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**GREEN PAPER**

**EFFECTIVE ENFORCEMENT OF JUDGMENTS IN THE EUROPEAN UNION:  
THE TRANSPARENCY OF DEBTORS' ASSETS**

(presented by the Commission)

## **GREEN PAPER**

### **EFFECTIVE ENFORCEMENT OF JUDGMENTS IN THE EUROPEAN UNION: THE TRANSPARENCY OF DEBTORS' ASSETS**

The purpose of this Green Paper is to launch a broad consultation among interested parties on how to improve the transparency of debtors' assets in the European Union. The Green Paper describes the problems of the current situation and possible solutions.

The Commission invites interested parties to submit comments by 30 September 2008 to the following address:

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The contributions received will be published on the internet, together with the identity of the contributor, unless such publication is likely to harm his or her legitimate interests. In that case the contribution may be published in anonymous form. Otherwise, the contribution will not be published, and its content will not be taken into account. Contributions will be published on the Commission's website (either on the main web portal "Your voice in Europe", which is the Commission's single access point for consultation, or on the DG JLS consultation page linked to it).

The Commission may hold a public hearing on the subject matter of the Green Paper.

## I. Introduction: Shortcomings of the current situation

There is a risk that problems of cross-border debt recovery may be an obstacle to the free circulation of payment orders within the European Union and may impede the proper functioning of the Internal Market. Late payment and non-payment jeopardise the interests of businesses and consumers alike. This is particularly the case when the creditor and the enforcement authorities have no information about the debtor's whereabouts or his assets.

The Commission already noted the difficulties of cross-border debt recovery in its 1998 Communication "Towards greater efficiency in obtaining and enforcing judgments in the European Union".<sup>1</sup> Two years later, the Programme on Mutual Recognition stated that "it would in fact be much easier to enforce judgments within the European Union if it were possible to obtain accurate information on the debtor's financial position. Measures could therefore be taken to enable precise identification of a debtor's assets in the territory of the Member States."<sup>2</sup> *The Study on making more efficient the enforcement of judicial decisions within the European Union*<sup>3</sup>, which was prepared for the Commission in 2004, analysed the situation in 15 Member States and proposed several measures to improve the enforcement of judicial decisions in the European Union. In the context of the European Judicial Network in civil and commercial matters, the Commission asked the 12 Member States which have joined the European Union since then to provide information about the legal situation in their countries. The answers have been incorporated into this Green Paper. Lastly, on 24 October 2006, the European Commission adopted a Green Paper on improving the efficiency of the enforcement of judgments in the European Union: the attachment of bank accounts.<sup>4</sup> Whereas that Green Paper focused on one specific measure to improve the enforcement of monetary claims, namely the attachment of bank accounts, which allows a creditor to secure a sum of money due to or claimed by him by preventing the removal or transfer of funds held to the credit of his debtor in one or more bank accounts within the territory of the European Union, this Green Paper aims more generally at improving the transparency of the debtor's assets which is provided through registers and by the debtor's declaration.

The search for the debtor's address and/or for information about his financial situation is often the starting point of enforcement proceedings. At present, transparency of debtors' assets is generally achieved at national level through different sources of information, in particular through registers and the debtor's declaration. While the basic structures of the national systems appear similar, there are considerable differences in the conditions of access, the procedures for obtaining information, the content and the overall efficiency of the systems.<sup>5</sup>

From a comparative perspective, there are two different kinds of techniques providing access to information.<sup>6</sup>

- The first is a system of declaration of the entire patrimony by the debtor.<sup>7</sup> In some Member States,<sup>8</sup> there is a similar system under which the debtor is also obliged to disclose his assets, but only to the extent necessary for the satisfaction of the claim.

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<sup>1</sup> *Commission Communication to the Council and the European Parliament*, OJ C 33, 31.1.1998, p. 3.

<sup>2</sup> Programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters, OJ C 12, 15.1.2001, p. 1.

