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**Annex to the Green Paper on improving the efficiency of the enforcement of judgments
in the European Union: the attachment of bank accounts**

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TABLE OF CONTENTS

1.	Introduction	4
1.1.	Requests for a Community initiative in the field of enforcement	4
1.2.	The attachment of bank accounts in Europe	5
1.3.	Commission activity in the area to date	6
1.4.	The need for Community action	6
2.	A possible solution: A European system for the attachment of bank accounts	7
2.1.	EU procedure or harmonisation of national laws?	7
2.2.	General policy considerations	9
2.2.1.	The need for speed	9
2.2.2.	Protection of the debtor	9
2.3.	The Nature of the Remedy	9
3.	The Procedure for obtaining an Attachment Order	10
3.1.	Circumstances in which a creditor can apply for an Attachment Order	10
3.2.	Conditions of issue	11
3.2.1.	The existence of the claim	11
3.2.2.	The notion of urgency	11
3.2.3.	Hearing of the debtor	12
3.2.4.	Security	12
3.3.	Details of account information required	13
3.4.	Jurisdictional Issues	14
4.	Amount and Limits of the Attachment Order	15
4.1.	Amount to be secured by an Attachment Order	15
4.2.	Costs of the banks	16
4.3.	Attachment of several, joint and nominee accounts	16
4.3.1.	Attachment of several accounts	16
4.3.2.	Attachment of joint accounts	17
4.3.3.	Attachment of nominee accounts	17
4.4.	Amounts exempt from execution	18
5.	Effects of an Attachment Order	18

5.1.	Implementation of the attachment order	18
5.1.1.	Abolition of "exequatur procedure"	18
5.1.2.	Notification of the attachment order to the bank	19
5.1.3.	Methods of transmission	19
5.1.4.	Time periods for implementing the attachment order	21
5.1.5.	Information to be provided by the bank on the debtor's accounts.....	21
5.1.6.	Effect of the attachment order on ongoing operations	23
5.2.	Protection of the debtor	23
5.2.1.	Notification of the attachment order to the debtor	24
5.2.2.	Obligation of the claimant to proceed with the principal action	24
5.2.3.	Objections to the attachment order and jurisdiction	24
5.2.4.	Claimant's liability for damages caused by the attachment order	26
5.3.	Ranking of competing creditors	26
5.4.	"Transformation" into an executory measure	27

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Annex to the Green Paper on improving the efficiency of the enforcement of judgments in the European Union: the attachment of bank accounts

This Staff Paper forms an annex to the Green Paper on improving the efficiency of the enforcement of judgments in the European Union: the attachment of bank accounts. It is intended to provide additional background information on the questions raised therein and, in particular, on the different approaches of Member States' legal systems towards them.

1. INTRODUCTION

1.1. Requests for a Community initiative in the field of enforcement

In the Treaty of Amsterdam, the European Union set itself the goal of gradually creating an area of freedom, security and justice. In the field of civil justice, Article 65 of the EC-Treaty envisages amongst other things the taking of measures to improve and simplify the recognition and enforcement of judgments in civil and commercial cases. Since the coming into force of the provisions of Title IV of the Treaty, a number of measures have been taken to fulfil the aim of establishing a genuine European area of justice¹ the most significant of which for the purposes of this paper is Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the "Brussels I Regulation")².

In line with the objective laid down by the Treaty, the Programme on mutual recognition, adopted by the Council in December 2000, requested that measures be taken to improve the mutual recognition of judicial decisions in the Member States, by, amongst others, "establishing protective measures at European level" to enable a protective measure issued in one Member State to take effect against the debtor's assets in the whole territory of the Union³. This possibility would, for example, "enable a person who has obtained judgment against a debtor in one Member State, in the event of the later challenging recovery of his debt, to have the debtor's property forthwith frozen in another Member State as a protective measure, without recourse to a further procedure." At the same time measures "improving the attachment measures concerning banks, e.g. by establishing a European system for the attachment of bank accounts" should be taken, explaining that "with a judgment certified as enforceable in the Member State of origin, measures could be taken, without *exequatur* and *ipso iure*, in any other Member State for attachment of the debtor's bank accounts."

More recently, the Hague Programme strengthening freedom, security and justice in the European Union⁴, which was adopted by the Heads of Government in December 2004, made

¹ See the conclusions of the meeting of the Heads of Government at Tampere, Finland in October 1999, paragraphs 28 et seq.

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, OJ L 12, 16.1.2001, p 1.

³ Programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters, OJ C 12, 15.1.2001, p. 1,5.

⁴ The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, OJ C 53, 3.3.2005, pp. 1, 13 at 3.4.2.

the continued implementation of the programme of measures on mutual recognition a main priority, emphasizing that the effectiveness of the existing instruments on mutual recognition of decisions in civil and commercial matters has to be strengthened by work in the area of the enforcement of judgments⁵.

1.2. The attachment of bank accounts in Europe

The attachment of bank accounts exists in practically all Member States and, if working efficiently, can be a powerful weapon against bad debtors⁶. However, while debtors are today able to move their monies almost instantaneously out of accounts known to their creditors into other accounts in the same or another Member State, creditors are not able to block these movements of monies with the same swiftness. Although provisional remedies, which secure the future enforcement of a monetary claim by freezing bank accounts, are today available in all Member States, the current legislation does not ensure that such remedies are recognised and enforced throughout the European Union.

Under the Brussels I Regulation, a creditor has to obtain a declaration of enforceability in order to be able to enforce an attachment order in another Member State. Pursuant to Article 43 (5) of the Regulation, the enforcement of the order can only take place one month after the declaration of enforceability has been served on the debtor which leaves a debtor wanting to evade the enforcement more than enough time to transfer his funds to another account. According to the case law of the European Court of Justice⁷ the Brussels I Regulation does not provide for the recognition and enforcement of a preliminary or protective measure obtained *ex parte* in one Member State in another Member State without prior service on the party against whom it is directed. Thus, the surprise effect of a provisional measure is not guaranteed if it has to take effect in a Member State other than the one where it was granted.

This problem is only partly remedied by the provisions of the Brussels I Regulation dealing with provisional and protective measures. Currently, Article 31 of the Regulation allows a creditor to apply for provisional and protective measures available under the law of the Member State where the measure has to be executed even if, under the Regulation, the courts of another Member State would be competent to hear the case on the substance. Article 47 clarifies that this possibility exists in particular for a creditor awaiting the recognition of his judgement. These options, however, have their shortcomings: First, not all Member States confer jurisdiction for protective measures on the court where enforcement takes place⁸. Furthermore, the location of the account(s) might oblige the creditor to seek a protective measure in a Member State that has no connection whatsoever with his contractual relation to the debtor and confront him with procedural and linguistic obstacles which he did not contemplate when entering into the contract. Finally, a creditor wanting to obtain an attachment order for accounts situated in different Member States has to apply to several courts, each having different procedural and linguistic requirements, which will often be overly cumbersome for him.

