



European Economic and Social Committee

INT/342
Attachment of bank
accounts (Green Paper)

Brussels, 26 September 2007

OPINION

of the
European Economic and Social Committee
on the
**Green Paper on improving the efficiency of the enforcement of judgments in the European
Union: the attachment of bank accounts**
COM(2006) 618 final

On 24 October 2006 the European Commission decided to consult the European Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the

Green Paper on improving the efficiency of the enforcement of judgments in the European Union: the attachment of bank accounts
COM(2006) 618 final.

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 18 July 2007. The rapporteur was **Mr Pegado Liz**.

At its 438th plenary session, held on 26 and 27 September 2007 (meeting of 26 September), the European Economic and Social Committee adopted the following opinion by 131 votes to 1 with 6 abstentions.

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1. Summary

- 1.1 With this Green Paper and as a follow-up to a range of initiatives aimed at establishing a European judicial area, the Commission is launching a consultation on the possibility of creating a Community legislative instrument to make the enforcement of monetary claims more efficient, by ensuring that sums of money in a debtor's bank accounts in any Member State are frozen at the outset of proceedings.
- 1.2 On the basis of this Green Paper, which cannot be considered without also reading and analysing the Working Document appended to it¹ and the commissioned Study on which it is based, it appears that the Commission envisages proposing an optional regulation that defines the legal system for a European attachment order in the form of a preventive seizure of bank accounts, regardless of the nature of the debt or the status of the parties involved. However, there is some conceptual inconsistency in the definition of the objective and subjective scope of the measure, and the translations of the Commission document into some languages are particularly unreliable.
- 1.3 There has been no study of the impact of such a measure, and the comparative law studies on which it is based only consider 15 of the 27 EU Member States. In such circumstances the Committee, whilst sharing the Commission's concerns, does not consider that the need for such a measure is sufficiently proven in terms of subsidiarity and proportionality: an

¹ SEC(2006) 1341.

equivalent result could perhaps be satisfactorily achieved simply by altering two provisions of the Brussels I Regulation.

- 1.4 Nor does the Committee find any logical justification for limiting the scope of an initiative of this nature to the preventive seizure of sums of money deposited in bank accounts. The Committee suggests that its scope should be extended to cover a debtor's other moveable assets and, with any necessary changes, attachment after an enforcement order has been granted. The Committee also considers it crucial to ensure that this measure is accompanied by an initiative on the transparency of bank accounts, on the obligations to provide information and on the requisite confidentiality and data protection rules.
- 1.5 The Committee agrees with the Commission that, should the introduction of such a measure be deemed absolutely necessary, the appropriate instrument would be an optional regulation for freezing a debtor's bank accounts in Member States other than the one in which the creditor lives or where his business is based.
- 1.6 On this basis, and in order fully to comply with the Commission's request for an opinion, the Committee puts forward a detailed set of technical and legal recommendations for defining what it considers to be the most appropriate system for the initiative, specifically as regards court jurisdiction, the conditions under which the order can be granted, the limits on the amounts that can be seized, exemptions, guarantees for the protection of the debtor and of third-party holders of joint accounts in which they share equal liability or accounts in which liability is proportional, appeals and deadlines, the system of legal costs, obligations and responsibilities of the banks where the accounts in question are held, and the rules of national or international private law that might also apply.

2. **Gist of the Green Paper**

- 2.1 With this Green Paper, the Commission is launching a consultation among interested parties on how to improve the enforcement of monetary claims. It proposes the creation of a European system for the attachment of bank accounts as a possible solution.
- 2.2 The Commission starts by identifying existing enforcement problems in civil procedures in the "European judicial area" resulting from the fragmentation of national rules in this area, and acknowledges that Regulation (EC) 44/2001 (Brussels I)² *"does not ensure that a protective remedy such as a banking seizure obtained ex parte is recognised and enforced in a Member State other than the one where it was issued"*.

² Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I), in OJ L 12 of 16.1.2001. The EESC opinion on this matter was drawn up by Mr Malosse (CES 233/2000 of 1 March 2000, in OJ C 117 of 26.4.2000).

