

SUMMARY OF REPLIES TO THE GREEN PAPER

ON IMPROVING THE EFFICIENCY OF THE ENFORCEMENT OF JUDGMENTS IN THE EUROPEAN UNION: THE ATTACHMENT OF BANK ACCOUNTS

In October 2006, the European Commission presented a Green Paper on "*improving the efficiency of the enforcement of judgments in the European Union: the Attachment of Bank Accounts*"¹. With the purpose of improving enforcement legislation within the EU, the Commission launched a broad consultation process to gather opinions on the possible creation of an **instrument aiming at improving cross-border debt collection**.

The Commission received a total of 67 replies from Member States and other interested parties. These can be **accessed on the DG Justice, Liberty and Security website**², except in cases where the author has requested confidentiality. The replies can be summarised as follows.

1. A POSSIBLE SOLUTION: A EUROPEAN SYSTEM FOR THE ATTACHMENT OF BANK ACCOUNTS

Most of the replies thanked the Commission for its initiative and **recognised the necessity of facilitating cross-border debt collection** in an area where free movement of capital and new information and communication technologies could contribute to the dissipation of assets. Therefore, **the creation of a new instrument was welcomed by many Member States and stakeholders through the establishment of an independent European procedure**.

While some Member States and stakeholders were in favour of a directive, a majority of respondents regarded harmonisation of national laws by means of a directive as **complex and unnecessary**.

A minority of respondents still had **doubts about the necessity of any kind of instrument**, preferring to await the results of the impact assessment in order to be sure that the instrument would meet a real need. A few stakeholders expressed their strong disapproval of the Commission initiative, arguing that there was no legal basis for such an instrument

A majority of replies agreed that the instrument should be no more than a **protective order preventing the withdrawal and the transfer of monies standing to the credit of bank accounts**. However, some Member States and stakeholders suggested that it should be possible to attach other assets, while others suggested that the order should not be merely protective, or that it should be a first step towards a real harmonisation of the attachment of bank accounts.

Replies from certain Central Banks voiced concerns about the **specific immunities enjoyed by Central Banks against attachment procedures** and stressed that the instrument should uphold and reassert these concerns, as part of the special role of national and European

¹ COM(2006) 618 final, 24.10.2006

² http://ec.europa.eu/justice_home

Central Banks in ensuring the smooth functioning of monetary policy and of the financial system as a whole.

2. PROCEDURE FOR OBTAINING AN ATTACHMENT ORDER

2.2 Circumstances in which a creditor can apply for an Attachment Order

Most of the replies expressed their support, or their willingness in principle to agree to the **order being available at all stages of the procedure**, namely: i) prior to the initiation of legal proceedings on the merits of the claim, ii) concurrently with the raising of the principal action, iii) at any subsequent stage during the judicial proceedings and iv) during the period between the issuing of an order in one Member State and of the declaration of enforceability of the order in the Member State where the debtor's account is situated.

Agreement on the order being available at the first stage of the procedure would be contingent on a **clause stating that the main proceeding should be filed within a fixed period of time** or, in certain circumstances, be accompanied by strong safeguards. While it is necessary to seriously address the legal issues which this kind of availability might raise, , there were some replies which were opposed to the order being available before the main proceeding had begun.

A few replies argued that the order should not be available between the issuing of the order and the declaration of its enforceability in a Member State.

2.2 Conditions of issue

A majority of replies argued that the conditions for granting the protective order should be: **the probability of the existence of a claim** (*fumus in boni juri*) and **the probability of a difficult recovery** (*periculum in mora*). Replies as to the degree of probability vary from likelihood to substantive grounds for action. Other conditions could be required, such as written evidence, proof that the debtor holds an account in a specific institution, complete disclosure of all material facts, or proof that the collection of the debt has already been partially unsuccessful.

Another option is the **need to hold an enforceable title**, or proof of non-payment, as proof of the existence of the claim.

Others suggested that the onus of proof and the degree of evidence required **should be harmonised at Community level**.

