



EUROPEAN CENTRAL BANK
EUROSYSTEM

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DIRECTORATE GENERAL LEGAL SERVICES

29 March 2007

Re: Public consultation on the Commission's Green Paper on improving the efficiency of the enforcement of judgments in the European Union

As a possible solution to the current fragmentation of national rules on enforcement in the EU which would hamper cross-border debt collection, the Commission's Green Paper on improving the efficiency of the enforcement of judgments in the European Union (the 'Green Paper') suggests to create a European order for the attachment of bank accounts. The proposed order would allow 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 several bank accounts within the territory of the EU. The Directorate General - Legal Services (DG-L) of the European Central Bank (ECB) wishes to take the opportunity to contribute to the Commission's open consultation on this Green Paper

1. Introductory remarks

The following comments, which were prepared with the assistance of the Legal Committee of the European System of Central Banks, are not intended to constitute a comprehensive assessment of

the various issues addressed in the Green Paper and its Annex¹. Instead, the main focus of this letter is to draw the Commission's attention to the need to fully take into account existing provisions of Community and national law protecting the smooth functioning of central banking operations in any analysis of the legislative proposals that may result in a proposal at an EU level regarding the attachment of bank accounts. Secondly, some selected preliminary observations are provided on certain specific issues raised in the Green Paper. The present letter however is without prejudice to the ECB's views in the context of a formal consultation under Article 105(4) of the Treaty establishing the European Community (the 'Treaty').

2. The Treaty and the smooth functioning of central bank operations

Article 105(2) of the Treaty provides that the basic tasks to be carried out through the Eurosystem are in particular 'to define and implement the monetary policy of the Community', to 'conduct foreign-exchange operations consistent with the provisions of Article 111' (i.e., consistent with the exchange-rate policy for the euro in relation to non-Community currencies) and 'to promote the smooth operation of payment systems'.

In this context, and with a view to ensuring a smooth conduct of central bank operations, the ECB and national central banks benefit under the Treaty and the Statute of the European System of Central Banks and of the European Central Bank (the 'Statute') from specific provisions in relation to the opening and operation of accounts. In particular, Article 17 of the Statute (entitled 'Accounts with the ECB and the national central banks') provides that, in order to conduct their operations, the ECB and the national central banks may open accounts for credit institutions, public entities and other market participants and accept assets, including book entry securities, as collateral. Article 18(1) of the Statute provides that the ECB and the national central banks may conduct credit operations with credit institutions and other market participants, with lending being based on adequate collateral. Under Article 19(1) of the Statute, the ECB may require credit institutions established in Member States to hold minimum reserve on accounts with the ECB and national central banks in pursuance of monetary policy objectives. Under Article 23, fourth indent, of the Statute, the ECB and national central banks may conduct all types of banking transactions in relations with third countries and international organizations, including borrowing and lending operations.

The conduct of these operations by the Eurosystem entails the need for the account arrangements through which these operations between national central banks and their respective counterparties, including credit institutions, market participants, public entities, third countries and international organizations, can be effected in a timely and secure manner.

¹ Commission staff working document, Annex to the Green Paper, COM(2006) 618 final, 24.10.2006, SEC(2006)1341.

3. Statutory prerogatives of central banks and certain financial institutions

In its Green Paper, the Commission points out that in several national systems, in particular if the domestic freezing mechanisms can target all funds and therefore can be very intrusive, the position of the debtor is protected by immunities. The Green Paper further notes that given that freezing assets in several jurisdictions might entail different immunities, a European system for attachment of bank accounts would have to deal with the issue of exemptions².

It should be noted in this respect that not only immunities aiming to protect the position of a debtor against any attachment of bank accounts would need to be considered by the Commission, but also other types of exemptions corresponding to the statutory immunities, privileges or other rights granted to central banks, which may include rules protecting central banks accounts or assets against any civil enforcement proceedings. The ECB³ and, in certain instances, the national central banks of the ESCB⁴ enjoy the benefit, by virtue of the Treaty, the Statute or national statutory provisions, of certain immunities that are considered necessary for the performance of their tasks (including when these assets are held with third parties)⁵. Furthermore, specific mechanisms, rules or protections may also be in place in certain jurisdictions in order to secure the smooth functioning of monetary policy operations, payment systems, foreign exchange operations or any other central bank operations⁶. In other jurisdictions, specific statutory mechanisms have been established in order to secure the smooth functioning of payment and securities settlement systems⁷.

² See the Commission staff working document, '4.4. Amounts exempt from execution', p 18.

³ Article 291 of the Treaty expressly grants to the ECB the same privileges and immunities conferred to the Community 'in the territories of the Member States (...) as are necessary for the performance of its tasks, under the conditions laid down in the Protocol of 8 April 1965 on the privileges and immunities of the European Communities'. Article 40 of the Statute reiterates this provision, providing that the ECB shall enjoy in the territories of the Member States such privileges and immunities as are necessary for the performance of its tasks, under the conditions laid down in the Protocol on the privileges and immunities of the European Communities. Under Article 1 of this Protocol, the property and assets of the Communities (which includes the ECB) shall not be the subject of any administrative or legal measure of constraint without the authorisation of the Court of Justice. Moreover, Article 6 of the Headquarters Agreement between the ECB and the Government of the Federal Republic of Germany concerning the seat of the ECB provides that the 'protection against administrative or legal measures of constraint (...) also applies to funds or records of transactions which are held with the ECB for the purpose of settlement in the context of payment systems'.