⁵ See paragraph 3.4.2 of the a.m. document.

⁶ Cf. Commission communication to the Council and the European Parliament towards greater efficiency in obtaining and enforcing judgments in the European Union, OJ C 33, 31.1.1998 p. 3, 14 et seq.

⁷ ECJ, Case 125/79 (*Denilauler v. Couchet Frères*), [1980] ECR 1553.

⁸ This is notably not the case in Spain, cf. Hess report p. 143.

1.3. Commission activity in the area to date

Following the adoption of the Treaty of Amsterdam, the Commission issued, in 1998, a communication to the Council and the European Parliament outlining possible ways to improve efficiency in enforcing judgments in the European Union⁹. The communication identified several obstacles to prompt and efficient enforcement of court judgements throughout the European Union. However, not only Member States' legislation on enforcement but also the organisational structure of enforcement authorities varies wildly across the European Union which makes Community intervention more difficult. Hence, the Commission proposed to initially confine reflection to one of the problems most commonly occurring in practice: the question of banking seizures¹⁰.

In 2002, the Commission issued an invitation to tender for a *Study on making more efficient the enforcement of judicial decisions within the European Union*¹¹. In parallel, the Commission held, in April 2003, a first meeting of government experts which discussed possibilities to improve the procedure for the attachment of bank accounts in the European Union. The report of the study, undertaken by Professor Burkhard Hess and a team of academics and issued in December 2003, analyses the situation in the then 15 Member States. It shows the diversity of treatment of the subject matter even between legal systems which are in other respects relatively similar¹², and describes the risks such differences may create for the functioning of the internal market in relation to the free circulation and enforcement of monetary payment orders. In order to remedy the shortcomings of the present situation, the report proposes several measures to improve the enforcement of judicial decisions in the European Union. It suggests adopting both, measures enhancing the transparency of the debtor's assets and measures improving the attachment of bank accounts¹³. As to the latter, the report proposes the creation of a European order for the attachment of bank accounts as well as a European protective order.

These recommendations have provided the basis on which the Commission's further work has been carried out. In February 2004, an additional meeting of experts was convened to consider the findings and conclusions of the Hess report. In consideration of its discussions with the government experts, the Commission decided to concentrate in a first step on protective measures improving the attachment of bank accounts. A Green Paper on how to improve the transparency of the debtor's assets will follow by the end of 2007.

1.4. The need for Community action

The need for action in the area of enforcements of judgments to supplement the provisions of the Brussels I Regulation and of the Brussels Convention¹⁴ which it replaced has been recognised for some time. Several conferences on the subject have been held under various

⁹ Commission communication, Fn.6.

¹⁰ Commission communication, Fn. 6, pp. 14 et seq.

¹¹ Study No. JAI/A3/2002/02 available at:

http://ec.europa.eu/justice_home/doc_centre/civil/studies/doc_civil_studies_en.htm.

¹² See, generally, the discussion on 'garnishment' in the section 'The Attachment of Bank Accounts' pp.60 et seq.

¹³ See pp. 147 to the end.

¹⁴ Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 27th September 1968.

auspices¹⁵ one of which, organised by the French Ministry of Justice in July 2000 concluded that it was desirable to establish a European procedure for the attachment of bank accounts. In addition to the Hess report, studies in the area by Professor Wendy Kennet of the University of Keele in England have revealed the extent of the disparities in the procedures for enforcement in a number of Member States¹⁶.

Disparity by itself may not always be a difficulty. There are many differences and inconsistencies between the legal systems in the Member States of the European Community which are relatively unimportant as regards the functioning of the civil justice systems in Europe or as regards the functioning of the internal market. The nature of judicial organisation, for example, is not likely as such to have damaging effects provided that the judges in the Member States adopt a consistency of approach to the interpretation of European Law and legal norms which is consistent with these norms in question and with each other. Failure to do so risks cases being presented to court at European level for such consistency to be achieved. In some situations, however, the very existence of inconsistency is so difficult that by itself it argues for a remedy at European level. In this respect, in the case of protection of creditors the legal problems identified by the Hess study provide a solid basis for reflection on the need for European action¹⁷.

A consistency of approach amongst the Member States as regards the attachment of bank accounts might also help to avoid potentially discriminatory effects where remedies in different Member States create disparity in outcomes quite apart from the potential, and probably actual, effects on the functioning of the Internal Market.

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

2.1. EU procedure or harmonisation of national laws?

A possible solution to the problems of debt-recovery outlined above would be to create a European system for the attachment of bank accounts which would allow a creditor in certain circumstances to secure the payment of a sum of money due to 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. The attachment order under this system would be a protective measure issued by a court in summary proceedings which would only allow a creditor to block funds, not to effect their transfer.

The decision whether or not to put forward a legislative proposal for the attachment of bank accounts will be subject to an impact assessment in which will be analysed the extent of the problems of cross-border debt recovery and the likely effectiveness of possible alternatives to a European instrument. An obvious alternative to Community action would be to maintain the status quo; another might be to abolish the *exequatur* procedure for attachment orders without at the same time establishing common standards for the procedure of granting attachment

¹⁵ See for example the Seminar organised by the Union Internationale des Huissiers de Justice in Vienna in October 2004.

¹⁶ W. Kennett, *The Enforcement of Judgments in Europe* (2000).

¹⁷ See the conclusion on page 147, and the legal material on which this is based notably in sections C and D, of the study.

orders. The possibilities outlined in the Green Paper and this Staff Paper are not intended to prejudice the result of the impact assessment.

There are two different possibilities for creating a European system for the attachment of bank accounts: One would consist of designing a new and self-standing European procedure which would be available to citizens and companies in addition to existing national procedures for banking seizures. Alternatively, Member States' national rules on the attachment of bank accounts could be harmonised by way of a European Directive which would guarantee that the same standards for the granting of an attachment order apply throughout the European Union. In this case, the rules on provisional and protective measures in Regulation Brussels I outlined at point 1.2 above would need to be amended in order to ensure that an attachment order issued in one Member State is recognised and enforced in all other Member States.