Most of the replies expressed a preference for using the risk of dissipation of assets and frustration of the claim, rather than the concept of urgency, as the criterion for granting the order. Such a risk would be a key condition for granting the order.

Only a few replies expressed the view that the aspect of risk or urgency should simply be taken into account, or should not be a condition if the creditor possessed an enforceable title.

The question of **imposing a mandatory security deposit or bank guarantee** on the creditor was **generally approved as a practical way of protecting the debtor against wrongful use of an Attachment Order**. Nevertheless, a balance has to be struck between deterring

illegitimate claims and raising too many obstacles to the use of such an order. Most of the replies argued that **providing a bank guarantee/security deposit should be left to the discretion of the court**, in terms of the suitability or the amount or form of the security. Some respondents wanted to impose such a guarantee only in exceptional cases, e.g. in the absence of an enforceable title, or in proportion to the likelihood of the claim. Others argued that the security/guarantee should take into account all the prejudicial effects that could result from the attachment (for example, possible difficulty in accessing the financial products afterwards), and should therefore be 1.5 to 2 times the amount of the claim.

Some emphasised **the need for harmonised guidelines** to provide the parties with legal certainty throughout EU territory, to make sure that the bank guarantee obtained in a Member State would be recognised by the courts of another Member State, or to specify in which cases the court should require it.

As an alternative to a harmonised guarantee, one reply suggested creating a pan-European, "one-size-fits-all" bank or insurance bond.

In addition, some suggested that the **creditor should undertake to cover any loss due to the order**. Others recommended that the guarantee be supplemented by a **mechanism of liability independent of fault**.

One reply rejected the argument that the court could have jurisdiction to impose any kind of fees on the creditor, while another raised doubts as to whether it was actually possible to calculate the potential damages suffered by the debtor.

2.3 Hearing of the debtor

All the replies agreed that, in order to preserve the "surprise effect", **hearing of the debtor prior to granting the attachment should be avoided**, at least in those cases where an attachment might be required, provided that the debtor's rights are protected.

2.4 Details of account information required

The information which the creditor would be required to provide when applying for an Attachment Order proved to be a controversial issue. A balance has to be struck between two different imperatives: namely the necessity to provide banks with accurate information about the account and its holder, allowing the bank to implement the order safely, swiftly and at low cost, and the concern that the procedure should remain as simple and accessible as possible for the creditor, thus obviating the need for him to provide data that might be difficult for him to obtain.

Providing **the full name and the address of the debtor** - plus a registration number if the debtor is a legal entity - and **the name and address of its bank and bank branch** seems to be a consensual requirement from the creditor's side. However, some replies argued that more information might be required, such as the **account number**, where known, although it was acknowledged that such an obligation might have a deterrent effect. Providing the court with the **debtor's ID or social security number** was suggested as a way of avoiding any case of homonymy.

Some replies suggested that the implementation requirements be drawn up in line with national legislation, or that the order be transmitted to the **enforcement authority**, which would be in charge of finding detailed information about the debtor.

Lastly, it was proposed that the creditor should provide evidence that the debtor had an account in a particular Member State.

The question of the **bank's liability** in the event of non-enforcement of the order was addressed by some stakeholders, although this is still an issue that is **difficult to evaluate properly**. The bank could not be obliged to enforce the order if it were unclear. The creditor could be liable in cases where no account existed. On the other hand, banks could bear the responsibility for providing the account number.

2.5 Jurisdictional issues

The question was whether, **in addition to the court having jurisdiction on the merit of the case**, competence to grant an Attachment Order should be given to other courts, such as the court of the **defendant's domicile or the court of the Member State where the account is situated**.. Giving jurisdiction to other fora would make **the order easily accessible** while, at the same time, possibly **giving rise to conflicts with the court having jurisdiction**.

Opinions on this issue differed sharply. A **majority** of the replies were in favour of granting competence to issue an order **solely to the court having jurisdiction on the merit of the case according to Regulation (EC) No 44/2001**³. One reply suggested that sole jurisdiction should be granted to the court of the debtor's domicile.

