AN ECONOMIC ANALYSIS OF THE EUROPEAN COMMISSION'S PROPOSAL FOR A EUROPEAN ACCOUNT

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Abstract

This paper performs an economic analysis of the European Commission's proposal for a European-wide preservation order. Bentham's utilitarianism theory suggests that legislators must take into mind the pleasures and pains associated with any legislation and to form laws in order to create the greatest good for the greatest number. These ideas are reflected in the modern economic theories of welfare economics. But are these principles sufficient to create effective legal rules and achieve justice? Section 2 of this work analyzes the difficulties in obtaining a provisional measure to preserve another party's assets in another Member State of the European Union ("EU"). Section 3 sets out the Commission's proposal for a European Account Preservation Order ("EAPO"). Section 4 applies welfare economics principles in order to identify the effect of legal rules related to this proposal, while it proposes an alternative approach to these principles. Lastly, section 4 makes suggestions on the proposal based on this alternative approach.

Keywords: Account, European Commission, Economic Analysis

1 Introduction

More and more citizens of the EU do business in other Member States of the Union. When business relations become inharmonious, citizens and companies may be faced with the problem of having to recover from a party in another Member State. Currently, a litigant who wants to recover a debt in another Member State faces significant difficulties. Specifically, while a number of European instruments provide for the jurisdiction of the courts in cross-border disputes, and the procedure to have judgments recognized and declared enforceable, the execution of an enforceable title remains entirely a matter of national law. Parties seeking to enforce a judgment in another Member State are confronted with different legal systems, procedural requirements, and language barriers, which entail additional costs and delays in the enforcement procedure.[25] What is more, litigants in cross-border disputes are deprived of provisional measures in aid of enforcement, such as the so-called preservation orders.

2 Background – the problem

The objective of a preservation order is to prohibit the party against whom it is granted from dissipating his[26] assets pending a judgment that his opponent might obtain against him.[27] Modern technological developments, such as the transfer of funds between bank accounts electronically, allow the defendants to dispose of with their assets very easily. At the same time, the extraterritorial effects of preservation orders implicate concerns of sovereignty and other national policies,[28] making the law surrounding them extremely complicated.

Specifically, in order to block a party's assets in another EU Member State, a litigant has mainly two options: firstly, he may apply to the courts of the State which have jurisdiction on the case for a provisional measure under Article 31 of the Brussels I Regulation[29] to preserve the other party's assets in the foreign jurisdiction and then attempt to enforce it in the foreign jurisdiction. This is mainly possible in the common law jurisdictions of the EU[30], by issuing a worldwide freezing order ("WFO").[31] Under Article

[25] commission green paper on improving the efficiency of the enforcement of judgments in the european union: the attachment of bank accounts, at 2, com (2006) 618 final (oct. 10, 2006).

[26] for purposes of concision and convenience, the antonyms throughout this work are all in the masculine form.

[27] ADRIAN ZUCKERMAN, ZUCKERMAN ON CIVIL PROCEDURE – PRINCIPLES OF PRACTICE para. 9.139 (2d ed. 2006).

[28] OSCAR G. CHASE ET AL., CIVIL LITIGATION IN COMPARATIVE CONTEXT 317 (2007).

[29] council regulation (ec) 44/2001, of 22 december 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The only eu state to which the brussels i regulation does not apply is denmark. On 19 october 2005, however, the eu concluded an agreement with denmark that extended the provisions of the regulation to that country. The agreement was approved on behalf of the eu on 27 april 2006 by council decision 2006/325/ec and it entered into force on 1 july 2007.

[30] england and wales, northern ireland, ireland, and cyprus.

[31] BURKHARD HESS, STUDY NO. JAI/A3/2002/02 - MAKING MORE EFFICIENT THE ENFORCEMENT OF JUDICIAL DECISIONS WITHIN THE EUROPEAN UNION 135 (2004). However, in order not to infringe any foreign jurisdiction or affect any third parties

32 of the Brussels I Regulation, a judgment, which is enforceable in the Member State in which it was granted can be enforced in another Member State as per Article 38. "Judgments" as defined by Article 32 include provisional measures and thus preservation orders. First it will be automatically recognized in the foreign State as Article 33 stipulates and then, according to Article 38, it has to be declared enforceable there. However, in *Denilauler v. Couchet Frères* the European Court of Justice held that judgments can be recognized and enforced in another Member State only if they have been the subject of "an inquiry in adversary proceedings" in the Member State of origin, i.e. were not granted ex parte.[32] The main arguments for the exclusion of ex parte orders are their drastic effects, the protection of the respondent who does not know that proceedings have been instituted against him abroad, and the effect of these orders on third parties. It follows that preservation orders cannot be recognized and enforced outside the jurisdiction unless they were obtained after notice had been given to the respondent or the respondent had the opportunity to contest the order subsequently. This restrictive position undermines the efficient protection of parties who apply for preservation orders, because they are deprived of the essential "surprise effect" of these orders.[33]

On 12 December 2012, a recast version of the Brussels I Regulation[34] was published. The revised instrument will apply from 10 January 2015. The most significant change relevant to the context of preservation orders is that a judgment will now be immediately declared enforceable in another Member State, since the requirement of declaring its enforceability (exequatur) will be abolished. The definition of "judgment", now in Article 2(a), also includes provisional measures, and thus preservation orders. However, it does not include orders which were granted without notice to the respondent unless the judgment containing the order is served on the respondent prior to enforcement. Thus, the problem with ex parte preservation orders remains.