<sup>3</sup> Study No. JAI/A3/2002/02. The final report is available at:  
[http://ec.europa.eu/justice\\_home/doc\\_centre/civil/studies/doc\\_civil\\_studies\\_en.htm](http://ec.europa.eu/justice_home/doc_centre/civil/studies/doc_civil_studies_en.htm).

<sup>4</sup> COM(2006) 618 final

<sup>5</sup> Study No. JAI/A3/2002/02, p. 47.

<sup>6</sup> Please note, however, that most of the Member States combine features from both systems, even if a national system overall can be classified as falling under one of the two systems.

- Other Member States, especially those where the debtor is not required to disclose his patrimony, allow access to search systems which provide specific information.<sup>9</sup> In these jurisdictions, the required information is mainly obtained from registers. This system is applied very differently in terms of access to registers and other sources of information and by means of powers of inquiry and of examination.

The cross-border recovery of debts is hampered by the differences between the national legal systems and by insufficient knowledge on the part of creditors about the information structures in other Member States. However, the similarity of the underlying structures of the legal systems of the Member States could provide a basis for approximation.<sup>10</sup> As an objective, possible measures at European level could improve the transparency of the debtors' assets and the right of creditors to obtain information whilst respecting the principles of the protection of the debtor's privacy, which counterbalance the creditor's right to efficient recovery and which are prescribed by the Data Protection Directive 95/46/EC.<sup>11</sup>

This Green Paper focuses on improvements of public enforcement of judgments. This means that neither questions of (material) limits to enforcement nor the roles of private or semi-private organisations in the enforcement process are discussed.

**Question 1:**

*Do you consider that there is a need for measures at Community level to increase the transparency of debtors' assets ?*

*Do you consider that the interface between enforcement of judgments and debtor protection or the role of non-public organisations in the enforcement of judgments need explicit attention in this context ? If so, which elements do you consider important ?*

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<sup>7</sup> E.g. in Germany, Greece and England.

<sup>8</sup> Spain and Portugal.

<sup>9</sup> E.g. in Scotland there are far-reaching online accessible registers, but the judicial system does not provide for a debtor's or third party debtor's declaration.

<sup>10</sup> Study No. JAI/A3/2002/02, p. 48.

<sup>11</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995, p. 31. The objective of Directive 95/46/EC is to ensure the fundamental right of protection of the personal data of individuals but also to ensure the free flow of these data within the European Union. According to the Directive, any processing of personal data must be fair and lawful. Personal data must be collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes (purpose limitation principle). The data must be adequate, relevant and not excessive in relation to the purposes for which they are collected (principle of proportionality). Information obtained shall not be transferred to unauthorised third persons. Data processing is permitted either if the data subject has given his consent or if one or more further conditions are met, among which if the processing is necessary for compliance with legal obligation of the controller or if the processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller. The processing of sensitive data is possible when it is necessary for the establishment, exercise or defence of legal claims. Furthermore, the transparency requirements of the Directive provide for the obligation to inform the data subject on the sort of processing of his personal data, including the identity of the controller, the purposes of processing and the possible recipients of the data. According to the above rules, the purpose of the processing, the type of the necessary personal information and the recipients of the data must be precisely defined and the data subject duly informed. If these conditions are met, there is no obstacle for the providing for an efficient transparency of a debtor's assets.

## II. Possible solutions

Information about a debtor's assets can be obtained from various sources, in particular through registers and through the debtor himself. Instead of focusing on a single European measure, therefore, it is suggested that a bundle of measures be considered which could help to ensure that the creditor obtains reliable information on his debtor's assets within a reasonable period of time. The possible measures considered in this Green Paper are:

- Drawing up a manual of national enforcement laws and practices
- Increasing the information available in and improving access to registers
- Exchange of information between enforcement authorities
- Measures relating to the debtor's declaration.