2.3 In the Commission's opinion, this shortcoming could potentially distort competition between businesses, depending on the effectiveness of the judicial systems of the countries in which these businesses operate. It could thus form an obstacle to the smooth operation of the internal market, which requires uniform efficiency and speed in the recovery of monetary claims.

2.4 The Commission thus puts forward the proposal to create a "European order for the attachment of bank accounts which 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 European Union" and offers a detailed analysis of a possible legal framework for this, the parameters of which it sets in the form of 23 questions.

3. Context of the initiative

3.1 This initiative rightly fits into a broader set of measures that the Commission has adopted with the laudable aim of creating a European judicial area that provides legal support for the completion of the internal market³, in particular following the transformation of the Brussels

³ Amongst others, these include the:

- Commission communication entitled "Action plan on consumer access to justice and the settlement of consumer disputes in the internal market", 14 February 1996 (COM(96) 13 final).
- Commission communication entitled "Towards greater efficiency in obtaining and enforcing judgments in the European Union" [COM(97) 609 final in OJ C 33 of 31.1.98]
- Green Paper on access of consumers to justice and the settlement of consumer disputes in the single market [COM(93) 576 final].
- Green Paper on alternative dispute resolution in civil and commercial law [COM(2002) 196 final of 19.4.2002].
- Commission Recommendation of 12 May 1995 on payment periods in commercial transactions and the relevant Commission communication in OJ L 127 of 10.6.1995 and OJ C 144 of 10.6.1995 respectively.
- Directive 98/27/EC of 19 May 1998 on injunctions for the protection of consumers' interests in OJ L 166 of 11.6.1998.
- Directive 2000/35/EC of 29 June 2000 on combating late payment in commercial transactions, in OJ L 200 of 8.8.2000.
- Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I), in OJ L 12 of 16.1.2001. The rapporteur for the EESC opinion on this subject was Mr Malosse (CES 233/2000, 1 March 2000, in OJ C 117 of 26.4.2000).
- Regulation (EC) No 805/2004 of 21 April 2004, creating a European Enforcement Order for uncontested claims, in OJ L 143 of 30.4.2004. The rapporteur for the EESC opinion on this subject was Mr Ravoet (CESE 1348/2002, 11 December 2002, in OJ C 85 of 8.4.2003).
- Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, in OJ L 174, 27.6.2001. The rapporteur for the EESC opinion on this subject was Mr Hernández Bataller (CESE 228/2001, 28 February 2001, in OJ C 139 of 11.5.2001).
- Programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters (OJ C 12 of 15.01.2001).

Convention into a Community Regulation⁴ and the Regulation creating a European Enforcement Order⁵.

3.2 There is some truth in the Commission's practical comments on the problems in enforcing judgments in the different countries of Europe and on the differences in the regulations governing these judgments resulting from a lack of EU-level harmonisation of the enforcement process, with the consequences that it has correctly highlighted.⁶ It must also be said that these consequences will only have worsened with the recent accession of 12 new Member States. In this Green Paper, however, the Commission omits the crucial scrutiny of its initiative in relation to the principles of subsidiarity and proportionality.

3.3 This is not to say that the same result, or a result having a similar effect, could not have been obtained simply by amending one or two provisions in the Brussels I Regulation (notably Articles 31 and 47), extending its scope while retaining the existing system. This would have had clear benefits in terms of simplification⁷.