Secondly, the claimant may pursue a preservation order directly in the State where the assets are situated under the foreign procedural law. This is possible under Brussels I Regulation. Article 31 provides that an application for provisional measures, which include preservation orders, may be made to the courts of a Member State of the EU as are available under the national law of that State, even if the courts of another State have jurisdiction as to the substance of the matter. Under the revised Regulation, provisional measures in aid of foreign proceedings are available under Article 35. However, recourse to different jurisdictions entails delays and the respondent might be alerted that a preservation order is sought against him and thus transfer his assets out of the reach of the applicant.[35] Additionally, the conditions required under national laws for obtaining preservation orders vary throughout the EU. For example, in all Member States the applicant must prove the existence of a claim on the merits. Nonetheless the standard of proof varies: in Belgium, the applicant must only provide sufficient evidence to establish that the claim exists, in Portugal and Spain a prima facie standard applies, while in England and Wales the applicant must present a "good arguable case."[36]

Consequently, litigants within the EU are less inclined to seek a preservation order in a cross-border dispute than in a domestic one. The abovementioned limitation to orders granted ex parte, and the considerable delays and differences between national laws are not the only reasons. Another problem is that in some Member States such as Italy, Germany, and France, it is difficult for a party to obtain information about the whereabouts of his opponent's assets if he does not have that information. The reason for this lack of transparency is that the central registers containing the relevant information are inadequate.[37]

An additional reason that discourages litigants from pursuing preservation orders in cross-border cases is the differences between the national enforcement systems. Apart from the variations in the speed of enforcement, another key difference relates to the competent authorities. In some States such as France, Belgium, and the Netherlands, enforcement is carried out by bailiffs acting outside the court system. In other States, such as Austria and Spain this is done by the court, while in Sweden and Finland by a central administrative agency.[38] An applicant coming

holding assets abroad, various cases have imposed a number of conditions to be satisfied before a party is allowed to enforce a wfo in a foreign jurisdiction. *See, e.g.* In england and wales the babanaft proviso, first explained in *derby & co ltd v. Weldon (nos 3 and 4)*, [1990] ch 65 (ca) and then in *babanaft international co sa v. Bassatne* [1990] ch 13 (ca), the baltic proviso explained in *baltic shipping co v. Translink shipping ltd* [1995] 1 lloyd's rep 673 (qb), the dadourian guidelines set out in *dadourian group international inc v. Simms* [2006] ewca civ 399, [2006] 1 wlr 2499 (ca) etc. *See also* ADRIAN ZUCKERMAN, ZUCKERMAN ON CIVIL PROCEDURE – PRINCIPLES OF PRACTICE paras. 9.163-9.171 (2d ed. 2006).

[32] case 125/79, denilauler v. Couchet frères [1980] ecr 1553.

[33] BURKHARD HESS, STUDY NO. JAI/A3/2002/02 - MAKING MORE EFFICIENT THE ENFORCEMENT OF JUDICIAL DECISIONS WITHIN THE EUROPEAN UNION 138 (2004).

[34] regulation (eu) 1215/2012, of 12 december 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

[35] BURKHARD HESS, STUDY NO. JAI/A3/2002/02 - MAKING MORE EFFICIENT THE ENFORCEMENT OF JUDICIAL DECISIONS WITHIN THE EUROPEAN UNION 138 (2004).

[36] BURKHARD HESS, STUDY NO. JAI/A3/2002/02 - MAKING MORE EFFICIENT THE ENFORCEMENT OF JUDICIAL DECISIONS WITHIN THE EUROPEAN UNION 129 (2004).

[37] BURKHARD HESS, STUDY NO. JAI/A3/2002/02 - MAKING MORE EFFICIENT THE ENFORCEMENT OF JUDICIAL DECISIONS WITHIN THE EUROPEAN UNION 23 (2004).