### *1. Drawing up of a Manual of National Enforcement Laws and Practices*

At present, there is a very little information about different enforcement systems in the 27 Member States.<sup>12</sup> As a practical step, a manual on the enforcement systems of the Member States could be drawn up. Such a manual could contain all the sources of information about a person's assets which can be accessed in each Member State, the contact addresses of persons who can obtain access to that information if access is limited, the costs of access and other relevant details. This manual could be made available on the website of the European Judicial Network in civil and commercial matters.<sup>13</sup>

**Question 2:** *In what ways do you consider that a manual containing all information about the enforcement systems of the Member States would be helpful?*

### *2. Increasing the information available in registers and improving access to them*

#### *a) Commercial registers*

The main sources of information are public records, and the most important of these are commercial registers.

Commercial registers were partially harmonised by the First Council Directive on Company Law ("Publicity Directive")<sup>14</sup> of 1968 and the Eleventh Council Directive on Company Law ("Branch Directive") of 1989.<sup>15</sup> Article 2(1) of the Publicity Directive provides for the

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<sup>12</sup> Some basic information about the national enforcement systems and the competent authority to contact with an enforcement request is already available on the site of the European Judicial Network in civil and commercial matters:

[http://ec.europa.eu/civiljustice/enforce\\_judgement/enforce\\_judgement\\_gen\\_en.htm](http://ec.europa.eu/civiljustice/enforce_judgement/enforce_judgement_gen_en.htm)

<sup>13</sup> <http://ec.europa.eu/civiljustice/>

<sup>14</sup> *First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community*, OJ L 65, 14.3.1968, p.8.

<sup>15</sup> *Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State*, OJ L 395, 30.12.1989, p. 36.

compulsory disclosure of certain documents and particulars by companies.<sup>16</sup> Article 2(1) a) of the Branch Directive provides that the address of the branch must be disclosed. At present, business registers in the Member States provide detailed information on individual firms (legal status, date of establishment, company capital, text code, sector of activity, corporate bodies and their powers of representation, and sometimes even the number of employees).<sup>17</sup> This information is often recorded electronically in central registers and is accessible online.<sup>18</sup>

The two directives thus aim to provide transparency in business relations in the broad sense, including enforcement proceedings. They do not, however, provide for the full harmonisation of commercial registers. They apply only to certain commercial corporations and not to individuals and business partnerships.<sup>19</sup> Furthermore, Member States are free to establish local or central commercial or company registers: Whereas in the United Kingdom there are three central registers covering all information about business dealings, in Germany there are more than 400 registers, run by the local courts. Besides, information contained in commercial registers is not always equally reliable: in some Member States<sup>20</sup> the information is not verified before being entered in the register.<sup>21</sup> In some Member States, information in the commercial register may be outdated, because a company's failure to report changes of its status is not always linked to sufficient sanctions.<sup>22</sup>

Furthermore, the Publicity Directive does not deal with electronic data processing or with online access to commercial registers. However, it should be noted that the Council, at its meeting of 12 and 13 June 2007, concluded that “work should be carried on in the area of E-Justice with a view to creating at European level a technical platform giving access, in the sphere of justice, to existing or future electronic systems”. The priorities for future work include creating the “conditions for networking of insolvency registers and of commercial and business registers”.

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<sup>16</sup> Those documents and particulars are:

- (a) The instrument of constitution, and the statutes if they are contained in a separate instrument;
- (b) Any amendments to the instruments mentioned in (a), including any extension of the duration of the company;
- (c) After every amendment of the instrument of constitution or of the statutes, the complete text of the instrument or statutes as amended to date;
- (d) The appointment, termination of office and particulars of the persons who either as a body constituted pursuant to law or as members of any such body:
  - (i) are authorised to represent the company in dealings with third parties and in legal proceedings;
  - (ii) take part in the administration, supervision or control of the company.

It must appear from the disclosure whether the persons authorised to represent the company may do so alone or must act jointly

(e) At least once a year, the amount of the capital subscribed, where the instrument of constitution or the statutes mention an authorised capital, unless any increase in the capital subscribed necessitates an amendment of the statutes;

(f) The balance sheet and the profit and loss account for each financial year. The document containing the balance sheet shall give particulars of the persons who are required by law to certify it.