⁴ As an example, the Banco de España's statute provides that: 'no court or administrative authority may order the attachment or execution of assets or properties owned or held by the Banco de España provided that they are effectively committed to the exercise of public or administrative functions' (New Seventh Additional Provision to Law 13/1994 on the autonomy of Banco de España, as amended by Law 22/2005 of 18 November 2005, Banco de España's Statute, unofficial translation)

⁵ Moreover, it is noted that assets owned by foreign central banks tend to benefit, *under international law*, from immunity from execution. Articles 19 and 21 of the United Nations Convention on Jurisdictional Immunities of States and their Property – which has been adopted on 2 December 2004 but has not yet entered into force – grants immunity from post-judgment measures of constraint to property of central banks and monetary authorities of foreign states unless, for example, such immunity is voluntarily waived by States under the conditions foreseen in that Convention. In some Member States, there is legislation aiming to ensure the immunity of assets of foreign central banks, which often hold their currency reserves at accounts with EU central banks, while, in other Member States, courts would relate to a general rule of public international law to the same effect.

⁶ For example, an amendment to the Organic Law of the Banque centrale du Luxembourg (BCL) is expected to be adopted under which 'no account with the BCL intended to be used in the context of common monetary or exchange policies may be subjected to any seizure, sequestration or blocking order' (see the new proposed Art. 27

In view of the above, any proposed European initiative relating to the attachment of bank accounts would have to take into account existing Community and national legislation which prevents the adoption of intrusive attachment rules of bank accounts in order to protect the smooth functioning of central bank operations and to ensure the legal certainty of payment transactions made through payment and settlement systems. Accounts opened by central banks for the performance of their statutory tasks, including for monetary policy, foreign exchange and payment system purposes, or maintained by them with financial institutions, would need to be carefully considered when designing the envisaged European order. In crafting such a system particular attention would need to be given to the respective treatment of accounts maintained by central banks for different categories of persons, including credit institutions, other market participants, public entities, third countries, international organizations and central bank staff members, as well as accounts maintained for the purposes of the smooth functioning of payment and settlement systems and the conduct of central bank operations.

4. Other selected preliminary comments on specific issues raised in the Green Paper

Certain aspects related to the scope and content of the proposed European attachment order would need to be examined in detail once the Commission's initiative is translated into a more concrete shape. The following preliminary comments are therefore offered without prejudice to any further assessment by DG-L. For example, the definition of the debtors covered, the precise types of 'debtor's accounts' concerned (for instance, whether the proposal would apply to cash accounts related to/and securities accounts more generally), the categories of financial institutions holding accounts which would be covered by the proposed procedure and their respective obligations, would need to be further clarified. The issues addressed in the Hess report⁸ such as the legal effects of the attachment order in the Member State(s) where the institution in which an account is held, is

of the Organic Law). This additional paragraph is intended to provide immunity for third parties' accounts with the BCL.

⁷ In Belgium, statutory law prevents attachments from being made on cash and securities settlement accounts with Belgian settlement bodies (i.e. the National Bank of Belgium, Euroclear Bank S.A./N.V. and Euroclear Belgium). With respect to cash, the following is provided: 'Any cash settlement account with a management body or a settlement agent for a system, as well as any transfer of amounts, via a credit institution established under Belgian or foreign law, to be credited to such cash settlement account, cannot be seized, sequestered or blocked in any way by a participant other than the management body or the settlement agent, a counterparty or a third party'. The prohibition of attachments on cash settlement accounts held with Belgian settlement institutions has been extended to also apply to cash transfers, via local or foreign banks, to such accounts (Art. 9 of the Law of 28 April 1999 implementing the 1998 Settlement Finality Directive as amended by the Law of 19 November 2004). In Luxembourg, the Law on the financial sector contains a rule precluding seizure, under which settlement accounts with a system operator or with a settlement agent may not be seized, attached or blocked in any way whatsoever by a participant (other than the system operator or settlement agent), counterparty or third party. Settlement accounts are defined as 'an account with a central bank, a settlement agent or a central counterparty used to hold funds and securities and to settle transactions between participants in a system' (Art. 61-24(5) of the Financial Sector Law of 5 April 1993).

⁸ Study N°JAI/A3/2002/02 on making more efficient the enforcement of judicial decisions within the European Union: Transparency of a debtor's assets Attachment of bank accounts Provisional Enforcement and Protective Measure, Prof. Dr. Burkhard Hess, version of 18.02.2004

located, should be further considered. Moreover, to the extent that creditors from third countries would be covered by the proposed European attachment order, the Commission might wish to consider how to ensure that the benefit of this procedure should be conditional upon the adoption of reciprocal measures in the third countries concerned in favour of EU creditors. Lastly, in case a creditor who already benefits from a certificate for an enforcement order in a Member State would like to draw full benefit from this executory measure and recover swiftly its claim, a protective measure such as the proposed European attachment order might be considered as inadequate or insufficient to meet that objective⁹. This issue should be further examined when considering the compatibility of the proposed European attachment system with the existing *acquis communautaire* in the area of civil justice and, for instance, the European Enforcement Order for uncontested claims¹⁰.

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DG-L would not object if this contribution was made available in the context of the present public consultation. DG-L stands at the Commission's disposal in order to provide it with more detailed information regarding the applicable rules and appropriate references in the various EU jurisdictions in terms of statutory privileges and immunities granted to the ECB, central banks or, in certain instances, financial institutions. DG-L will also be happy to provide the Commission with any further comments or explanations and to assist it for the development of proposals regarding the above aspects.

⁹ This issue refers for instance to the distinction between '*saisie conservatoire*' and '*saisie-attribution*' under French law.

¹⁰ Regulation (EC) n°805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, OJ L143/15 of 30 April 2004.