In the past, measures in the area of civil justice have included both kinds of instruments, regulations and directives. The Commission has, for instance, proposed the creation of a European order for payment procedure¹⁸ and a European Small claims procedure¹⁹ by way of regulation but has put forward a directive to establish common rules for certain aspects of mediation in civil and commercial matters²⁰ and minimum standards for the compensation of crime victims²¹.

The creation of a self-standing European procedure would have the advantage that it would supplement the existing remedies under national law without requiring Member States to substantially modify their national enforcement systems. Given the wide divergence of these systems, this solution might be preferable. On the other hand, the Commission's approach to juxtapose self-standing European procedures with procedures under national law has been criticised for creating an overcomplicated system of remedies which would hamper rather than encourage individuals and businesses to exercise their rights. One solution to this situation would obviously be to create a European procedure which would not only be available for the attachment of bank accounts situated in a Member State other than the one where the order was issued but also for the attachment of bank accounts situated in the same Member State.

Irrespective of the type of instrument chosen, a Commission proposal on the attachment of bank accounts would have to deal with a number of issues which are discussed in more detail below: the procedure for obtaining an attachment order would need to be clarified (see point 3), the amount and possible limits of the attachment order would have to be defined (see point 4) and the effects of the order and procedural safeguards for the debtor would need to be

¹⁸ Commission Proposal of 19 March 2004, COM (2004) 173 final. The objective of the proposal is to introduce a uniform order for payment procedure in all Member States. This procedure would allow claimants to obtain rapidly and at low costs a judicial decision which is enforceable throughout the Union without the need for an *exequatur* procedure.

¹⁹ Commission Proposal of 15 March 2005, COM (2005) 87 final. The objective of this proposal is to simplify, accelerate and to lower the costs for the settlement of small claims by introducing a uniform European procedure.

²⁰ Commission Proposal of 22 October 2004, COM (2004) 718 final.

²¹ Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims, OJ L 261, 6.8.2004, p. 15.

assessed (see point 5). There are a number of general considerations that have to be taken into account when making policy choices on these issues.

2.2. General policy considerations

2.2.1. The need for speed

The overriding policy objective of a provisional remedy for attachment of bank accounts would be the need for speed. This objective is recognised in the European Convention on Human Rights which establishes in Article 6 the right to a fair trial. This provision has been interpreted by the Strasbourg Court as applying to both the procedure for granting the remedy and the methods of execution. This implies that the creditor can claim a right not only to recovery within reasonable time, but also that the procedures for recovery and seizure should be efficient²². Similar guarantees are contained in Article 47 of the European Charter of Fundamental Rights.

The use of modern technology by banks, in particular the possibility to transfer money on-line and via the internet even outside business hours, has made the rapidity with which an attachment order can be granted an even more crucial issue. In addition, the tendency of the European Community to encourage the creation and grouping of Europe-wide systems for banking²³ is likely to further facilitate the speedy movement of money in the European Union since the realisation of policy objectives behind the creation of Europe wide banking system which are aimed at facilitating consumer access to better, faster and cheaper banking services are precisely such as will permit crafty debtors to seek to avoid their liabilities by taking advantage of technological and other improvements to transfer money quickly.

2.2.2. Protection of the debtor

The enforcement procedure does not only have to respect the creditor's fundamental rights but also those of the debtor. Article 6 ECHR and Article 47 of the EU Charter equally protect the debtor's right to a fair trial; his human dignity and family life are protected by Article 8 ECHR and Article 7 of the EU Charter. In the Commission's view, this implies notably that a certain amount of money must be exempt from execution (see under 4.4) and that the debtor must have an effective possibility to contest an attachment order (see below under 5.2). In addition, the constitutional principle of proportionality, which is inherent to enforcement, requires a legislator to balance the competing rights and interests of the parties when designing enforcement laws. Thus, enforcement measures should not unnecessarily infringe upon the debtor and third parties rights and should not be disproportionate or vexatious measures.

2.3. The Nature of the Remedy

The crucial policy objective to be met by the use of a provisional procedure against the bank accounts of a debtor would be to act as quickly as possible where it is clear that the interests of the creditor may be threatened by acts of the debtor in transferring money out of one or more bank accounts. The difficulty at present is that, as the Hess study shows, although most

²² Hess report, p. 13 with further references.

²³ See most recently, the White Paper on Financial Services Policy (2005 – 2010) of 5.12.2005.

Member States have procedures which may be able to achieve the result these procedures are inconsistent with one another in their effects and also as regards their juridical nature²⁴.

In some of the systems, mostly but not exclusively in the common law tradition, the remedy is directed to the person of the debtor rather than against the account itself. The defendant is ordered *in personam* to refrain from dealing with the asset, e.g. from disposing of monies on a bank account, but the operation of the asset remains legally possible albeit sanctioned. In this way the control exercised by the court depends on the authority of the court and the sanctions available to it. The remedy does not work to create a nexus between the creditor and the debtor and the bank where the account is situated; this depends on a further procedure which in itself requires formal service on the debtor before it can be opened. Such a procedure is more akin to an action for payment than a measure of enforcement as such and in England and Wales, where it is known as a 'garnishee' order it is relatively uncommon as compared, say, with the incidence of freezing orders in that jurisdiction.

In other Member States the procedures involved may be directed against the account of the debtor directly thereby creating an attachment of that asset with the effect that any operation of the account is deemed invalid against the creditor. In this procedure there are notable differences among the Member States as to whether the remedy is general against all property of the debtor or specific as regards particular property. There are also substantial differences in the effects that the remedy will create where combined with other remedies, say, of an *in personam* nature.

These differences could be resolved by the creation either of a harmonised European system or of a European procedure. The question of the nature of the procedure is clearly linked to the question of the amount to be secured and of the effects of the remedy; the issue therefore will need to be solved if a European instrument is envisaged. The Commission *prima facie* considers more suitable a measure which constitutes an attachment *in rem* since this type of measure seems to be more appropriate to target a specific sum of money standing to the credit of one or several specific accounts. However, since the Green Paper specifically forms an open consultative stage the Commission is open to alternative arguments.

3. THE PROCEDURE FOR OBTAINING AN ATTACHMENT ORDER

3.1. Circumstances in which a creditor can apply for an Attachment Order

In many Member States provisional measures for the seizure of assets are granted in summary proceedings on the application of the creditor²⁵. Most often the creditor will apply for such measures prior to lodging the main proceedings in which case, a number of Member States require that the main proceedings be commenced within a definite time period (see below 5.3). Many Member States offer the creditor the possibility to apply for a provisional measure concurrently with the main proceedings which seems to be a time and cost efficient means to safeguard the rights of the creditor. It seems also plausible to grant the creditor the possibility to apply for a protective measure during judicial proceedings in order to take into account specific circumstances which have arisen after an action has been commenced, for example on the grounds that the debtor's chances to win the process have diminished, e.g. following a court hearing, or that in the course of the proceedings doubts have been raised as to the

²⁴ See Hess Report p. 121; responses to question 2.5.3.2 in the national reports on provisional measures.