<sup>17</sup> In Italy, this information is recorded in a central register, which is operated by the Italian Chambers of Commerce and accessible online at [www.infocamere.it](http://www.infocamere.it).

<sup>18</sup> Please note that private services for online access to commercial registers or to commercial databases with business information such as the European Business Register ([www.ebr.org](http://www.ebr.org)) also rely on the official register information.

<sup>19</sup> Comparative surveys show, however, that information about individual businessmen is registered and available in all Member States.

<sup>20</sup> Examples: Ireland, Netherlands, Finland, United Kingdom.

<sup>21</sup> In other Member States, the information is examined and verified by the registrars before being recorded.

<sup>22</sup> Example: ECJ, C-191/95, *Commission v. Germany*, [1998] ECR I 5449.

**Question 3:** *Should information available in and access to commercial registers be increased? If so, how and to what extent?*

**b) Population registers**

A creditor seeking the address of a non-professional debtor may face even more problems. In most Member States<sup>23</sup> the addresses of all inhabitants are recorded in the population register. However, these registers are organised in very different ways. In some Member States<sup>24</sup> they are maintained by local authorities, so a creditor seeking the address of a debtor would have to search all local records across the country - which is an impossible task. Central registers are often not available to the creditor.<sup>25</sup> Consequently, creditors seeking the address of a debtor who is a consumer or a private individual face serious problems. Moreover, not all jurisdictions allow enforcement authorities access to registers. The creation of such registers in Member States where they do not already exist may not be in keeping with their legal traditions. Private services for cross-border register enquiries are at an early stage of development. Any possible measure would also have to respect the rules of data protection and the protection of the debtor's privacy.

**Question 4:** *Should access to existing population registers be improved? If so, how?*

**c) Social security and tax registers**

Social security and tax registers often contain information about the debtor, such as his address, details of his employer or his bank accounts; access to such information can significantly facilitate the enforcement of a monetary claim. The legal systems of those Member States without a debtor's declaration empower enforcement bodies to search state-maintained records for information regarding the debtor's assets.<sup>26</sup> However, direct access by enforcement bodies to non-public registers is not restricted to jurisdictions that do not provide a debtor's declaration. On the contrary, modern enforcement laws allow qualified bodies access to non-public files. In Austria<sup>27</sup> and in Spain, the courts may request information about the debtor's employment from social insurance registers. In Portugal, bailiffs must first request the authorisation of the enforcement courts, but open access is available. In Spain and Sweden, the enforcement bodies may also directly request information from tax records. In Slovenia, tax authorities may disclose data on a particular taxable person to other state authorities, authorities of self-governing local communities and holders of public authority for the exercise of their powers stipulated by law. In Estonia, as of 2008, a bailiff will be able to

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<sup>23</sup> Exceptions are the United Kingdom and Ireland.

<sup>24</sup> Examples: Germany, Italy.

<sup>25</sup> Exception: In Austria the Central Population Register is available online: [www.business.telekom.at](http://www.business.telekom.at).

<sup>26</sup> Exceptions are Italy and Scotland. In the Netherlands and in Belgium, bailiffs can get information about the debtor's address and employment from social security records. In Luxembourg, a creditor may request the *juge de paix* to contact the social security register in order to find out the debtor's address and employment. In France, the legal situation is more complicated as the *huissiers de justice* do not have direct access to administrative assistance, but must request the help of the *Procureur de la République*. Additionally, the *huissiers* are prohibited from using the information obtained for purposes other than the enforcement of the title held by the creditor.

<sup>27</sup> Austrian law gives preference even to information from social registers. A debtor's declaration may only be requested if the social insurance register could not provide any data of the debtor's employment or income.

obtain information from the Health Insurance Fund Register, the Social Security Board Register and the Securities Register. In these jurisdictions, the efficiency of enforcement proceedings has been considerably improved. Additionally, private and public debts are (at least to some extent) treated equally. The Swedish system, where enforcement authorities have access to social security and tax registers, may provide the creditor with a better means of information than the debtor's declaration, since it does not require the cooperation of the debtor, it enhances the chances of speedily obtaining accurate information and it could be an efficient means for a creditor to obtain information about his debtor that he cannot obtain otherwise.