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- Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ L 160 of 30.6.2000). The rapporteur for the EESC opinion on this subject was Mr Ravoet (CESE 79/2001, 26 January 2001, in OJ C 75 of 15.3.2000).
 - Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for joint children, *idem*. The rapporteur for the EESC opinion on this subject was Mr Braghin (CES 940/1999 of 20 October 1999, in OJ C 368 of 20.12.99).
 - Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters; *idem*. The rapporteur for the EESC opinion on this subject was Mr Hernández Bataller (CES 947/1999 of 21 October 1999, in OJ C 368 of 20.12.99).
 - Council Decision of 28 May 2001 establishing a European Judicial Network in civil and commercial matters, (OJ L 174 of 27.6.2001). The rapporteur for the EESC opinion on this subject was Mr Retureau (CESE 227/2001 of 28 February 2001, OJ C 139 of 11.5.2001).
 - Regulation (EC) No 1896/2006 of 12 December 2006 (OJ L 399 of 30.12.2006) creating a European order for payment procedure. The rapporteur for the EESC opinion on the draft regulation (COM(2004) 173 final of 19.3.2004) was Mr Pegado Liz (CESE 133/2005 of 22.2.2005, in OJ C 221 of 8.9.2005).
 - Proposal for a Regulation establishing a European Small Claims Procedure (COM(2005) 87 final of 15.3.2005). The rapporteur for the EESC opinion on this subject was Mr Pegado Liz (CESE 243/2006 of 14.2.2006)

4 Regulation (EC) No 44/2001 of 22.12.2000. The rapporteur for the EESC opinion was Mr Malosse (OJ C 117 of 6.4.2000).

5 Regulation (EC) No 805/2004 of 21.4.2004, based on proposal COM(2002) 159 final, 27.8.2002. EESC Opinion CESE 1348/2002 of 11 December 2002, rapporteur: Mr Ravoet (OJ C 85 of 8.4.2003).

6 Specifically in its Communication entitled Towards greater efficiency in obtaining and enforcing judgments in the European Union (OJ C 33 of 31.1.1998)

7 These two articles are extremely broad, which means that the interpretation to adopt should be that derived from case law, specifically the Denilauer case (Judgment C-125/79 of 21.05.1980, p.1553) on Article 31. Issues concerning time-limits, exequatur mechanisms, the conditions for proceeding with a case (the need to prove “*fumus bonus iuris*” and “*periculum in mora*”), the means/guarantees of defence and the amounts that can be seized/exemptions could be subject to the two articles referred to above, extending the measure's scope and thus meeting the aims of the Commission proposal.

3.4 The Commission has not yet carried out a preliminary impact assessment, which should take account not only of the 15 Member States whose situation was analysed in the study on which this Green Paper was based⁸, but of all of the current Member States. It must be accompanied by a proper assessment of measures aimed at ensuring greater transparency regarding debtors' assets and the essential access to information on their bank accounts (with due respect for the protection of banking secrecy), because only by considering all these factors can a correct assessment be made of the initiative in terms of (a) the need for its existence, (b) its scope and (c) the rationale for it.

4. General comments

4.1 The Committee has divided its comments into two categories:

- a) General comments on substantive issues concerning the nature and scope of the provision, and
- b) Specific comments on procedural issues.

4.2 Preliminary issue: terms and concepts

4.2.1 As the Green Paper is likely to be followed by a legal instrument (probably in the form of a Community regulation), the terms used to identify the concepts that will define the nature of the ensuing procedural order must be extremely rigorous and technically and legally precise in every Community language.

4.2.2 The current situation is that in at least five language versions⁹, the terms used by the Commission to identify the type of measure it is contemplating are ambiguous and not necessarily equivalent. This could lead to technical or legal confusion as regards the legal nature of the provision. The Commission should therefore act swiftly to ensure the accuracy of the translations, in order to avoid uncertainty arising solely from the use of incorrect terminology¹⁰.

⁸ For a fuller understanding of the content of the Green Paper, account should be taken not only of the Commission Working Paper (SEC(2006) 1341) of 24.10.2006 but also of Study No JAI/A3/2002/02, in its updated version of 18.2.2004, by Prof. Dr. Burkhard Hess, Director of the Institute of Comparative and Private International Law at the University of Heidelberg, which can be found at: http://ec.europa.eu/justice_home/doc_centre/civil/studies/doc_civil_studies_en.htm.

⁹ Those with which the rapporteur is most familiar. Unfortunately he is not proficient in the other 15.