²⁵ Hess report, p. 128

debtor's solvency. It will need to be determined whether the attachment order should be available in all the circumstances outlined above.

Taking into account the European context, a European system for the attachment of bank accounts should also enable the creditor to prevent the removal of funds held to the credit of his debtor's bank account while the creditor is awaiting the recognition of his enforceable judgment or title. The creditor would then dispose of a European system for requesting a protective measure in this situation and no longer depend on the availability of national protective measures as it is currently the case under Article 47 of the Brussels I Regulation. It is therefore feasible that an attachment order should be available either on its own or as part of a judgment for payment granted in a normal civil procedure under national law.

Furthermore, the European system would have to be compatible with the existing *acquis communautaire* in the area of civil justice. A creditor should therefore be able to apply for an attachment order in the course of the future European procedures which have been proposed by the Commission in order to simplify and accelerate civil procedures in the Member States, i.e. the European Small Claims procedure²⁶ and the European Order for Payment procedure²⁷. The application for an Attachment Order should also be available together with an application for a certificate for a European Enforcement Order²⁸.

3.2. Conditions of issue

3.2.1. *The existence of the claim*

All Member States analysed in the Hess report require the creditor to show the existence of a claim on the merits and a danger that the enforcement of the claim may be frustrated, when applying for the protective measure²⁹. However, given the time frame within which provisional measures are issued, it is obvious that the court cannot carry out a fully-fledged analysis of the case. Consequently, all EU-15 Member States lower the "standard of proof" somewhat in relation to the claim on the merits. Most Member States only require the claimant to establish a *prima facie* case, although the terminology used is different³⁰: Some refer to the Latin term *fumus boni iuris*³¹, others require the claimant to "substantiate" that he has a claim, or to show the "serious probability that the claim exists". In the common law jurisdictions, the claimant must present a "good arguable case". The practical differences of the different formulae do not seem to pose insurmountable obstacles to a common solution.

3.2.2. *The notion of urgency*

More diversity exists concerning the notion of urgency. Most Member States require the claimant to show that there is a risk that the enforcement of a future judgment would be endangered if the attachment order were not to be granted (*periculum in mora*)³². Some specify that the claimant has to show that the defendant will dispose of assets or remove

²⁶ Cf. Commission Proposal of 15 March 2005, COM (2005) 87 final.

²⁷ Cf. Commission Proposal of 19 March 2004, COM (2004) 173 final.

²⁸ Regulation (EC) No. 805/2004 of 21 April 2004, OJ L 143, 30.4.2004, p. 15.

²⁹ Hess report, p. 129.

³⁰ See answers to questions 2.4.2 – 2.4.4 in the national reports on provisional measures.

³¹ This term is also used by the European Court of Justice, cf. decision of the President of the Court of First Instance in the case T-201/04 R (*Microsoft Corp./Commission*) of 22 December 2004.

³² Hess report, p. 129; see also the answers in the national reports on provisional measures to question 2.3.2.

assets from the jurisdiction so as to make it likely that any judgment against him could not be satisfied in the absence of a freezing order. By contrast, the mere fact that the debtor might become insolvent usually does not suffice to show a special need for protection. In other Member States urgency is not a prerequisite for the seizure of bank accounts. In these Member States, urgency is not a pre-requisite for the granting of an attachment order, as long as the claim on the merits appears to be well-founded³³. The question as to the preconditions under which a protective measure can be issued is linked to the question of debtor protection. Systems where the threshold for the issue of the attachment order is very high (e.g. by requiring the claimant to show urgency) already provide for a considerable level of debtor protection; systems where this is not the case need other ways to achieve an adequate balance of the creditor's and the debtor's interests. It will have to be assessed which way should be chosen for the European system.

3.2.3. *Hearing of the debtor*

The question whether the debtor must be heard prior to granting a bank attachment is treated differently in the Member States³⁴. In some Member States, a provisional freezing of bank accounts is regularly granted without a hearing of the debtor. In other Member States, the debtor is customarily heard and provisional measures are only granted *ex parte* if the creditor can assert particular urgency. As a general rule, the debtor has a right to oppose the measure if an attachment is granted *ex parte*.

This divergence between national legal systems creates serious difficulties. Where a bank attachment is not granted without a prior hearing, the debtor is forewarned as to what is afoot and if so minded can vitiate the motives of the creditor to the disadvantage of the latter by moving monies quickly out of one or more accounts and often this will lead to a cross-border transfer of funds achieved as fast as the electronic transfer of funds can operate. In the framework of a new Community instrument which would specifically guarantee the debtor's right of defence, it might be arguable to adopt the approach of the first category of Member States and not to require a customary hearing of the debtor. This approach would guarantee the "surprise effect" of the measure and prevent the debtor from removing funds from the targeted account during the procedure. If this solution is developed, careful consideration would need to be given to the shaping of measures for the debtor's protection in order to properly balance both parties' interests (see below at 5.2).

A further difficulty concerns the recognition and enforcement of a provisional remedy in another Member State. The European Court of Justice has held in 1980 that measures given *ex parte* are not recognized under what is now Regulation 44/2001. Now that 26 years have passed, this judgment might need to be revisited. In the context of a European system which would establish common standards that provide for an efficient protection of the debtor, it seems to be appropriate to extend the principle of mutual recognition in this area and to allow the cross-border recognition of *ex parte* orders securing the enforcement of monetary claims.

3.2.4. *Security*

Most Member States require the claimant to compensate the defendant in some way or other for the damage caused by the attachment order if it turns out that the order should not have

³³ Hess report, p. 129; this is notably the case in France.

³⁴ Cf. answers in national reports on provisional measures to question 2.4.3.1.

been granted (see the discussion at point 5.2 below)³⁵. In order to guarantee the actual payment of damages in such a case, some Member States oblige the creditor to provide security to the court when applying for a provisional measure³⁶. In other Member States, the decision as to whether security has to be provided is left to the discretion of the court. If security has to be provided, this can often be done by a bank guarantee. In the common-law jurisdictions, the claimant typically has to give an undertaking to the court that he will compensate the defendant for any loss he would suffer if the provisional measure was wrongfully used. Where the claimant has insufficient assets within the jurisdiction to support the undertaking, the court will require him to provide appropriate security, usually in the form of a bond³⁷.