Others argued that **joint jurisdiction should be granted** not only to the court having jurisdiction on the merit of the case, but also **to the court of the Member State where the account is held, or to the court of the debtor's domicile**. Several replies suggested that jurisdiction should be granted to **all three courts mentioned**. A minority proposed modulating jurisdiction according to when the order is granted. One reply proposed that **the court of the creditor's domicile** should have jurisdiction.

3. AMOUNT AND LIMITS OF AN ATTACHMENT ORDER IN THE EUROPEAN SYSTEM

3.1 Amount to be secured

Limiting the attachment to a maximum amount was the favoured option in most of the replies. For a majority of Member States and stakeholders this maximum should include **the amount of the claim, the legal fees and any interest**. To simplify matters, the amount of the claim could be increased by a fixed percentage to cover costs and interest.

Some respondents, on the other hand, excluded certain elements from the calculation of the maximum amount, i.e. interest or legal fees and interest not yet due, or wanted to limit the attachment to the sole claim.

3.2 Costs of the banks

The enforcement of the order is likely to create certain **costs for the banks** (execution of the order, monitoring of the account). The issue is whether those costs should be considered to be

³ Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001 p1

part of the public duty of the bank, as this might also lead to the banks increasing the operating fees they charge all their customers.

Very few respondents opposed the principle of remunerating the banks or were willing to leave this matter to national law. Some argued that enforcement authorities, such as bailiffs, should be given an important role in serving the order, which would reduce additional costs for the banks.

Most of the stakeholders declared themselves in favour of charging specific fees for executing the order. However, the amount and the manner of charging those fees remained highly controversial. A majority was in favour of **capping the fees**. Some replies suggested that fees should be set at EU level, while others preferred to leave them to the discretion of the Member State. On the question of payment, an equal proportion of Member States and stakeholders declared themselves in favour of payment by the creditor before, rather than after, the judgment of the case.

Some proposed deducting the fees from the credit balance of the attached account. One reply proposed including a fees clause in the contract between the bank and its customer.

3.3 Attachment of several, joint and nominee accounts

In order to freeze the total amount of the claim, the creditor could be willing to **attach several accounts simultaneously**. Therefore, the question arises as to how the order should be served so as not to block a sum which might exceed the amount of the claim. The replies to the Green Paper suggested a wide range of possibilities.

The option that garnered the most support was to allow the **attachment of several accounts simultaneously and the release of the surplus funds after the attachment** ordered by the court, by the enforcement authority, in accordance with Community rules. An alternative would be for the release to take place following an agreement between the creditor and the debtor.

However, **other replies focused on the need to prevent the total sum attached from exceeding the amount of the claim**. Several mechanisms were explored:

- some Member States suggested that an information system at Community level would provide information about the attachment process;
- certain replies suggested that the attachment could follow priority rules. In this way, current accounts, accounts in the same currency as the creditor's account, or the account having the greater amount could be attached as a priority;
- others proposed that the court or the bank should have discretion in this matter;
- the last option would be to attach the accounts in equal proportions or to spread the seizure over the accounts, with a view to minimizing disruption of the debtor's accounts.

Two further options were suggested for dealing with the **practical implementation of the attachment, namely: transferring the attached sum to another account**, which would allow the debtor's account to be unblocked, or **leaving the sum on the debtor's account**, since the sole purpose of the order must be to protect.

The method of dealing with **joint and nominee accounts** may also seem problematic. The protection of the interests of the co-holder of the account and of the third party holding monies on behalf of the debtor must be addressed, in conjunction with the actual effectiveness of the order.

A few respondents preferred to leave this matter to the **national implementing legislation or to the discretion of the court**.

However, most of the replies considered that **attachment of joint accounts was feasible** once the **co-holder of the account** has been given **the possibility to protect its rights on the monies it owns** or if only **half of the monies of the account are subject to attachment**. One reply suggested that attachment of the joint account should be determined by its legal nature, i.e. whether or not both co-holders had the full power to manage it.

A minority of Member States and stakeholders rejected any possibility of attachment of joint accounts.