[38] MADS ANDENAS ET AL., ENFORCEMENT AGENCY PRACTICE IN EUROPE 31 (2005).

from a State with one system of enforcement will have difficulties to find out who he has to address in order to enforce a preservation order in another State. Differences also exist as to who is responsible for serving the order on a bank, how much time the bank has to implement the order, and how long the order remains in force.[39]

Finally, the costs for obtaining and enforcing a preservation order in a cross-border dispute are higher than in domestic cases. If a preservation order must be obtained and/or enforced in a Member State other than the one having jurisdiction on the merits, the applicant will need a lawyer licensed to practice in the foreign jurisdiction to represent him.[40] Of course, after the litigant obtains a final decision on the merits, he will unavoidably have to hire a lawyer in the foreign jurisdiction for the enforcement of his title. But in any event, extra costs so early in the litigation process are a disincentive for the litigant to apply for a preservation order in a foreign country.

These factors, identified long ago, have prompted the EU legislators to take action in the area of preservation orders in cross-border disputes. Because of the complexity of the issue, it took more than ten years until a proposed instrument was drafted.

3 The proposal for an EAPO

The Commission already noted this need in its 1998 Communication "Towards Greater Efficiency in Obtaining and Enforcing Judgments in the European Union".[41] In view of the diversity of Member States' legislation and the complexity of the subject, the Commission proposed to confine reflection initially to the problem of bank accounts. The Council endorsed this approach in its 2000 Program of Mutual Recognition.[42] Indeed, in practice plaintiffs regard bank accounts as priority targets for preservation orders because of their high net value. Moreover, the extraterritorial preservation of a bank account seems to involve less sovereignty concerns than the preservation of tangible assets in a foreign State such as land or buildings. At the same time the preservation of a bank account is a sensitive matter for the respondent because the funds in bank accounts are often essential to ensure the livelihood of private persons and are of vital importance for businesses and thus it is better to regulate this issue with a harmonized instrument.

The Commission conducted various studies and consultations with experts and other key-players. In 2006 it adopted a Green Paper on improving the efficiency of the enforcement of judgments in the EU through the attachment of bank accounts.[43] In 2008, it adopted another Green Paper related to the enforcement of judgments, on the Transparency of Debtors' Assets.[44] Finally, after examining and rejecting other options such as the effect of the revision of the Brussels I Regulation in this area if the status quo was preserved, or the harmonization of national rules for the preservation of bank accounts, the Commission decided in 2011 to propose the so-called European Account Preservation Order. The EAPO is intended to become a self-standing European-wide preservation order that will exist alongside the national equivalent instruments. The Commission's proposal has now entered the EU's legislative procedures involving the Council of the EU, the European Parliament, and the Commission.[45]

Analyzing this proposal, an interesting question to ask is, what exactly is the effect of the various existing or non-existing rules on the behavior of the actors involved in this area? Also, what are the objectives of this new instrument and what features should it have in order to achieve these objectives? These questions can be answered with the help of economic analysis.

4 Economic analysis of the proposal

The economic approach to the analysis of law seeks to answer two basic questions about legal rules: the effect of legal rules on behavior and outcomes

[39] commission 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, at 18, sec (2011) 937 final.

[40] commission 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, at 17, sec (2011) 937 final.

[41] commission communication to the council and the european parliament towards greater efficiency in obtaining and enforcing judgments in the european union, com (1997) 0609 final.

[42] council draft programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters 2001/c 12/01.

[43] commission green paper on improving the efficiency of the enforcement of judgments in the european union: the attachment of bank accounts, com (2006) 618 final (oct. 10, 2006).

[44] commission green paper on effective enforcement of judgments in the european union: the transparency of debtors' assets com (2008) 128 final.

[45] title v of part three of the tfeu (area of freedom security and justice). This proposal is not applicable to denmark. It is also not applicable to the united kingdom and ireland, unless those two countries decide otherwise. On 31 october 2011 the united kingdom government, although it initially welcomed the commission's proposal (ministry of justice, impact assessment on proposed eu regulation creating a european account preservation order to facilitate cross-border debt recovery in civil and commercial matters, at 8, moj (2011) 109 (u.k.)), it announced by way of a written ministerial statement to the house of commons its decision not to opt in to the proposed regulation because the government's recent consultation revealed significant problems, including a concern that there was a lack of adequate safeguards for defendants. However, it stated that it will participate in the forthcoming negotiations with a view to opting in in the future (PARL. DEB. H.C. (31 october 2011) col 28ws (u.k.)). Ireland on the other hand, announced its participation. The other member states will be bound automatically if the commission's proposal passes into law.

(descriptive question), and the social desirability of legal rules (normative question).[46] Answering these questions helps making actual legal policy decisions.

