more ambitious solution to be found and would welcome the opportunity to assist the Ministry further in looking into this issue at the appropriate stage of the process.

The Committee notes Article 17(b), which envisages co-operation between the courts of Member States in relation to applications for Freezing Orders "in order to ensure proper coordination between the proceedings as to the substance and the protective measure." The Committee considers that mandating for "proper coordination" between the courts in this way may not reflect the different models of litigation in the Member States adequately. For example, the UK courts do not have an investigative function but rather limit themselves to the impartial function of adjudication between competing parties. In this context, the extent of the "proper coordination" that could be conducted by UK courts may well be more limited than that within the remit of the courts in other European jurisdictions. The FMLC therefore considers that legal certainty in this area would be assisted by giving further colour to the nature of the obligation on UK courts to work with courts in other European jurisdictions.

Finally, the FMLC considers that the Ministry may wish to encourage the Commission to limit the scope of Article 31, which sets out the remedies of the defendant in the Member State of enforcement. The FMLC considers that the nature of this provision is such that it is open to significant interpretation within different Member States, which could lead to the reintroduction of all the uncertainties that the draft Regulation seeks to address by providing a EU-wide European Freezing Order process. Again, the FMLC would welcome the opportunity to assist the Ministry further with devising an alternative approach to address this concern.

Please do not hesitate to contact me if you have any questions about the points made above or wish to discuss this further. The FMLC looks forward to continuing to work with the Ministry on this issue.

Yours sincerely

A handwritten signature in black ink, reading "Joanna Peters". The signature is written in a cursive style with a large initial 'J' and a small flourish at the end.

FMLC Director