Some respondents were against the attachment of **nominee accounts** on the grounds that it was **too complicated**. Some felt that it ought to be possible to attach nominee accounts based on the **presumption that the account holder is also the owner of the monies** or, on the contrary, if the **debtor was the sole beneficiary of the account**. For others, this kind of attachment would only be possible if the monies are actually owned by the debtor.

3.4 Amounts exempted from execution

Nearly all Member States and stakeholders welcomed the exemption of certain sums from the attachment as a part of the debtor's protection, enabling the debtor and its family to pursue a normal life. **Particular attention should be paid to certain types of income**, such as social benefits, as in some Member States these cannot be attached.

Nevertheless, the **process of exemption** was a controversial issue and two major options were discussed. A number of replies favoured an ***ex officio* exemption**, enabling the court to exempt certain sums, **subject to an increase** if the debtor were to request it, whereas others preferred **to let the debtor request such a measure after the order has been granted**.

As regards applicable law, most of the replies suggested that **the law of the state of enforcement** or the **law of the state of the debtor's habitual residence should apply**, while a minority proposed that **rules or guidelines should be laid down at Community level**.

4. EFFECTS OF AN ATTACHMENT ORDER

4.1 Implementation

All except two replies agreed with the **removal of the interim measure (*exequatur*)** in the Member State requested to enforce the order granted by the court of another Member State. This option would **allow the prompt serving of the enforcement order**, which would have direct effect throughout the EU.

The manner in which the attachment is transmitted from the issuing court to the bank holding the accounts must have regard not only to the purpose of the order, namely to make

the freezing of the account more efficient, but also to the need to secure the transmission. Therefore, the replies focused mainly on **two options**: numerous Member States and stakeholders advocated the **use of electronic transmission** as a way to make enforcement of the order easier, although this could involve creating a European database to gather all the information needed for the transmission. On the other hand, a number of respondents stressed **the technical difficulties in making resources of this kind available in all Member States with the same level of efficiency and data protection**. Because of those possible obstacles, a number of replies suggested **using the provisions introduced by Regulation 1348/2000⁴ to transmit the order by registered post or to leave the transmission to the rules of the Member State of enforcement**. Some respondents were against direct transmission from court to bank, and suggested the **use of enforcement authorities (bailiffs)** instead. Alternatively, it was proposed that the **creditor should be made responsible for transmission**.

The question concerning the time that would remain for banks to implement the order and the effect this would have on ongoing operations gave rise to differing replies. **A majority acknowledged that the order should be served as quickly as possible**, but opinions on when this should be done varied **from immediate entry into force to a couple of days**, allowing the bank enough time to perform the operation. It was also suggested that an **EU standard processing period** should be laid down.

A small majority of replies backed the option of blocking ongoing operations, defined as transactions that were initiated prior to the granting of the order but had not yet implemented, or of blocking only debit operations. Some opposed this idea, while others suggested that the matter be left to national legislation.

A large majority of replies supported the idea that **banks should inform the court or the enforcement authority whether and to what extent the order has been successfully implemented**, provided that the bank can do so in the language with which it is the most familiar, and that banking secrecy can be preserved. Some suggested that the bank **should also inform the parties or only the creditor**, who would then have the duty to inform the court. A very small number of Member States and stakeholders rejected the idea that the banks should provide information, arguing that this would impose too big a burden on them.

4.2 Protection of the debtor

Protection of the debtor was a key issue in most of replies. Ensuring rapid information for the debtor as well as facilitating the debtor's access to court to lodge possible objections were highlighted as issues of the utmost importance, since the debtor would not be informed prior to the granting of the order.

A large majority of Member States and stakeholders considered that informing the debtor of the existence and enforcement of the order should be the duty of the **enforcement authority and/or the issuing court**. For others, this obligation should rest with the banks. They could also have the option of informing their customers if they so wished, as part of their customer relations. Another option would be to make the **creditor responsible for notifying the debtor**.

⁴ Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extra judicial documents in civil and commercial matters; OJ L 160, 30.6.2000 p 37.