¹⁰ The English term "attachment", even in its technical/legal sense, is ambiguous, since it could refer to what in Portuguese is called either "penhora" or "arresto". Even in English, given the legal nature of the measure, it would have been better to use the term "arrestment" or "freezing order", in order to make a distinction between this and the concept of "garnishment". Furthermore, only the Italian translation - "sequestro conservativo" - correctly expresses the preventive and restraining nature of the measure; the French term "saisie", with the additional explanation that it could be "granted by a court in summary proceedings", fulfils the requirement; the Spanish term "embargo" appears inadequate to express the purpose of the measure. **In any event, in Portuguese, the use of the word "penhora" is entirely wrong and should be replaced with "arresto".**

4.2.3 From an analysis of the proposed conditions (the need to prove "*fumus boni iuris*" and "*periculum in mora*") and purpose (freezing or blocking sums deposited in bank accounts until the final judgment and enforcement in civil proceedings to recover monetary assets - obviously those of a civil or commercial nature and not those resulting from criminal proceedings), it seems fair to conclude that this is a **protective order in the form of a preventive seizure**.

4.3 **Scope of the measure**¹¹

4.3.1 The Committee also questions limiting the scope of the protective measure to "bank accounts".

4.3.2 An attachment of monetary assets, which of necessity must be universal, should apply to all of the debtor's assets up to the amount ordered to be seized. A protective remedy such as the one proposed could target other assets of the debtor for possible seizure, including debt securities, shares, debenture bonds and other entitlements and claims on third parties and not only money deposited in certain bank accounts or accounts in other types of financial institution. There is no reason to assume that it would be excessively complicated to broaden the measure's scope to cover, at the very least, moveable property that does not need to be registered and also a debtor's claims to money (including shares, debenture bonds, rental and other income, monies owed by third parties, etc.), i.e. moveable property directly linked to a bank account.

4.3.3 Furthermore, there does not appear to be any justification for limiting the scope of the Community instrument to the preventive seizure of bank accounts: it could usefully be extended, with any necessary changes, to cover attachment of these assets after an enforcement order has been granted, given that the same type of difficulty regarding the seizure and disappearance of goods (which form the justification for the measure) could also occur then.

4.3.4 The Commission should thus properly assess and justify the value and cost of a measure that only covers the preventive seizure of money held in a debtor's bank accounts.

4.4 **Timing of the request for an attachment order**

4.4.1 The question of the timing of the application for a protective order is automatically resolved by its very nature, as set out above. In accordance with the best legal practice, it should be possible to apply for a protective order at any point in the legal process to which it relates, and more specifically prior to the start of the principal action, as a preparatory and preventive procedure, as this is where it is of most practical use.

¹¹ In the Committee's view, this should be confined to civil and commercial debt.

4.4.2 Account must clearly be taken of the obvious specific characteristics of the regime, depending on whether the protective remedy is effected before the main action is raised or a decision upholding the claim is obtained, before or during an enforcement proceeding, or whether or not an appeal has been launched in higher courts against the order granted in first instance or, lastly, when the enforceable right does not take the form of an order (a letter, promissory note, cheque or other enforceable document).

4.5 **Jurisdiction of the court**

4.5.1 To a certain extent, the question of the court's jurisdiction to consider and grant the protective order is also resolved by the above. The court that has jurisdiction is obviously the one that is responsible for dealing with the main case, from the time when the action/enforcement has already been effected.

4.5.2 The court of the State in which the bank accounts are held should **also** have jurisdiction, however, if the order is requested **before** the action/enforcement is initiated. In this case, however, it must be ensured that, as soon as the main action/enforcement is proposed, responsibility for the protective order that has been granted passes to the court that has jurisdiction in the main case. Even if it comes under another national jurisdiction, the latter court should accept this without requiring a process of recognition¹².

4.6 **Conditions for granting the order**

4.6.1 There is an inherent need to ensure that the **conditions** which the Commission quite rightly identifies in point 3.2 of the Green Paper – "*fumus boni iuris*" and "*periculum in mora*" – are met. Nevertheless, if a court order or other type of enforceable right has already been granted, only proof of "*periculum in mora*", in other words, of the urgent need for a seizure order, will be required.