⇒ *A. The effect of rules on behavior and outcomes*

First, it is argued that citizens do not make full use of the Single Market of the EU[47], knowing that, if their counterparties default, their rights will be insufficiently protected. According to a recent Eurobarometer survey (2009), only 8% of EU's consumers bought goods via the Internet in the last 12 months from a seller in another EU Member State.[48] Here, a practical example might be useful: Let's imagine that Pablo, a Spanish student, wants to buy a smart phone. He found one in a shop in Madrid for €700. His friend tells him that he can find the same model for much less from France. Pablo checks online and finds the smart phone for €500 plus €50 shipping costs from a seller in France. Pablo asks his father who is a lawyer, what will his options be if the seller does not send the smart phone. His father tells him that he will have to initiate substantive proceedings against the seller and in the meantime he must obtain a preservation order to freeze the seller's bank account, because otherwise the seller might have insufficient assets to satisfy the judgment. However, with the current legal framework, it is extremely complicated to obtain such an order against the seller. Most likely, Pablo will finally decide not to buy the smart phone from the French seller.

This is the case, not only with individuals, but with companies as well. There are 20 million enterprises in the EU of which 99.8% are classified as Small and Medium Enterprises ("SMEs").[49] It is estimated that only 25% of the SMEs are involved in selling goods and services to other EU Member States.[50] The European Business Test Panel ("EBTP") survey elicited responses from 422 businesses completing a questionnaire.[51] When asked how important are difficulties with debt recovery when they are doing business in other EU countries, 31.7% answered "very important" and 39.1% answered "important".[52] Moreover, when asked to what extend would their organization be likely to undertake more cross-border trade if rules were adopted at a European level making it easier to obtain a preservation order, 29.5% answered "quite likely", 23% "a lot more likely" and 10% "very likely".[53] Indeed, citizens and companies would make more use of the Single Market had they knew that the legal framework around debt recovery - and specifically preservation orders - was adequate.

Secondly, it could be argued that contracting parties in cross-border transactions are more likely to default on their promises knowing that to obtain a preservation order against them is not easy, and they are less likely to default if the opposite is true. A comparison of the number of international and domestic debt collection cases could shed some light on this assumption. A useful source of information is the Federation of European National Collections Association (FENCA) survey on debt collection, which is based on statistics collected from debt collection agencies in 11 European countries. In 2007–08, its members handled 9.5 million cases of which 98.8% related to domestic situations with only a very small proportion involving cross-border debt.[54] One would expect a higher number of cross-border debt cases considering that contracting parties would be less deterred to default because of the inexistence of cross-border preservation orders. Of course, apart from the fact that cross-border transactions are significantly less than domestic ones, the very low percentage of cross-border debt cases has to do also with the hesitation of creditors to pursue cross-border debt recovery proceedings. A more accurate statistic to prove the likelihood of parties to default because of the inadequate legal framework, would be the total amount of bad debt in domestic transactions compared to the amount of bad debt in cross-border transactions—and not just the number of debt recovery cases—but such estimation is unavailable. Moreover, other factors might also play a role in the parties' behavior, such as that companies who engage in cross-border commerce are larger and more reputable and thus less likely to default, or the fact that in some countries the domestic legal framework might also be insufficient (for example Spain had 4.5 million domestic debt cases of the total 9 million).

[46] HOWELL E. JACKSON ET AL., ANALYTICAL METHODS FOR LAWYERS 357 (2003).

[47] the eu's internal market (sometimes known as the single market) seeks to guarantee the free movement of goods, capital, services, and people –the eu's "four freedoms" – within the 27 member states.

[48] commission flash eurobarometer no 282, attitudes towards cross-border sales and consumer protection, at 5 (march 2008).

[49] commission study for an impact assessment on a draft legislative proposal on the attachment of bank accounts, centre for strategy and evaluation services (cses), at 15 (jan. 5, 2011).

[50] commission study for an impact assessment on a draft legislative proposal on the attachment of bank accounts, centre for strategy and evaluation services (cses), at 15 (jan. 5, 2011).

[51] commission study for an impact assessment on a draft legislative proposal on the attachment of bank accounts, centre for strategy and evaluation services (cses), at 9 (jan. 5, 2011).

[52] commission study for an impact assessment on a draft legislative proposal on the attachment of bank accounts, centre for strategy and evaluation services (cses), at 26 (jan. 5, 2011).

[53] commission study for an impact assessment on a draft legislative proposal on the attachment of bank accounts, centre for strategy and evaluation services (cses), at 95 (jan. 5, 2011).

[54] commission study for an impact assessment on a draft legislative proposal on the attachment of bank accounts, centre for strategy and evaluation services (cses), at 21 (jan. 5, 2011).