Overall, it seems to be a widely accepted principle that some sort of security has to be granted in order to protect the debtor against spurious or purely vexatious seizures of his bank account. It is therefore suggested that this principle should be applied in a European system for the attachment of bank accounts. As regards the form which this security should take, it is suggested to adopt the approach which grants a higher level of debtor protection. This is *prima facie* a rule which would not leave it to the discretion of the court whether security were granted or not but only the amount of the security which would have to relate to the risk involved.

3.3. Details of account information required

Member States' legislation and case law differ considerably when it comes to the specification of the bank account(s) to be seized³⁸. Some legal systems do not require the creditor to specify a particular account targeted for seizure, either because they grant wide-ranging freezing orders or because the enforcement authorities conduct the necessary investigations into the debtor's assets³⁹. In France, for example, a creditor can obtain an order freezing the balance of all the accounts the debtor may have in a given bank domiciled in that Member State, even if that bank operates on a nation-wide basis⁴⁰. Similarly, in Scotland and the Netherlands, the largest banks are regularly the subject of applications by creditors seeking to enforce provisional measures in all accounts, whether identified or not, by means of "fishing attachments"⁴¹.

In other Member States, an attachment order will only be granted if the creditor describes the account to be seized with sufficient specificity as to allow its identification. While there do not seem to be written rules on the level of precision required, the case law of most Member States allows the indication of the name and the address of the bank holding the account to suffice. Few Member States require the creditor to specify the debtor's exact account number but in those it may be possible to use other execution remedies to establish this information⁴². Given the difficulty for the creditor to obtain his debtor's exact account number, it is suggested that this should not be a requirement under a future European system.

³⁵ Cf. the answers of the national reports on provisional measures to question 2.6 and 3.6.

³⁶ Hess report, p. 130.

³⁷ Hess report, p. 131.

³⁸ See National reports on the attachment of bank accounts, answers to questions 2.2 et seq; Hess report p. 132.

³⁹ This seems to be the case in Finland, Sweden and Spain.

⁴⁰ Hess report, p. 132 with further references.

⁴¹ See National reports on the attachment of bank accounts, question 2.2.1 et seq.

⁴² See Irish national report on the attachment of bank accounts, at question 2.2.

Where the attachment order contains only the name of the debtor and the name of the bank where the account is located, banks will have to search their client databases to find out whether the debtor has any account with them. This places an additional financial and organisational burden on the banks (on the question whether the banks should be compensated for these costs see below at point 4.2) and has raised concerns of data protection, banking secrecy and unjustified attachments due to mistaken identities. It is clear that any solution adopted in this respect at the European level will have to carefully balance the interests of the creditors and the banks (as third parties) in this process.

As to the problem of mistaken identities, it seems obvious that the bank must be able to oppose the execution of the attachment order if, for example, several of the bank's clients bear the debtor's name and no additional information were provided to identify the "correct" debtor. Where such information has, however, been provided, such as the date of birth or the exact address of the debtor, the bank should be able to identify unmistakably the "correct" debtor.

3.4. Jurisdictional Issues

Regulation Brussels I does not establish specific rules on jurisdiction for provisional and protective measures but Article 31 and 47 allow the claimant to apply for such measures if they are available under national law. All Member States covered by the Hess report confer competence to grant orders for provisional measures to the courts deciding the main proceedings⁴³ and this competence can also be exercised before the main proceedings are initiated⁴⁴. In the European context such competence is determined by Regulation Brussels I. In addition, most Member States confer jurisdiction on the court where enforcement takes place, that is, where the defendant's assets are located or the defendant is domiciled⁴⁵. While these (alternative) heads of jurisdiction seem to be perfectly appropriate for obtaining an attachment order two problems have to be addressed when designing a European system in this field:

One arises from the traditional perspective still predominant in many Member States that enforcement proceedings are based on the territoriality principle and therefore strictly limited to the territory of the enforcing state⁴⁶. This means that in the absence of a European rule courts of most Member States will not issue an attachment order for a bank account situated in another Member State. It is true that as a matter of practice courts in England and Ireland took to granting what became known as "Mareva injunctions" or freezing orders (as they are now called) with extraterritorial effect. But since other Member States have not adopted the same approach, this possibility has led to considerable forum shopping⁴⁷. In any event, 'Mareva injunctions' were never more than *ad personam* and so entirely dependent for their efficacy on the ability of the granting court to enforce them against the debtor personally within its jurisdictional competence.

In Germany and Austria, cases of cross-border service of (final) attachment orders have been reported but the legal situation as to the status of such attachment orders is still unclear⁴⁸. It is

⁴³ Cf. the answers to question 6.1. in the national reports on provisional and protective measures.

⁴⁴ Hess report, p. 133.

⁴⁵ Hess report, p. 134.

⁴⁶ Hess report p. 76.

⁴⁷ Hess report p. 135 with further references.⁴⁸ Hess report, p. 83.

therefore suggested that the courts of the Member State deciding on the merits of the case should have jurisdictional competence to grant an order for the freezing of the debtor's accounts situated in several Member States. In this context, it will also be necessary to address the problem of languages and assess whether the cross-border service of attachment orders can be facilitated by using a standard form.

Second, a European instrument would have to clarify the relation between the court competent to determine the main proceedings (under the Brussels I Regulation) and the court where the debtor's assets are located or where the debtor is domiciled (if different). It is suggested that the principal responsibility should lie with the court competent for the main proceedings and that the court where the debtor's assets are located should only be competent to grant ancillary protective measures limited to the territory of that Member State.

4. AMOUNT AND LIMITS OF THE ATTACHMENT ORDER

4.1. Amount to be secured by an Attachment Order

Member States' legislation varies considerably when it comes to the amount to be secured by an attachment order. One difference is linked to the fact that in some Member States the freezing of bank accounts operates *in rem* while in others, the defendant is ordered *in personam* to refrain from disposing of monies standing to the credit of his account (see discussion at point 2.3 for details). But even within those measures characterised as *in rem*, there are significant differences in the Member States. In some jurisdictions, the seizure or freezing operates in a general way against all assets, in others in a specific way against a particular account. In some legal systems, the amount or type of assets for seizure are clearly defined, in others, they are left unspecified. For example, in France by operation of law the seizure has a blocking effect with respect to all accounts kept by a bank in any of its branches.⁴⁹ In the Netherlands, an attachment order will usually cover the entire account of the debtor, whereas, amongst others, in Ireland and Portugal the order will relate to a specific sum including enforcement costs⁵⁰.