However, access to registers might conflict with the rules on data protection and social and fiscal secrecy. In particular, information from social security and tax registers may be sensitive. Therefore, access to these data should take into consideration the specific legal conditions for the processing of sensitive data that may differ from one Member State to another.

**Question 5:** *Should access to social security and tax registers by enforcement authorities be increased? If so, how and to what extent?*

### **3. The exchange of information between enforcement authorities**

#### **a) Current situation**

At present, enforcement bodies are not able to access directly the (non-public) registers of other Member States which are open to the enforcement bodies of that state. If access to these registers by enforcement bodies exists at all, it is strictly limited to national enforcement bodies. There are currently no international instruments dealing with the exchange of information between national enforcement bodies.<sup>28</sup>

However, the lack of co-operation between enforcement agents and bodies in civil matters stands in contrast to the close cooperation of tax authorities in the European Union. A directive dealing with the recovery of claims resulting from the Agricultural Guarantee Funds<sup>29</sup> provides for a system of a direct exchange of information between national authorities. The scope of application of this Directive has been extended to claims relating to certain taxes.<sup>30</sup> Article 4 of the Directive provides that “at the request of the applicant authority, the requested authority shall provide any information which would be useful to the applicant authority in the recovery of its claim.” Requests are now being transmitted

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<sup>28</sup> However, the Nordic Countries are planning to adopt an “Agreement on the Exchange of Information in Recovery Matters”. This Convention would be the first instrument providing for direct cooperation between enforcement bodies. This is, however, an exception, and for the most part the improved access to registers which has recently been granted to enforcement bodies in some jurisdictions remains strictly territorial.

<sup>29</sup> Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of the agricultural levies and customs duties, OJ L73, 19.6.1976, p. 18.

<sup>30</sup> Council Directive 2001/44/EC of 15 June 2001 amending Directive 76/308/EEC on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of agricultural levies and customs duties and in respect of value added tax and certain excise duties, OJ L 175, 28.6.2001, p.17.



electronically.<sup>31</sup> The requested authority is not obliged to supply information which would disclose any commercial, industrial or professional secrets or if the disclosure would be liable to prejudice the security or be contrary to the public policy of the state.<sup>32</sup>

#### ***b) Possible solutions***

Consequently - in the absence of Europe-wide registers - one option could be to enhance cooperation between national enforcement authorities and introduce the direct exchange of information between them. Enforcement bodies in one Member State would be able to request the assistance of the competent bodies in other Member States. In this regard, the existing Community instrument on the mutual assistance of tax authorities could serve as a model.

The extent to which the Internal Market Information system (IMI) could be used for the exchange of information between national enforcement authorities could also be examined. IMI has been developed as an electronic tool for information exchange between Member States administrations working in all official languages, and it can potentially support any piece of Community legislation.

Following this approach, a future Community instrument could provide a list of national enforcement authorities entitled to request information from registers in another Member State and could set time limits within which a request for information should be implemented. There could be standardized question and answer forms in all Community languages, and data could be exchanged electronically as far as possible.

If this option is pursued, it will be necessary to consider how to deal with the considerable differences in the information available to enforcement bodies. In some Member States<sup>33</sup> enforcement authorities are not state-run and do not have access to public registers in their own Member States. Consequently, they could not provide appropriate information to enforcement authorities of other Member States.

Data protection rules are to be taken into consideration during mutual assistance procedures.

**Question 6:** *Should the exchange of information between enforcement authorities be improved? If so, how?*

#### ***4. The Debtor's Declaration***

##### ***a) Current situation***

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<sup>31</sup> *Commission Directive 2002/94/EC of 9 December 2002 laying down detailed rules for implementing certain provisions of Council Directive 76/308/EEC on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures*, O J L 337, of 13.12.2002, p. 41.