Thirdly, assuming that a creditor is risk neutral, he will apply for an EAPO when the cost of the order is less than the expected benefits from it. When a creditor obtains a preservation order, the chances of him collecting the amount owed to him increase. As Posner puts it, a party optimizes his litigation expenditures by spending up to the point where a dollar spent increases the expected value of the litigation to him (by increasing his chances of winning) by just a dollar.[55] Creditors are less likely to pursue their debts knowing that it is difficult to obtain an order or that the costs are higher than the expected benefit from the order. When asked which factors are the most important in deciding whether or not to pursue a commercial dispute against someone from another EU Member State, 88.5% answered the cost associated with court proceedings and 83.8% the complexity of proceedings.[56] Moreover, when asked which factors are the most important in deciding whether or not to pursue a bank account preservation order in another EU Member State, 66.7% answered the costs associated with obtaining the order and 63.4% the difficulty in obtaining information about the debtor's account.[57] The most interesting statistic is the data collected by the Centre for Strategy & Evaluation Services ("CSES"), which took sample from 13 banks in eight different Member States. Eight of the 13 banks making up the sample were able to give some indication of what proportion of the total number of preservation orders involved cross-border situations. The percentages ranged from 0% to 2%.[58] This shows that creditors are very reluctant to seek cross-border preservation orders, arguably because of the high costs and complexity involved. Nevertheless, seen from another point of view, when the legal framework is particularly friendly for obtaining a preservation order, it might prompt creditors to apply for an order lightheartedly and irresponsibly and this would cause a very high amount of orders.

When creditors will pursue an EAPO, a number of externalities is likely to be caused. One party's action is said to create an externality if it influences the well-being of another person.[59] Externalities may be beneficial for, or detrimental to, the affected party. The problem that externalities create is that those who make decisions about acts with externalities do not naturally take into account the external effects.[60] In the case of the EAPO, first, respondents will be affected. The disruptive effects of an order may be serious and extensive. The respondent's business may run out of cash, his ability to obtain credit may be undermined, and his reputation may be seriously injured.[61] Moreover, EAPOs will be an additional burden on courts, which will have to ensure that there will be sufficient human resources available to handle the EAPOs applications on time.[62] Additionally, national authorities competent for the enforcement of EAPOs or the handling of requests for obtaining bank account information will also be burdened. Finally, a surge of EAPOs originating from other Member States could considerably increase the workload on financial institutions.[63]

⇒ *B. The socially desirable rules*

In order to analyze the so-called normative questions, i.e. those of the form "What policy should we adopt"—as opposed to descriptive questions analyzed in the previous paragraph, which are of the form "What will the effect of a policy be?"—economists use the notion of welfare economics.[64] Descriptive questions are concerned with identifying the results of a policy, not with evaluating the social goodness or badness of the results. The task of evaluation is that of welfare economics.[65]

An important factor to consider in evaluating policies is the well-being of individuals. Economists use the notion of an individual's utility to refer to the person's well-being. Economists conceive the notion of utility very broadly, encompassing not only the material comforts of life that a person selfishly cares about, but also any satisfaction derived from helping other people or from doing one's duty. Anything that pleases a person increases, by definition, that person's utility.[66]

Modern economists evaluate social well-being by referring to a measure of social welfare.[67] This measure is typically built up from things that matter

[55] RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 610 (7TH ED. 2002).
[56] commission study for an impact assessment on a draft legislative proposal on the attachment of bank accounts, centre for strategy and evaluation services (cses), at 34 (jan. 5, 2011).
[57] commission study for an impact assessment on a draft legislative proposal on the attachment of bank accounts, centre for strategy and evaluation services (cses), at 45 (jan. 5, 2011).
[58] commission study for an impact assessment on a draft legislative proposal on the attachment of bank accounts, centre for strategy and evaluation services (cses), at 51 (jan. 5, 2011).
[59] HOWELL E. JACKSON ET AL., ANALYTICAL METHODS FOR LAWYERS 335 (2003).
[60] HOWELL E. JACKSON ET AL., ANALYTICAL METHODS FOR LAWYERS 335 (2003).
[61] ADRIAN ZUCKERMAN, ZUCKERMAN ON CIVIL PROCEDURE – PRINCIPLES OF PRACTICE para. 9.172 (2d ed. 2006).
[62] commission study for an impact assessment on a draft legislative proposal on the attachment of bank accounts, centre for strategy and evaluation services (cses), at 103 (jan. 5, 2011).
[63] commission study for an impact assessment on a draft legislative proposal on the attachment of bank accounts, centre for strategy and evaluation services (cses), at 104 (jan. 5, 2011).
[64] HOWELL E. JACKSON ET AL., ANALYTICAL METHODS FOR LAWYERS 347 (2003).
[65] HOWELL E. JACKSON ET AL., ANALYTICAL METHODS FOR LAWYERS 347 (2003).
[66] HOWELL E. JACKSON ET AL., ANALYTICAL METHODS FOR LAWYERS 348 (2003).
[67] HOWELL E. JACKSON ET AL., ANALYTICAL METHODS FOR LAWYERS 348 (2003).

to individuals in some way. Whatever measure is used to define social welfare, the objective for the person who endorses it is to maximize it. Economists typically restrict their attention to measures of social welfare that depend solely on the individuals' well-being and thus on the individuals' utility. Other measures tend to lack appeal because, by hypothesis, they depend on something that no person cares about.[68] Consequently, in modern western societies, evaluation of social policies, and thus of legal rules, is done with reference to a standard measure of social welfare: a legal rule is said to be superior to a second if the first results in higher social welfare.[69]