In the European context, the principle of proportionality and the human rights parameters of fair trial and protection of the debtor (see above at point 2.2.2) will also influence the responses to this question. In this respect, a measure which relates to a specific amount seems more proportionate. It is therefore suggested, that only a specific amount should be frozen.

If the attachment order is limited to a specific amount, the question arises how this amount should be determined. The limit could be set at the level of the order sought in the main proceedings, that is the amount could be limited to the debt allegedly due to the creditor and claimed by him against the debtor. It could, however, also be permitted to secure additional sums, notably any future interest arrears and legal expenses (as to the costs of the banks, see below at point 4.2). In relation to the legal expenses, it will need to be assessed, how the potential costs of lawyers and enforcement officers should be estimated. It might be desirable

⁴⁹ Hess Report p. 121; see also Niboyet & Lacassange, "National Report: France", in Andenas, Hess & Oberhammer (eds), *Enforcement Agency Practice in Europe* (London, 2005), p. 160.

⁵⁰ See the National Reports in relation to Attachment of Bank Accounts (Appendix 2 to the Hess Report), in particular responses to question 4. *Nota bene*: These responses often presume a final judgment and are therefore not fully compatible with the attachment of bank accounts as a protective measure envisaged in the Green Paper.

to treat this situation differently from that where the creditor has obtained a judgment on the merits which in many Member States will allow him to recover interest and costs in addition to the principal sum due.

4.2. Costs of the banks

Two issues need to be considered when discussing the costs of the banks. The first issue relates to the operational costs which the banks incur when carrying out the function of attaching a bank account. Member States treat these costs differently. Some Member States require the banks to treat the attachment of bank accounts as a matter of public duty and to absorb any costs arising out of this activity into the general operating expenses of the banks without being able to charge any fee to either of the parties. Other Member States allow the banks to charge a fee for the attachment of bank accounts. If it is considered appropriate that banks can charge a fee for their services, the apparent question is which of the parties should bear it, whether the creditor should provide a guarantee for this cost or whether the charge should be deducted from the funds being attached. A further question to be considered in this case is how the amount which can lawfully be requested by the bank for this service should be calculated and whether it should be capped, be that at national or European level.

The second cost which a bank might incur in the context of an attachment order relates to its potential liability in the case of the freezing of the wrong account. In most Member States, again, because the banks implement attachments as part of their public duty this risk is absorbed into the bank's general operating costs. It seems, however, that the European context has raised the concern that cases of wrongful attachments may increase because of the difficulties for banks in verifying the legitimacy of a foreign attachment order. The fear is that the banks might be exposed to a financial liability arising out of the contractual relationship with their client. The question arises who should bear the cost of such a risk. Here it is perhaps more suitable to ask whether the creditor applying for the attachment should provide a guarantee for these costs.

For good order and for the sake of clarity it should be noted that the potential payment of the costs of the banks in relation to either of the abovementioned heads is a separate issue from potential security to be provided by the applicant creditor to cover the potential damage the attachment may cause to the debtor (see above at point 3.2.4).

4.3. Attachment of several, joint and nominee accounts

4.3.1. Attachment of several accounts

As outlined above under paragraph 4.1 the domestic measures in the Member States diverge and can be targeted generally against several assets or against specific assets. A general freezing can naturally be more effective but also more intrusive than a specific one. If the attachment order in the European system as envisaged would *prima facie* only secure a clearly defined sum it would be less intrusive. However, the effectiveness of the measure might be significantly thwarted if only a single account could be frozen since the debtor often has the means of dispersing his assets over several accounts. Therefore the practical question arises how to regulate that sufficient funds, albeit these might be limited to a specific sum, are secured vis-à-vis several accounts without resulting in an attachment of double or triple the amount due. The question raises difficult practical hurdles to overcome, the scenario depending on whether the accounts are held in completely different banks. Notably, there

might not be any prior knowledge as to how much funds are available for freezing in each account or such prior information may turn out to be outdated.

In this context, it is worth noting the French practice. In France, an attachment order has a freezing effect on all the bank accounts, even if the amount exceeds the sum claimed or owed. However, since this wide-ranging effect has been considered prejudicial for the economic activity of the debtor, the banks have in practice re-interpreted the legal provision and created a system in which the actual amount of the debt claimed is placed in a special account and the remaining sums are freely disposable by the debtor, if he provides a guarantee to the bank and all parties agree⁵¹.

Therefore, in order to render the European system effective, the question arises whether or not an attachment order should be available for freezing all accounts until the court or enforcement authority has established that sufficient funds have been seized. Thereafter, if necessary, a reduction in the attachment executed would have to be effected with regard to one or several accounts. This could be combined with a procedure to enable the court to restrict the effect of an attachment order executed against several bank accounts to secure the sum claimed plus any allowable expenses and interest. Clear and precise rules regarding the obligations and role of the banks, the court or other competent authority as well as the parties would have to be elaborated in this respect. This whole question links in with the question of implementation (see below at point 5.1).

4.3.2. *Attachment of joint accounts*

Member States also have divergent approaches with respect to the attachment of joint accounts, that is, accounts held by spouses or unmarried couples⁵². In some Member States, the whole account may be attached, but the spouse may apply for a release of his or her part. Other national systems provide a presumption against ownership by the other spouse. In a third category of jurisdictions, the attachment order only affects half of the balance and the onus is on the creditor to apply for additional access. In England and Ireland, a joint account is not attachable by an attachment order relating only to one of the spouses unless the court decides otherwise. In many Member States the salary of a spouse paid into the joint account cannot be seized for the purposes of execution in relation to the debts incurred by that spouse.

4.3.3. *Attachment of nominee accounts*

The Hess report does not cover the question whether accounts into which the debtor has transferred all or part of his assets but which are held by a third party, can be subject to an attachment order. However, this issue causes problems in practice where fraudulent debtors seek to evade enforcement measures by transferring monies out of their accounts into an account held by a different person, be that a spouse, a friend or a business partner. This problem becomes particularly important where creditors seek to recover claims resulting from illegal or criminal activities, e.g. fraudulent insolvencies. To the Commission's knowledge, Member States deal with this problem differently. While some legal systems enable enforcement authorities to "trace" the money transferred, others do not provide for the possibility of enforcing into nominee accounts if the nominee has held his own funds in the same account. It will need to be considered how this issue can best be dealt with.

⁵¹ Niboyet & Lacassange, "National Report: France", in Andenas, Hess & Oberhammer (eds), *Enforcement Agency Practice in Europe* (BIICL, London, 2005), p. 160.