<sup>32</sup> In this context, please note that also Art. 44 of the *Commission Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations* (COM (2005) 649 final) provides for a system of cooperation between national central authorities which “shall give access to the information which can facilitate the recovery of maintenance claims”. This information is provided in order to achieve, inter alia, the objectives to “locate the debtor” and to “evaluate the debtor’s assets”:

<sup>33</sup> E.g. France and the United Kingdom.

Many of the national systems<sup>34</sup> empower enforcement bodies to question the debtor directly about his assets. In some Member States, the debtor's declaration is made in the form of testimony before the enforcement court. The debtor is required to attend an oral hearing where he is questioned by the judge (or a judicial clerk).<sup>35</sup> The creditor can ask further questions.<sup>36</sup> Cross-examination of the debtor may also take place, and the debtor must present documentary evidence of his assets.<sup>37</sup> However, in other Member States the debtor's declaration is made by filling out mandatory forms.<sup>38</sup> In these Member States, the debtor's

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<sup>34</sup> Denmark, Germany, Estonia, Ireland, Greece, Spain, Austria, Portugal, Finland, Sweden, United Kingdom (England and Wales).

Belgium, France, Italy, Luxemburg, Netherlands and Scotland do not provide for a debtor's declaration. However, in France there is a limited obligation of the debtor to disclose a bank account, in the Netherlands, the enforcement organ can request the debtor disclose his earnings, in Belgium, the debtor must reveal his assets when applying for a protective order. The introduction of a debtor's declaration is discussed in Italy.

In Latvia, there is no debtor's declaration as such. However, according to the Civil Procedure Law (Articles 552 and 557), at the stage of the enforcement of a decision or a judgement of a court the debtor has to provide information to the sworn bailiff about his financial situation. For providing intentionally wrong information to the bailiff about his/her financial circumstances the debtor may be subject to administrative or criminal liability.

In Romania, there is no obligation of the debtor to make a statement on its assets/income before a writ of enforcement is obtained. According to the Code of Civil Procedure, the bailiff has the duty to insist by all the means permitted by law, for the achievement in full and with celerity of the obligation provided in the writ of enforcement. The bailiff may request the debtor to make a written *statement* regarding its income and assets, and the place where such are located (art. 373 of the Civil Procedure Code).

In Cyprus, the debtor seeks the court's assistance in order to be declared bankrupt. At the first stage the debtor applies to the court for a receiving order and is subsequently declared bankrupt by the court.

<sup>35</sup> In Denmark, Ireland, England, Austria and Spain.

In Bulgaria, at present the Code of Civil Procedure of 1952 does not contain any rules about a debtor's declaration. According to Art. 448 of the Code of Civil Procedure which will come into force on 1 March 2008, the debtor will be obliged to appear before the district court and to declare all his property and income, if the established debtor's property is not sufficient. For obtaining a debtor's declaration the bailiff must file a request before the regional court which shall consider the request at an open hearing. For incorrect information or the refusal to appear before the court or to disclose his property, the debtor bears responsibility under Art. 290a of the Penal Code and can be punished by imprisonment of up to three years.

In the Czech Republic, there is a declaration of assets (§260a – 260h of the Code of Civil Procedure). There is no specific form, and the declaration can be also made orally before the court. The refusal of the debtor to disclose his assets or wrong declarations are sanctioned by a term of imprisonment of up to one year or by a pecuniary penalty (§256 d of the Criminal Code).

In Slovenia, the debtor is obliged, upon an application by the creditor or at the discretion of the court, if the creditor proves presumptively that the proposed execution measures will not suffice for the satisfaction of his claim, to submit at any time during the execution procedure an inventory of his property together with a proof of ownership and other real rights in respect of this property, and to state the evidence which supports his claims. The court shall order the debtor to submit the inventory of his property by decree. If the debtor fails to produce the inventory by the deadline given by the court, the court shall hold a hearing at which the debtor shall be questioned concerning the facts regarding the inventory of his property. The court shall instruct the debtor on the consequences of perjury. A debtor who has been duly summoned but fails to appear at the hearing, or who, at the hearing or in the inventory of his property, does not state accurate and true data shall be punished by a fine not exceeding EUR 4173 in the case of natural persons, and EUR 41730 in the case of legal persons and sole proprietors.