These ideas stem mainly from Jeremy Bentham's theory of utilitarianism. The "greatest happiness principle", or the principle of utility, forms the cornerstone of all Bentham's thought. By "happiness", he understood a predominance of "pleasure" over "pain". He wrote in "The Principles of Morals and Legislation":

Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand the standard of right and wrong, on the other the chain of causes and effects, are fastened to their throne. They govern us in all we do, in all we say, in all we think.[70]

Bentham's theories follow those of Epicurus, who believed that pleasure is the highest good and pain is the highest evil.[71] Bentham suggested a procedure for estimating the moral status of any action, which he called the Hedonistic or Felicific calculus. This calculus includes, inter alia, the extent of an action, i.e. the number of people who will be affected by any pleasure or pain arising as a result of an action.[72] Bentham's "hedonistic" theory, however, lacks a principle of fairness or morality. For example, for Bentham it would be acceptable to torture one person if this would produce an amount of pleasure in other people, which outweighs the pain of the tortured individual. In "The Principles of Morals and Legislation" Bentham calls upon legislators to measure the pleasures and pains associated with any legislation and to form laws in order to create the greatest good for the greatest number.[73] The concept of the individual pursuing his happiness cannot be necessarily acceptable, because often these individual pursuits can lead to greater pain and less pleasure for a society as a whole.

Bentham's ideas are mirrored in his theories about punishment. In "The Rationale of Punishment" he says that, with respect to a given individual, the recurrence of an offense may be provided against in three ways: (a) By taking from him the physical power of offending. (b) By taking away the desire of offending. (c) By making him afraid of offending.[74] Bentham argues that when a man supposes pain to be the consequence of an act, he is acted upon in such a manner as tends to withdraw him from the commission of that act. If the apparent magnitude, or rather value of that pain is greater than the apparent magnitude or value of the pleasure or good he expects to be the consequence of the act, he will be absolutely prevented from performing it.[75] However, it could be argued that there is a fourth way to prevent the recurrence of an act: this is to make the individual believe that offending is morally wrong and thereby not want to offend, with his own volition. This is quite different from the ways Bentham suggests - even from the second one - because they all present the individual as a passive being who acts instinctively and not consciously, and only for the purpose of avoiding pain and satisfying his desires. In other words, the goal must be, not only to prevent offenders but also to establish a culture whereby actors will think in themselves that it is wrong to offend, even if this is against their desires for pleasure and despite the need to be subject to pain.

In direct contrast to Epicurus' and Bentham's philosophy is Socratic philosophy. If anything in general can be said about the philosophical beliefs of Socrates, it is that he was morally, intellectually, and politically at odds with many of his fellow Athenians. When he was on trial for heresy and corrupting the minds of the youth of Athens, he used his method of "elenchus" to demonstrate to the jurors that their moral values were wrong-headed. He told them that they were concerned with their families, careers, and political responsibilities when they ought to be worried about the welfare of their souls.[76]

Socrates believed the best way for people to live was to focus on self-development rather than the pursuit of material wealth. He stressed that virtue was the most valuable of all possessions and the ideal life was spent in search of the "good".[77] This search is part of the so-called Socratic state of mind, i.e. the process of putting ourselves to test through open-

[68] HOWELL E. JACKSON ET AL., ANALYTICAL METHODS FOR LAWYERS 348 (2003).
[69] HOWELL E. JACKSON ET AL., ANALYTICAL METHODS FOR LAWYERS 358 (2003).
[70] JEREMY BENTHAM, PRINCIPLES OF MORALS AND LEGISLATION 1 (1823).
[71] CICERO, ON MORAL ENDS 13 (julia annas ed., 2001)
[72] JEREMY BENTHAM, PRINCIPLES OF MORALS AND LEGISLATION 30 (1823).
[73] JEREMY BENTHAM, PRINCIPLES OF MORALS AND LEGISLATION 31 (1823).
[74] JEREMY BENTHAM, THE RATIONALE OF PUNISHMENT 20 (1830).
[75] JEREMY BENTHAM, THE RATIONALE OF PUNISHMENT 20 (1830).
[76] "best of men, you are a citizen of athens, the greatest and most glorious city in wisdom and power, and are you not ashamed of caring for money, that you shall have as much as possible, and for reputation and honor, whilst for wisdom and truth and the soul, that is shall be as good as possible, you do not care nor take thought?" PLATO, THE APOLOGY OF SOCRATES 29d (d. F. Neville ed. 1901)
[77] L.A. MICHAEL, THE PRINCIPLES OF EXISTENCE AND BEYOND 16 (2007).

ended questions related to our thoughts, feelings and actions. One of Socrates' paradoxes is that, virtue is sufficient for happiness.[78] Socrates always invited others to try to concentrate more on a sense of true community, because he felt this was the best way for people to grow together as a populace. His actions also manifested his beliefs: in the end, Socrates accepted his death sentence when most thought he would simply leave Athens, as he felt he could not run away from or go against the will of his community. This action also shows that Socrates believed in justice and morality and valued them more than his individual welfare, and most importantly without anyone imposing it to him, but out of his free will.