⁵² Hess report, p. 70 with further references, answers to questions 4.4 et seq..

4.4. Amounts exempt from execution

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 particular rules might often be geared towards protecting natural persons as debtors and the purpose is to secure a level of sustainable living for the party and his family notwithstanding his debts. Each national system has detailed rules with regard to immunities, sometimes as part of their general enforcement laws. For example, in Greece salary accounts cannot be attached at all, in Finland the attached portion is usually one third of the debtor's earnings, and in Portugal the amount considered to be the minimum salary is exempted from freezing. In the Netherlands, no minimum amount is protected but social benefits and child allowance are exempt from execution.⁵³

In the European Union context, freezing assets in several jurisdictions might entail different immunities and overlapping protection. Therefore, at the very least a European system would have to distinguish how to deal with exemptions and how the interaction between banks and the competent authorities would take place. Again this would have to tie in with the rules on implementation (under point 5.1). In practice it might be helpful if a mutual standard could be agreed, either in minimum or in maximum terms. This standard could naturally not be a direct specific sum but would have to be specified in a more generic or index-bound manner, which would take into account the differing living costs and currencies across the Union.

5. EFFECTS OF AN ATTACHMENT ORDER

One important aspect of the effects of an attachment order, the nature of the remedy, has already been discussed (above at point 2.3). In this section, further aspects of the effects will be addressed: first, by which means and at what moment the attachment order should become effective; second, how the defendant can be adequately protected during the procedure; third, what impact the attachment order will have on other creditors and their possible ranking and finally, how an attachment order can become "executory", so that, after the court has made an order on the merits, the claimant can receive payment out of the attached account.

5.1. Implementation of the attachment order

5.1.1. Abolition of "exequatur procedure"

Given the need for speed (see point 2.2.1 above), it has to be ensured that once the attachment order is granted, it can be implemented as quickly as possible in the Member State where the bank account is situated. It is therefore suggested, that an attachment order take effect in the Member State of execution without any intermediary procedure (*exequatur*) being required. This suggestion corresponds to the general Community policy to suppress exequatur procedures in the European Union with a view to creating a genuine European area of Justice where judgments can circulate freely⁵⁴. In line with this policy objective, the Regulation

⁵³ For more detail see responses to questions in section 7 of National Reports on Attachment of Bank Accounts (Appendix 2 to the Hess Report).

⁵⁴ See the Programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters, OJ C 12, 15.1.2001, p 1; The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, OJ C 53, 3.3.2005, p. 1.

creating a European Enforcement Order for uncontested claims⁵⁵ provides that a judgement which has been certified as a European Enforcement Order in the Member State of origin is recognised and enforced in the other Member States without the need for a declaration of enforceability and without any possibility of opposing its recognition⁵⁶, provided that certain minimum standards concerning the notification of the debtor have been respected in the procedure. Similarly, the proposal for a Council Regulation on Maintenance obligations⁵⁷ proposes the suppression of the *exequatur* procedure for decisions on maintenance claims while at the same time establishing common procedural rules guaranteeing the compliance with the requirements of fair trial according to common standards in all the Member States.

5.1.2. *Notification of the attachment order to the bank*

According to general principles of civil procedure, the attachment order has to be served formally to become effective vis-à-vis the concerned parties. The question whether in order to take effect the order has to be served on the debtor or on the bank holding the account depends on the nature of the remedy, notably on whether the order is designed as a remedy in *rem* or in *personam*. For the reasons outlined at point 2.3 above, it is suggested to create a remedy in *rem* which has effect directly against the account of the debtor so that any operation of the account is deemed invalid against the creditor. Consequently, in order to be effective in stopping actions on the accounts, the attachment order has to be notified to the bank.⁵⁸

Irrespective of its nature (in *rem* or in *personam*), the provisional attachment order will also have to be served formally on the debtor. This issue is dealt with at point 5.2.1 below.

5.1.3. *Methods of transmission*

The question of how the attachment order is to be transmitted from the issuing court to the bank holding the account is crucial. Within each Member State, the requirements for the service of an attachment order on the bank are governed by national law; for the cross-border service of an attachment order, in the absence of other provision in an EC instrument, Council Regulation 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil and commercial matters⁵⁹ applies.

The Regulation sets rules for the cross-border service of a document via a transmitting and receiving agency designated by each Member State on the basis of a standard form but also allows Member States to effect service of documents directly by post, provided that the conditions specified by the receiving Member State are respected (Article 14). The regulation is currently being revised in order to further facilitate and accelerate the cross-border service of documents⁶⁰. The proposal notably introduces an obligation to effect the service of a document within one month of receipt by the receiving authority. Moreover, since it was not

⁵⁵ Regulation (EC) No. 805/2004 of the European Parliament and of the Council of 21 April 2004, OJ L 143, 30.4.2004 p.15.

⁵⁶ Article 5 of the Regulation.

⁵⁷ (COM(2005) 649 final).

⁵⁸ See also Hess report, p. 61 and 64 to the proposal for an "European Garnishment order".

⁵⁹ Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil and commercial matters, OJ L 160, 30.6.2000, p. 37.

⁶⁰ Commission Proposal of 7.7.2005 for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil and commercial matters, COM (2005) 305 final.

considered to be user-friendly that each Member State could set its own conditions for the service by post, the Commission proposed to introduce a uniform rule pursuant to which service of documents can be effected in all Member States by registered letter with acknowledgment of receipt or equivalent. In addition, the term post has been replaced by postal services in order to clarify that it includes services provide by private operates, such as couriers⁶¹.

While the report on the practical functioning of Regulation 1348/2000⁶² has shown that documents are frequently served by post in the European Union⁶³, this way of transmission might not always be the best method to serve an attachment order. In many Member States, the most expeditious way to transmit an attachment order is to have it served on the bank by an enforcement officer. It might therefore be desirable to allow the court granting the order to determine which way of transmission would be the most expeditious in a given case.

While the direct service of the attachment order by the means outlined above would already allow a relatively swift notification of the attachment order, it would still take longer than the debtor would need to remove his funds from the account targeted. In order to counterbalance the advantage of the debtor to transfer money by way of electronic banking, it needs to be considered whether the attachment order should also be transmitted by electronic means. Regulation 1348/2000 does not contain express provisions on the electronic transmission of documents but such transmission would be compatible with the Regulation⁶⁴.

The Commission is aware of the circumstance that the status of the introduction of electronic proceedings in national legal systems already varies significantly from one Member State to another. It is clear that the cross-border transmission of attachment orders by electronic means would require the creation of common interfaces between the respective judicial systems of the Member States and of common communication standards with regard to security of transmission and the electronic acknowledgment of receipt. At the same time, some Member States have already introduced means if electronic communication in their national procedures and have reported positive experiences with the use of new technologies⁶⁵.