<sup>36</sup> This is the case in most of the Member States.

<sup>37</sup> In Ireland and England.

<sup>38</sup> Germany, Spain, Austria, Sweden.

declaration is not considered as evidence, but rather as fact gathering by the enforcement bodies.

There are two different models of the declaration: the first model obliges the debtor to disclose all his assets, while the second limits this obligation to assets sufficient for the recovery of the creditor's claim.

The prerequisites for obtaining a debtor's declaration are similar. In all Member States the declaration is requested by the creditor. Normally, the declaration is only taken after an unsuccessful seizure attempt or if such an attempt is likely to be unsuccessful. Modern enforcement systems require the declaration to be made at the beginning of the proceedings in order to enable the enforcement bodies to obtain the necessary information at an early stage.<sup>39</sup> In these systems, an unsuccessful attempt at seizure is not a precondition.

The main problem with the debtor's declaration lies in the fact that the declaration must be given personally. If the debtor refuses to disclose his assets, enforcement bodies (with police support) may exercise physical coercion and arrest him.<sup>40</sup> In Portugal, a reluctant debtor may incur penalties; in many other Member States, imprisonment (of up to one or even two years) may be imposed on the debtor.<sup>41</sup> Making an incorrect or false declaration is considered a criminal offence.<sup>42</sup> Therefore, in some Member States, the declaration is sworn under oath as an affidavit.<sup>43</sup>

In some Member States there is no debtor's declaration.<sup>44</sup> This can be explained by the fact that the debtor's declaration is similar to a kind of "personal enforcement" (i.e. enforcement against the person of the debtor), which might be punished by imprisonment. An additional reason can be found in the legal nature of the declaration, which can be regarded as a taking of evidence, especially if the declaration is given in an oral hearing of the enforcement court. As enforcement bodies are clearly separate from the court system in most of the Romanic Member States, such taking of evidence may be considered as incompatible with the structures of enforcement. However, in other Member States the declaration may also be taken by the bailiff or other enforcement bodies. Besides, the obligation of a debtor to disclose his assets is widely recognised in insolvency and similar proceedings.<sup>45</sup>

### ***b) Possible options***

If measures at Community level with respect to the debtor's declaration were to be considered useful and necessary in order to improve the transparency of debtor's assets, a range of options exist:

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<sup>39</sup> E.g. in Spain and Portugal.

<sup>40</sup> In Ireland and England, the failure to comply with a court order is considered as contempt of court.

<sup>41</sup> Denmark, Germany, Ireland, England, Greece, Spain, Austria, Portugal, Sweden.

<sup>42</sup> In Estonia, a court may impose compulsory attendance or detention on a debtor, who - without good reason - fails to submit the list of assets to the bailiff or fails to perform the obligation to take an oath. A debtor may be sentenced to detention for up to thirty days. One year after taking an oath, a debtor is required to take an oath again only if the bailiff has reason to believe that the debtor has acquired assets after taking the oath.

<sup>43</sup> E.g. in Estonia, a court can - at the request of a bailiff or of a claimant - require a debtor to swear in court that the information submitted to the bailiff concerning his assets is correct.

<sup>44</sup> See above, footnotes 33 and 34.

<sup>45</sup> This is the case in Belgium for consumers' insolvency.

One possibility would be a Community instrument setting out the obligation of Member States to introduce a procedure for the taking of a debtor's declaration, but leaving them discretion as to the conditions under which such a declaration would have to be made. A model of such a provision has been drawn up by the *Storme Group on the Approximation of European Civil Procedures*.<sup>46</sup>

However, an instrument providing only for such "minimum harmonisation" would have several disadvantages: the differences in the national legal systems would continue to exist; disclosure on the basis of a single, common form would not be possible, and considerable differences would remain with respect to the imposition of penalties for non-performance of the obligation.