Socratic philosophy is echoed in Ronald Dworkin's "Taking Rights Seriously" where the latter wrote:

It is one thing to appeal to moral principle in the silly faith that ethics as well as economics moves by an invisible hand, so that individual rights and the general good will coalesce, and law based on principle will move the nation to a frictionless utopia where everyone is better off than he was before. But it is quite another matter to appeal to principle as principle, to show, for example, that it is unjust to force black children to take their public education in black schools, even if a great many people will be worse off if the state adopt the measures needed to prevent this. This is a different version of progress. It is moral progress, and though history may show how difficult it is to decide where moral progress lies, and how difficult to persuade others once one has decided, it cannot follow from this that those who govern us have no responsibility to face that decision or to attempt that persuasion.[79]

It could be argued that with welfare economics alone and without more, we have come to believe that more and more pleasure is the solution to the society's problems. This arguably causes conflicts between people and nations because we think that other people or nations are standing in the way between that pleasure and us. It is true that even modern economists agree that there is a number of particularistic notions of fairness and morality that relate to welfare economics in several ways.[80] First, individuals may care about the satisfaction of notions of fairness and morality per se. For example, a person may care whether punishment is in proportion to wrongdoing, about keeping contracts, about not discriminating etc. Second, satisfaction of the notions of fairness may lead to changes in behavior and outcomes that increase social welfare. For example, if we usually honor contracts, we may promote trust and joint enterprise; if we do not discriminate, we may advance production and create beneficial incentives. Third, we may want to invest social resources in teaching about notions of fairness by parents, teachers, religious authorities etc., because such beliefs lead to increases in social welfare. Hence the connections between welfare economics and the study of morality and ethics are significant.[81] After all, as Plato puts it, "every form of knowledge when sundered from justice and the rest of virtue is seen to be plain roguery rather than wisdom".[82]

To sum up, Bentham's ideas that legislators should consider the pleasures and pains associated with any legislation and to form laws in order to create the greatest good for the greatest number are particularly useful. Perhaps, however, the optimal way to go forward is to combine these principles of welfare economics with the Socratic quest for virtue, in order to inculcate in the citizens' minds the idea that they must follow the law consciously and not mechanically.

Returning to the analysis of Paragraph A of this section, of course the socially optimal result is that citizens and companies make full use of the Single Market. Secondly, it is also unquestionable that the optimal situation is that contracting parties in cross-border transactions do not default on their promises. To this end, the introduction of an EU-wide bank account preservation order is likely to have a positive impact on these issues.

The third issue, however, is a bit controversial. Of course it is desirable that creditors apply for preservation orders in order to recover their debts more easily. The EU Justice Commissioner Vivian Reding commented regarding the EAPO that "in these difficult economic times, companies need quick answers. Every euro counts especially for small businesses".[83] As the EAPO proposal is currently drafted - analyzed in Paragraph C of this section - it will be both easy and cost-effective to obtain an order and this will prompt creditors to pursue their debts. However, EAPOs will cause a number of other externalities, which, as mentioned in paragraph A, will affect debtors, courts, competent authorities, and banks. These externalities are considered harmful and thus undesirable when the orders are unjustified, i.e. when they are granted without there being a risk of dissipation of the debtor's funds. A socially desirable act, given the social goal of maximizing surplus, is one for which the benefits exceed the costs, including ll externalities.[84] Therefore, these detrimental externalities must be eliminated.

[78] TERENCE IRWIN, PLATO'S ETHICS 73 (1994).
[79] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 147 (1977).
[80] HOWELL E. JACKSON ET AL., ANALYTICAL METHODS FOR LAWYERS 355 (2003).
[81] HOWELL E. JACKSON ET AL., ANALYTICAL METHODS FOR LAWYERS 355 (2003).
[82] J. A. SHAWYER, THE MENEXENUS OF PLATO 246e (1906).
[83] commission press release, european commission to help businesses recover an extra €600 million in cross-border debts (2011).
[84] HOWELL E. JACKSON ET AL., ANALYTICAL METHODS FOR LAWYERS 335 (2003).