4.6.2 A further condition for granting the order could be proof that the creditor has made reasonable efforts to recover the debt with the debtor's agreement and without seeking redress through the courts.

4.6.3 The absence of a requirement for a **prior hearing** of the debtor is essential if the order is to be effective. However, this could go hand in hand with the **provision of a guarantee, to be set by the judge**, at a level sufficient to cover any loss or damage if the measure is set aside in the main proceedings or at appeal (if this does not have suspensory effect), provided that the measure is decreed before a definitive order exists or is obtained.

¹² Cf. Court of Justice ruling in Van Uden Maritime B.V. of 17.11.1998 – Case C-391/95 (European Court Reports 1998, page I-07091).

4.7 **Amount to be secured and exemptions**

- 4.7.1 The amount to be secured by the order must not exceed the sum that has been allegedly due and not repaid, plus that of the default interest (whether contractual or legal) incurred up to the time the enforcement order is applied for.
- 4.7.2 In the context of precautionary proceedings, which are inevitably provisional, and given the seriousness of freezing sums held in bank accounts, the Committee does not consider it legitimate to include any other sums, specifically to cover future interest payments, lawyers' fees, bank charges, legal costs, etc.
- 4.7.3 The Committee is aware that implementing this type of system could give rise to additional costs for banks. It does not consider it legitimate, however, to include these costs in the sums to be frozen in any bank accounts held by the alleged debtor. It should be left to national legislation to lay down arrangements for bank charges and for recovering these from creditors who use this procedure. These charges should be added to the settlement of court costs, which will be determined at the end of the process.
- 4.7.4 The Community instrument should also set the parameters for delimiting exemptions from execution, to enable the debtor (if the debtor is a private individual and not a business) to meet his and his family's basic needs, which could be jeopardised by the enforcement order.
- 4.7.5 After the protective order is granted, the bank should inform the court of any limitations on compliance with the seizure order, depending on the nature of the debtor's account (current account, savings account, mortgage account, etc.), the nature of the income or earnings paid into it (wages, professional fees, salaries, pensions and annuities, social security payments, etc.) and the nature of the expenditure associated with the account (mortgage, car repayment, rent, consumer credit, feeding the family, etc.), in accordance with the law of the country in which the bank account is held and insofar as the bank is in possession of such information.

4.8 **Third-party accounts**

- 4.8.1 By the same token, there appears to be no justification for broadening the scope of the protective order to cover bank accounts held in the name of third parties. In cases where it is not possible accurately to identify what proportion of the money in the account belongs to the debtor, it should be assumed that each holder has an equal share.
- 4.8.2 It is also unacceptable that several accounts should be attached to cover the same amount, although admittedly there is no easy solution when accounts are held in different countries: each court that has jurisdiction could be asked to grant the order, unaware that the same order has been requested elsewhere. The problem would continue until all proceedings are managed centrally by the court that has jurisdiction to hear the main case.

4.8.3 It therefore seems advisable, in conjunction with this initiative, to lay down clear **obligations to provide information** on the party applying for the attachment and on the banks subject to the protective order, as well as the duty for the banks and courts in the different Member States to cooperate, whilst fully respecting the rules on confidentiality, data protection and banking secrecy, as is rightly stated in the study underpinning the Green Paper.

4.8.4 It could be laid down, for example, that sums seized are reduced *ex-post* and within a specified short period of time, as soon as the information is obtained from the different banks, if more than one is involved.

4.9 **Guarantees for the debtor's protection**

4.9.1 It is crucial that protection of the debtor is guaranteed, providing him/her with the **means to contest the enforcement order within a reasonable timeframe** – which the Committee suggests be at least 20 calendar days – in order to demonstrate:

- a) the non-existence, either total or partial, of the debt;
- b) the absence of "*periculum in mora*";
- c) that the amount seized is incorrect;
- d) that the vital needs of the debtor or those of his/her family (in the case of a private individual) are jeopardised by the measure.