The introduction of a system to obtain the debtor's declaration should take into consideration the principle of proportionality: the declaration should avoid information that is not necessary for the purpose for which it is required. A solution that obliges the debtor to disclose all his assets in advance is less conducive to privacy- than a solution where the debtor is required to declare only the necessary information when specific conditions are met.

### ***c) The Introduction of a European Assets Declaration***

Another option to be considered, therefore, is the introduction of a uniform "*European Assets Declaration*" which would oblige debtors to disclose all assets in the European Judicial area. The transparency of the debtor's assets should not be limited by the territoriality of the enforcement proceedings in the Member States, since within the European Judicial Area - in which the free movement of judgments is guaranteed - all assets of a debtor are in principle subject to enforcement.<sup>47</sup>

The declaration could be given on a standard form available in all Community languages. Minimum (or even uniform) standards could be set for the conditions and content of the declaration and the related sanctions. As a result, creditors would have equal access to information about assets within the European Judicial Area, while debtors within the internal market would receive equal protection. In addition, "information shopping" within the European Judicial Area would be reduced.

As the possible instrument should not interfere in the organisation of enforcement bodies in the Member States, each Member State could indicate a competent body or public authority for taking the declaration. Disclosure would be made to the creditor or to the competent

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<sup>46</sup> See article 12.4 of the proposal from the group of experts in the Storme report (ed.) *Rapprochement du Droit Judiciaire de l'Union européenne*, p. 210-211.

"For the protection of a judgment creditor who establishes his inability to find sufficient assets in the hands of the judgment debtor for the satisfaction of the judgment, the law of Member States shall provide:

1. that the debtor shall disclose in their entirety the nature and location of his assets. Such disclosure shall be made to the creditor or the proper authority as provided by law;

2. that the proper authority may require third parties to disclose any information relating to the assets of the debtor which is in their possession. "Third parties" includes any institution which holds an account in the name of the debtor.

3. sanctions whereby these obligations may be enforced."

<sup>47</sup> Please note that it is already the case that territoriality does not apply to the debtor's declaration according to the practice in some Member States (especially in Austria, Germany and England). The obligation of the debtor to deliver an affidavit is not limited to his domestic assets, but the debtor must disclose his entire assets, including those abroad.

authority, as provided by the laws of the Member States (e.g. to the *huissier de justice*, the enforcement agency or in the enforcement court).

The debtor should have the opportunity to avoid the obligation of making the declaration by offering payment, or by identifying assets that are sufficient for the enforcement. It would also seem advisable to allow the debtor to avoid the obligation to make a declaration by offering a payment by instalments, which are secured by a bank guarantee or a similar security.

The debtor could make the declaration by filling out a form. Wherever possible, this should be done by ticking boxes (to indicate whether or not a specific type of an asset exists). The possibility of completing the form online in the European Judicial Atlas in Civil Matters could also be offered.<sup>48</sup>

Finally, the instrument could provide for sanctions to be applied in the case of non-performance. One option for consideration would be to provide for fines and for the arrest of the debtor. Incorrect statements by the debtor could be sanctioned by criminal law. In order to avoid undue coercion of the debtor, the instrument could prohibit the publication of the debtor's declaration in an open register ("debtors' list").

**Question 7:** *Do you consider that a European Assets Declaration should be introduced ?*

**Question 8:** *If so, under what conditions should it be possible to obtain it ? Should there be sanctions for incorrect statements contained in the declaration ? If so, which ?*

**Question 9:** *What degree of harmonization do you consider appropriate for the European Assets Declaration ? What should be the precise content of the European Assets Declaration?*

### **5. Other measures**

Apart from the possible measures to increase the transparency of debtors' assets discussed in this Green Paper, there may be other measures that could be considered.

**Question 10:** *Which other measures at EU level do you propose to increase the transparency of debtors' assets ?*

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<sup>48</sup> [http://ec.europa.eu/justice\\_home/judicialatlascivil/html/fillinginformation\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/fillinginformation_en.htm)