⇒ *C. Corrective policy*

With the above ideas in mind, we can proceed with some suggestions regarding the EAPO's provisions. The Regulation must basically remedy the imbalance between the privately determined and the socially best.[85]

In order to achieve the full use of the Single Market and the solvency of debtors, the new instrument must be easy to obtain. As the proposed Regulation is now drafted the applicant will be able to obtain an EAPO from the courts of the Member State where proceedings on the substance of the matter have to be brought, as well as from the courts of the Member State where the bank account is located (proposed Articles 6 and 14). In order to obtain an EAPO prior to the initiation of proceedings on the substance or at any stage during such procedures, or when the applicant has obtained a judgment which has not yet been declared enforceable in the Member State where the bank account is located ("section 1 EAPO"), the applicant must satisfy the court (a) that the claim against the respondent appears to be well founded and (b) that without the issue of the order the subsequent enforcement of a judgment is likely to be impeded or made substantially more difficult. When the applicant applies for an order after having obtained a judgment, which has been declared enforceable in the Member State where the bank account is located ("section 2 EAPOs"), he must only satisfy the second condition. Moreover, in cases where the applicant applies for a section 1 EAPO, the court shall issue the EAPO within 7 calendar days and when he applies for a section 2 EAPO, the order shall be issued within 3 days (proposed Article 21). Additionally, considering that no foreign lawyers will be involved, at least in order to obtain an EAPO, the costs for the applicant are reduced. These features make the obtainment of an EAPO quite easy for the applicant. Therefore they are likely to contribute towards the abovementioned desired goals, i.e. to encourage citizens to make full use of the Single Market, prevent contracting parties from defaulting on their promises, and prompt creditors to recover their debts.

Let's now move on to the detrimental externalities caused to debtors and other parties by unjustified orders. There is a number of ways to resolve externality problems. First, behavior may be constrained under direct regulation. In the case of the EAPO, the threshold for obtaining an order could be heightened. As proposed Article 7 is currently drafted, the applicant must satisfy the court that without the order the subsequent enforcement of a judgment is likely to be impeded or made more difficult. This test is relatively low because it uses the word "likely" and thus the requirement is satisfied even with a less than 50% chance. Instead, the phrase "more likely than not" could be used, which will require the judge to find a more than 50% possibility that, without the order, the applicant's enforcement of the judgment would be made more difficult.

Harmful externalities may also be reduced by making use of financial incentives and/or disincentives. Under tort liability, parties who suffer harm can bring suit against injurers and obtain compensation for their losses.[86] In fact, this liability may take the form of security, i.e. the applicant will provide a security deposit to ensure compensation for any damage suffered by the respondent if the order turns out to be unjustified. In common law jurisdictions, this practice, called "undertaking in damages", is an elementary requirement for provisional measures in general. Proposed Article 12 makes such provision, but it is not mandatory and it does not apply to situations where the applicant applies for an EAPO after having obtained a judgment which is enforceable in the Member State where the bank account is located. In order to prevent creditors from applying for EAPOs without concern, it is argued that the provision of security by the applicant should be compulsory in all circumstances.

Furthermore, the Regulation may impose further properly chosen fees to tackle the problem. Applicants who obtain orders which prove to be unfounded, could be fined. Moreover, the proposed Regulation makes provision for the payment of the costs incurred by banks (proposed Article 30), competent authorities (proposed Article 31), and courts (proposed Article 43). The Regulation could provide that these costs will be doubled if the order proves to be unjustified. Additionally, the unsuccessful party must bear the costs of the EAPO proceedings. This is already provided by proposed Article 42.

Finally, in furtherance of the idea of justice and morality analyzed in Paragraph B, the new Regulation must contain provisions and must be accompanied by measures that indicate to individuals and teach them which is the proper behavior. For example, the names of creditors who obtained bad-faith EAPOs could be published in order to show the condemnation of such action. Moreover, the authorities could organize conferences or promote advertisements in order to inform all the interested parties about the purposes of this Regulation and the way it works. Being informed about, and participating in, the administration of justice is arguably a way to drive actors to assimilate the desired behaviors and not just follow the rules blindly.

5 Conclusion

Economic analysis informs us of the effect of legal rules and how to achieve the socially optimal results.

[85] HOWELL E. JACKSON ET AL., ANALYTICAL METHODS FOR LAWYERS 419 (2003).

[86] HOWELL E. JACKSON ET AL., ANALYTICAL METHODS FOR LAWYERS 340 (2003).

The introduction of a European-wide preservation order, which is easy to obtain and cost-effective, will encourage the full use of the EU Single Market, debtors' solvency, and recovery of debts. However, orders which are unjustified will create a number of harmful externalities to creditors, national authorities, and financial institutions. Through properly chosen financial incentives and disincentives, these externalities could be eliminated. Since a creditor will apply for an EAPO when the cost of the order is less than the expected benefits from it, these safeguards will prevent unfounded, speculative, or even bad-faith applications. Finally, taking into consideration notions of fairness and morality, this piece of legislation - and every piece of legislation in general - should aim at inducing citizens to follow rules consciously and not mechanically.