It was suggested that the instrument should set minimum rules, modelled on those **contained in Regulation (EC) No 805/2004⁵** creating a European Enforcement Order for uncontested claims, or alternatively that **this matter be left to the application of national law.**

In the view of a majority of Member States and stakeholders, the debtor should be informed after the order has been executed, whereas a minority proposed that the debtor be informed immediately after the issuing of the order, or after the bank has been notified thereof.

The responses to the Green Paper overwhelmingly supported the **automatic lapse of the order after a certain time**, as part of the mechanism to protect the debtor against wrongful attachment. Therefore it was suggested **that the order be closely linked to predefined time limits**, within which the creditor had to start the main proceeding or obtain an enforceable title. However, it was proposed that this time period could be extended under certain conditions. Others were against the order being allowed to lapse automatically, favouring instead the right of the court to revoke the order.

The debtor's right to object to the order raised certain issues in connection with possible grounds for objection or the courts having jurisdiction to hear them.

As regards the grounds for objection, a number of replies suggested that **this should be harmonised** at European level, whereas **the overwhelming majority referred to the possibility of contesting any point that had been raised by the creditor to obtain the order.** Generally, replies focused on the demonstration by the debtor of the non-existence of the claim, or the usefulness of the order, or any objections of a substantive or procedural nature. Others suggested that the grounds for objection could vary, according to whether or not there was an enforcement order, or that they should be left to the application of national law.

A closely related issue is the question of **which court should be given jurisdiction to hear those objections.** Several options were mentioned by the Member States and the stakeholders. A majority of them **would be willing to give jurisdiction to the court that issued the order**, while others would give jurisdiction to:

- **the court having jurisdiction on the merit of the claim** (which could be the same court that issued the order);
- **the court of the debtor's domicile;**
- **the court of the State of enforcement;**
- **the court of the creditor's domicile;**
- **the court of the country in which the account is held.**

Some suggested that objections concerning the substance of the order should be dealt with by the court that issued the order, while objections related to its execution should be dealt with by the court of the Member State where the order was executed.

⁵ Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, OJ L 143 , 30.04.2004, pp. 0015 - 0039

Where the attachment proves to be unfounded, the **question arises of the creditor's liability** and the possible need to harmonise the principles on which it is based. **A small majority of respondents declared themselves in favour of such harmonisation**, proposing that it be based on a **no-fault liability**, although acknowledging that this might be a difficult process. However, some rejected this option, preferring to leave the matter to the application of national law or to the discretion of the court, based on the undertaking by the creditor to pay any damages.

4.3 Ranking of competing creditors

As regards the ranking of competing creditors, **where several creditors might ask for an Attachment Order against the same debtor**, most respondents were willing to leave the **matter to the application of national law**, without any harmonisation at EU level. The two main arguments against were: the need to avoid any risk of discrimination between attachments ordered outside the country and those ordered by the national court, and the absence of any legal basis in the Treaty to carry out such harmonisation. However, **a few Member States and stakeholders favoured this harmonisation**. If a rule were to be favoured, some respondents stressed that it must be **based on the "first come, first served" principle**.

4.4 "Transformation" into an executory measure

Once an enforceable order has been granted, the creditor might want to convert the protective measure into a money transfer, whether by a declaration of enforceability under Regulation (EC) No 44/2001⁶ or by providing a certificate issued under the rules of the new European procedures for small or uncontested claims. To that end, the Green Paper raised the issue of facilitating this process by **proposing that the order be changed into an enforceable measure**.

However, the large majority of the replies rejected a clause on this issue in the future instrument, preferring it to be left instead to the application of national provisions and especially to the provisions on enforceability under Regulation (EC) No 44/2001⁷ and Regulation (EC) No 805/2004⁸. **Thus, the two orders, i.e. both protective and enforceable, should remain separate processes without any automatic transformation**. A few respondents agreed that a **uniform procedure should be set up** allowing the court that issued the Attachment Order to change it into an enforceable measure.

⁶ Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001 p1

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