4.9.2 To this end, provision should be made for the debtor to be notified by the court that has jurisdiction as soon as it is ascertained that sufficient funds are present in the account to freeze the amount allegedly owed. The bank in question should give the same information to the debtor as soon as the account is frozen, in line with the conditions set by the court.

4.9.3 The Community instrument should also set out the **means of protection and the grounds or reasons for a challenge/appeal**, harmonising these at the Community level, in order to ensure that situations are treated equally in any competent jurisdiction and that means of protection are identical. An important question will be to determine the nature of the appeal (whether or not it is suspensory) and the court that has jurisdiction to hear it, when the court granting the order and the court hearing the main action come under different national jurisdictions.

4.9.4 It is also important that a **time-limit** for raising the main claim or an application for exequatur is set, starting from the day on which the creditor is informed of the enforcement of the order. The Committee thinks that a deadline of 60 calendar days would be reasonable, irrespective of the judgment granting a protective order.

4.10 **The Community instrument and its nature**

4.10.1 In its Green Paper, the Commission is unclear as to what legal instrument it intends to use to implement its initiative. In view of the desired aims and as a means of ensuring that procedures are identical in the different Member States, the EESC considers that the instrument should take the form of a **regulation**, as already applies to other similar instruments in the context of the European judicial area.

4.10.2 A different but closely related issue concerns its scope. If the measure is deemed necessary, the Commission could – as it has for other, identical instruments – make the procedure applicable only to cross-border cases and make it **optional** (the "28th regime"), allowing creditors to choose between a harmonised Community instrument and the existing option of using the applicable provisions of private international law.

4.11 **Costs**

The EESC suggests that the rules governing costs follow those already set out in Article 7 of Regulation (EC) No 805/2004, with any changes that are needed.¹³

5. **Specific comments**

5.1 With regard to issues of form alone, the Committee agrees that the exequatur procedure should be abolished for a judgment granting a protective order, whatever court has jurisdiction.

5.2 The Committee also considers that the rules on the court notifying the bank and the alleged debtor should not entail unnecessary formalities, provided that they ensure the authenticity of the instrument and the identity of the debtor. The rules already set out in Regulation (EC) No 1348/2000 seem appropriate here¹⁴. The identification of the accounts to be frozen should also be as complete as possible, so as to avoid a generic seizure order.

5.3 The Committee also considers that the order issued by the court should be enforced by the bank under the terms set by the court, whilst safeguarding any legitimate operations already under way, such as prior commitments guaranteed by letters, promissory notes or cheques, and obligations to preferential creditors such as the State, the social security authorities or employees. In any event, the bank should be answerable for the account's balance on the date of receipt of the seizure order and should ensure that the account is frozen automatically as

¹³ Article 7 states that: "Where a judgment includes an enforceable decision on the amount of costs related to the court proceedings, including the interest rates, it shall be certified as a European Enforcement Order also with regard to the costs unless the debtor has specifically objected to his obligation to bear such costs in the course of the court proceedings, in accordance with the law of the Member State of origin".

¹⁴ Regulation (EC) No 1348/2000 of 29.5.2000, in OJ L 160 of 30.6.2000.

soon as the order arrives, even via electronic means, if outside of working hours. The bank should face liability for any negligence in the disappearance of sums moved thereafter.

- 5.4 The Committee agrees that banks should be required to immediately inform the court, by electronic or other means of communication, of how they have complied with the order.
- 5.5 Community law should not lay down rules for ranking creditors competing over the same bank account. The Committee favours the application of national legislation.
- 5.6 The Committee considers that the practical enforcement of the order should be governed by the law of the country that has jurisdiction over this, in accordance with the applicable general rules on dispute settlement.
- 5.7 Lastly, the Committee would particularly draw the Commission's attention to the need to make provision for a mechanism for the translation of documents relating to the operation of the proposed system, along the lines of the mechanism established under Article 21(2)(b) of Regulation (EC) No 1896/2006 of 12 December 2006.

Brussels, 26 September 2007.

The President
of the
European Economic and Social Committee

The Secretary-General
of the
European Economic and Social Committee

Dimitris Dimitriadis

Patrick Venturini
