

## SUMMARY OF REPLIES TO THE GREEN PAPER

### ON EFFECTIVE ENFORCEMENT OF JUDGMENTS IN THE EUROPEAN UNION:

#### THE TRANSPARENCY OF DEBTORS' ASSETS

On 6 March 2008, the European Commission presented a Green Paper on the "effective enforcement of judgments in the European Union: the transparency of debtors' assets"<sup>1</sup>, the aim being to conduct a broad consultation process on the possible creation of an instrument for improving cross-border debt collection.

The Commission received a total of 58 replies from Member States and other interested parties. Although most of the respondents welcomed the initiatives set out in the Green Paper, views differed on the suggested instruments for improving the transparency of debtors' assets in the EU. The different approaches reflected in the responses are associated with the existing range of enforcement systems in Member States, differences in commercial, population, social security and tax registers, and — last but not least — with different approaches to the principles of proportionality and subsidiarity. The replies to the Green Paper can be accessed on the DG Justice, Liberty and Security website except in cases where the author has requested confidentiality. The replies can be summarised as follows.

#### *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 needs explicit attention in this context? If so, which elements do you consider important?*

Most of the respondents agree with the need for measures at Community level to increase the transparency of debtors' assets, though views differ as to what can be done in practice. Many of the replies point to the principle of proportionality. While some respondents believe that harmonisation of Member States' legislation is of vital importance, most of the responses think it advisable at Community level to determine common minimum standards on the availability of information concerning debtors: on the one hand these would increase the transparency of debtors' assets in countries where this is currently a problem; on the other hand, it would not be detrimental to the availability of such information in countries where it is already handled efficiently.

The few respondents who were strictly against action at Community level suggest simply trying to find solutions for local problems, leaving individual Member States to decide what data is stored on what register.

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<sup>1</sup> COM(2008) 128 final, 6.3.2008

Only very few respondents agree with the idea that non-public organisations should participate in and have access to the sources of information needed for enforcing judgements. Although, as mentioned above, national enforcement systems differ and in several Member States private bodies are indeed involved in enforcement procedures, respondents suggest that non-public organisations must have a statutory framework, must be supervised and their status must always be legally defined. One respondent stressed that non-public organisations' access should be based on limitations in terms of debt type, judgment type and possibly debt value — in other words, transparency of debtors' assets could be linked to the "judgment" rather than the body doing the enforcing.

Almost all the replies expressed concern regarding the compatibility of such measures with Directive 95/46/EC of the European Parliament and 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. There were questions on how to avoid misuse of incoming data and its subsequent use for other purposes, such as onward transmission. It was felt that there should be sanctions for misuse. There was, it was felt, a need for a mechanism to establish who requires information, for what purposes and for what reasons. Respondents suggested taking into consideration the way requests for information would be submitted, and if requests were received in writing, this would enable a check to be carried out later on whether the data were being used for the same stated purposes. Most replies noted the importance of the right balance between the interests of debtor and creditor.

Some replies from banks were concerned about how lenders' obligations with regard to banking secrecy would interact with commitments to transparency regarding debtors' data, especially where private bodies approached banks to obtain information covered by banking secrecy obligations.

One respondent suggested creating a licence system for bodies seeking access to data.

*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?*

Most replies supported and welcomed the idea of creating a manual, which was seen as a helpful measure for associations, the general public and small creditors, who would no longer have to hire legal experts. The general expectation is that the manual would contain not only information on enforcement systems, but also links to national information registers, including details of their content and accessibility, duration, cost, most frequent problems, and instructions on first steps.

All the positive replies see it as an electronic, easy-to-access manual in all Member States' languages. One reply suggested that multilingual EU websites could refer to the websites of national bodies and that it should be possible to consult these sites in English, German and French.

Very high importance was attached to the need to keep the manual up to date, either by determining clearly the range of information that Member States are obliged to provide or by

setting up a single maintaining body. Several replies expressed concern regarding the cost of keeping such a manual up to date.

Some replies mentioned the fact that, as was mentioned in the Green Paper, some basic information on national enforcement systems and the competent authority for enforcement requests in the Member States is already available on the website of the European Judicial Network in civil and commercial matters, via the European Commission Internet portal. A manual on national enforcement systems of the Member States would therefore duplicate that information. It might be useful to be able to place the information which, according to the Green Paper, should be included in the manual, in the European Judicial Network, but not in the manual, given the impracticability of regular updating.

Two replies were strictly against the manual, on the grounds that it would be an additional burden. These respondents thought that creditors would be hiring lawyers anyway, who would contact lawyers in other Member States and get the enforcement information free of charge. They feared the risk that a manual might be used in court to give a misleading impression of the situation in practice in another Member State.

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

Various reactions to the increased availability of commercial registers demonstrated once again the variety of such registers from country to country. The amount and type of data stored in these registers also differs. For all the replies the common denominator was that commercial registers exist — just the administration of them differs. A majority of respondents agree that data in commercial registers should be made more available by creating a register portal or by centralising Member States' commercial registers. Several replies were in favour of standardising national registers: they should be available online, easy to access, kept up to date and, if possible, not just in the national language, but also in English.

A few replies noted that commercial registers were not the right place to deal with this topic, and that a better option would be to improve the exchange of information between authorities, although general electronic access to the existing commercial registers should be ensured. A further suggestion was to adopt soft law measures to encourage Member States to develop their registers. Very few replies stressed that the centralisation of commercial registers should be viewed from the perspective of cooperation with the European Business Register.

Although the majority of respondents were convinced that commercial registers do not contain any sensitive data, and access to the information needed for enforcing judgments should be made easier, some drew attention to the data protection issue.

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

As was correctly noticed in the Green Paper, not all Member States have a population register, and even if they do, the information they contain differs, which is why replies and suggestions on improving population registers vary. However, most respondents agree that because of

existing differences it will be difficult to unify, standardise and centralise population registers, or only in the distant future. Member States with no population registers see the obligation to create one as disproportionate.

A large majority of replies express concerns regarding data protection and the protection of the debtors' privacy and agree that public access should not be increased. Should the idea of improving access to the data in population registers be taken further, one suggestion was to set requirements as to whom and how information might be given, e.g. order from a court (or some other enforcement body — status to be clarified). Proof of justified interest in the information would have to be submitted.

Few respondents raised questions about the expense of creating a centralised register.

The very few supporters of the idea of unlimited public access to the centralised population register thought that although debtors were entitled to their privacy, this could not be used as a means of becoming untraceable.

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

Opinions regarding improved access to social security and tax registers were split into two almost equally sized groups.

A large majority noted the differences in individual Member States. Replies that were in favour of improving access suggest setting strict requirements for access to such highly sensitive data in registers. The following requirements were suggested:

- access should be linked to the judgment type/debt value and enforcing body;
- access allowed when the debtor has failed to make settlement or co-operate with the enforcement process;
- access should be only to the extent strictly needed for the recovery of the debt;
- access to the registers could be limited to specific data considered of extreme relevance in this context;
- data which may relate to confidential tax matters must not be included in an information search of this kind.

Respondents who feel there is no need to improve access to social security and tax registers tend to be aware of possible conflict with data protection rules. One reply even urged the Commission to first undertake a more detailed analysis. The negative replies tend to express serious concerns regarding using information gathered for one purpose for another entirely. The right to privacy, including in data protection, should not be overridden by the necessities

of law enforcement and must be upheld. One reply took the view that this way calls into question not only debtors' rights, but also general citizens' rights, to a disproportionate level.

However some replies believe that judgments in the European Union could be successfully enforced by increasing cooperation between judicial and administrative authorities.

Regarding non-public organisations, one reply took the view that this may raise problems. Such bodies should be given only extremely limited access. They would also have to be required to use the information provided only for the specific individual case and then to destroy it.

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

The positive respondents in the main tend to believe that the possibility for enforcement authorities in the Member States to be able to exchange information is a decisive mechanism for achieving more effective enforcement of judgments. However, this must be in full compliance with Directive 95/46/EC. Also the Commission should be aware of the high degree of fragmentation that currently exists when it comes to national registers. Several replies see as a possible solution putting a standardised form at EU level into place and designating a national enforcement authority in each Member State which would guarantee compliance with data protection rules, check on the purpose of the requested information, and ensure that any information disclosed would not conflict with legitimate secrets or would not prejudice with national security/public policy. A further example was cooperation between tax authorities. Another option suggested by several respondents was an Internal Market Information system.

One point to remember is that enforcement authorities which themselves have no access to national registers could nonetheless act as messengers. They would at the very least have to be able to transfer encrypted information between the agency authorised to provide them with information and the requesting enforcement authorities from the other country, without being able to see the information themselves.

As regards non-government bodies, one reply stressed that they must not be allowed to participate in the system for purposes other than the enforcement role they have been officially entrusted with.

In countries where enforcement authorities do not exist, this kind of cooperation is viewed sceptically, because what does not exist cannot be improved. The systematic exchange of information between these authorities would have to be built up from scratch. However these replies suggest that it must be done on a case by case basis and stress that the proportionality principle must be duly taken into account, limiting the data that must be disclosed by the debtor to that which is proportionate to the specific purpose pursued in the specific case.

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

A large majority of respondents welcomed the European Assets Declaration, though its added value is doubtful and it is seen as only an additional information source and may not introduce the acquisition of information from Member States' registers.

Replies that were sceptical to this proposal regard the European Assets Declaration as neither called for nor useful. As a European Assets Declaration could be established only by the directly applicable provisions of a regulation, it is incompatible with the idea being put forward here of laying down Community-wide minimum standards for fact-gathering in a directive. Also it should be borne in mind that the different rules applicable in the Member States to the liability to seizure of assets mean that a standard form for a European Assets Declaration would either have to be very abstract, and therefore of little practical use, or very detailed, and therefore time-consuming and complicated.

There were also doubts as to this proposal's compatibility with the subsidiarity and the proportionality principles, because civil law is state intervention, so creating a manual is more acceptable.

*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?*

Most replies stated that a declaration of assets would only be justified when enforcement has failed, i.e. and enforcement order has been issued and the debtor was given time to voluntarily satisfy the claim. There is no justification seen for divulging a person's entire assets before the first attempt at enforcement. This should only happen after an enforcement attempt finds that no movable securable assets, for instance, are available, or the debtor's known assets are not sufficient to satisfy the creditor. Few replies suggested that it should primarily concern cases in which enforcement is carried out using Community instruments (e.g. European Enforcement Order, European Payment Order and judgments handed down under the European Small Claims Procedure).

Very few replies were in favour of making the declaration only after notification of enforcement and the injunction, but before the enforcement procedure starts.

To make the declaration effective, sanctions for incorrect/fraudulent statements are needed, and they should be laid down in domestic law to be sure of complying with the subsidiarity principle. However they should be proportionate, and suggestions vary from fines up to criminal sanctions. One respondent suggested that there could be periodic penalty payments proportionate to the value of the debt pending enforcement. If the instruction to provide the declaration is not satisfied after a specified number of fines, such non-performance could be regarded as criminal defiance of the courts. Only a general framework for sanctions can be considered.

*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?*

Unfortunately there was no clear and unified position in the replies regarding the degree of harmonisation. All the replies to this part of question can be divided into three groups – replies supporting full harmonisation at European level, replies stating that the European assets declaration should only be harmonised on the principle of minimum harmonisation, and replies viewing harmonisation as unnecessary. Replies supporting the idea of harmonisation in general agreed on the need to have a standard form of European Assets Declaration throughout the Member States.

In trying to define the content of the European Assets Declaration, a large majority suggested that it should include an estimated market value of each of the assets and details of all encumbrances on the assets identified and/or any third party rights which might have preference over the judgment creditor's claim, personal data, data on and identifying real estate, data on and identifying assets over a certain value (e.g. €500, or e.g. car details), any securities and bank account claims, any other monetary claims, any personal income (salary, royalties, payments due, dividends, etc.). Many respondents were in favour of the declaration not being limited either territorially (not only assets in the European Union, but also those registered in non-EU countries), or corresponding to the amount of claim, that way granting the creditor enough choice among enforcement objects.

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

Although a majority of the replies either mentioned no proposals at all or believed that measures mentioned in the Green Paper will be enough to improve the transparency of debtors' assets in the EU, there were a few suggestions, as follows:

- A cooperation body should be set up for the Member States' national enforcement bodies to boost cross-border enforcement procedures. Such a body with representatives from the executive authorities in all Member States should help make recovery more effective.
- Register of Debtors, to be involved in the deliberations.
- Commission should facilitate the enforcement of EC Enforcement Orders for uncontested claims – EC Reg. N° 805/2004 – and any other judgment by creating a register of the competent enforcement authorities at the domicile/registered site of the debtor.
- Commission should state that the foreclosure of a bank account will affect all bank accounts which the debtor has with the relevant bank, included all subsidiaries and all affiliated group companies of that bank.
- Commission should create a register of Opening requests and Opening orders of Insolvency procedures. This would help creditors to avoid the initiation of unlawful enforcement proceedings, and thus help all affected authorities, bodies and the creditor to save precious time and costs.

- Commission should require Member States to create public registers for the following assets:

*land property*

*shares*

*aeroplanes*

*motor vehicles*

*ships, motorboats*

- and enable creditors to have access to all information, particularly on the name and address of (co-)owners and securitisation of the assets.
- Commission should lay down a maximum time limit for the issue of the required enforcement order and the taking of enforcement measures and set out the consequences of inaction.
- Standard procedure for cross-border matters with simple and effective forms, but not harmonisation impinging on national sovereignty.
- An improvement in the reliability and operation of the trade register and the existence of an insolvency register.
- Simple (including electronic) cross-border payment mechanisms.
- Ease data protection laws that prevent the rightful recovery of either late payments or full debt recovery.
- Establish harmonised rules as to when an instrument (a bill of exchange, a contract, a judgment) is to be considered a Europe-wide enforceable title.
- Establish harmonised rules that specify and assess the grounds on which the debtor can oppose enforcement.
- Registration in a commercial register should be required for individual natural person merchants so that there is public record of an address where notices can be served with legal effect.
- There should be a requirement for certain small and medium-cap companies that the natural persons who own their shares and the subsequent transfers of those shares be on record in the commercial register, so that the identity of the owners who benefit from any fraudulent acts committed by the company can be immediately ascertained.