Moreover, the Hague Conference on Private International Law has recently developed a system for the electronic transmission of legalised documents (eApostille project), the pilot phase of which was been launched in April 2006⁶⁶. In the light of these examples and of the need for speed and economy in the transmission of the order, it is suggested that the issue be considered. Member States and interested parties are therefore invited to advance their opinions on the desirability of using electronic communication in judicial proceedings and to

⁶¹ See the Commission's explanatory memorandum to the proposal quoted above (previous FN).

⁶² Report of 1.10.2004 from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the application of Council Regulation (EC) 1348/2000 on the service in the Member, COM (2004) 603 final.

⁶³ P. 6 of the report (previous FN)

⁶⁴ Cf. Art. 4(2) of Council Regulation 1348/2000: "The transmission of documents requests, confirmations, receipts, certificates and any other papers between transmitting agencies and receiving agencies may be carried out by any appropriate means, provided that the content of the document received is true and faithful to that of the document forwarded and that all information in it is easily legible.

⁶⁵ E.g. Austria, c.f. the presentation by Martin Schneider, Federal Ministry of Justice of Austria on the use of 'electronic submission forms' and any other ways of electronic communications to send a claim to a civil court, at the joint Conference of the European Commission and the Council of Europe "Towards an ideal trial", Brussels, November 18-20, 2004.

⁶⁶ See the information brochure at www.hcch.net

share any experiences they may have in introducing and using this technology so as to apply it for the purposes of the attachment order.

5.1.4. Time periods for implementing the attachment order

The question within what time frame the bank will have to implement the attachment needs to be assessed. For the reasons outlined above at point 2.2.1, it is necessary for the attachment to take effect as soon as possible and certainly before it would be possible for the defender to effect removal or transfer of any funds. It is therefore suggested that the account(s) be blocked immediately after the order is served on the bank. The immediate blocking of accounts is already current practice in many Member States where the order is served by registered mail or enforcement officers and, at least where the bank receives the order during its working hours, the prompt implementation should not pose any problems.

Difficulties may arise where an electronically transmitted order reaches the bank outside its normal working hours, such as at week-ends, during bank holidays or in the evening. In this case, it will have to be considered whether the order has to be implemented immediately upon receipt or whether it would suffice if it was implemented only at the start of the following working day. Any solution adopted in this respect would need to ensure that a crafty debtor would not be able to thwart the attachment of his account by moving money out of his account outside the bank's working hours by electronic banking or otherwise.

It would therefore only be acceptable to allow a bank to wait with the implementation of an attachment order reaching it outside working hours until the following working day if it can be guaranteed that such an order takes precedence over any money transfer order issued after the bank's last close of business. It would be necessary to ensure that all the banks in Europe were capable of operating such a rule without there being a risk that an attempt by a crafty debtor to move money outside business hours would be given effect in preference to a properly executed attachment order.

5.1.5. Information to be provided by the bank on the debtor's accounts

One of the essential points to be regulated in any new instrument is the question whether and to what extent the bank has to provide information on the amount(s) attached in the defendant's bank account(s) and the credit balance. The information provided by the bank is necessary to find out whether the attachment was wholly, partially or not at all successful. In many Member States the bank has to provide information as to whether it holds any account(s) for the debtor and, if so, indicate the balance standing to the credit of the debtor in the account.⁶⁷ The bank also has to provide information on whether the credit balance has already been attached by another creditor of the defendant. In some Member States the bank has to pronounce itself on its willingness to settle the attached claim.⁶⁸

The obligation of the bank to provide information on its debtor's account(s) raises questions of data protection and banking secrecy. The information held by the bank about the account(s) of the debtor constitutes personal data which are protected by Directive 95/46/EC on data

⁶⁷ Hess report, p. 42 with footnote 225.

⁶⁸ Hess report, p. 40 et seq.

protection⁶⁹. Article 6 of the Directive establishes the "purpose limitation principle" which means that personal data must be collected for specified, explicit and legitimate purposes [only] and not further processed in a way incompatible with those purposes. The information on the client's account is processed by the bank for the purpose of fulfilling the contract of deposit between the debtor and the bank. The disclosure of this information to the court serves the purpose of facilitating the recovery of money by the creditor, which – although legitimate – is a purpose different from the original one and incompatible with it. It therefore constitutes an exception to the purpose limitation principle.

Such exceptions are permissible, as long as they comply with the requirements set out in Article 13 of the Directive. According to that provision, Member States may adopt legislative measures to restrict the scope of the obligations and rights provided for in among others Article 6 of the Directive if such a restriction is necessary to safeguard the protection of the data subject or of the rights and freedom of others. In addition, according to the European Court of Justice, the communication of data to third parties, including public authorities interferes with the right to privacy protected by Article 8 of the European Convention of Human Rights (ECHR). Any legislation permitting derogations from the principle of purpose limitation therefore also needs to be justified from the point of view of Article 8 ECHR⁷⁰. In this respect, the Strasbourg Court has repeatedly recalled that the law providing for the interference “must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference.”⁷¹.

A future legislative instrument would need to comply with these requirements, notably by establishing the conditions under which banks can be required to disclose their customers' account information and the extent of the information to be provided. Additionally, it seems to be desirable to make available standard forms for a declaration by the bank of the debtor's assets in order to facilitate and to speed up the procedure.⁷²

Consideration will also need to be given to the question which nature the bank's statement should have. Member States' legislation on this issue varies significantly across the European Union.⁷³ In some Member States, the bank's declaration is a formal acknowledgment of the claim seized,⁷⁴ while in others it is treated as an enforceable title of the creditor against the bank.⁷⁵ A third group of Member States treats the statement merely as information. If the bank is not willing to pay, the creditor has to sue him for payment.⁷⁶

⁶⁹ Directive 95/46/EC of the European Parliament and of the Council of 24.1.1995 the protection of the individual with regard to the processing of personal data and the free movement of such data, OJ L 281, 23.11.1995 p. 31.

⁷⁰ Judgment C-465/00 of the ECJ (*Rechtshof*), §§ 68 et seq.

⁷¹ *Rotaru v. Romania*, §55 ff ; *Amann v. Switzerland*, §76 and §80; *Khan v. UK*, §26; *Valenzuela Contreras v. Spain*, §60 and §61; *Kopp v. Switzerland*, §72 and 75; *Funke v. France*, § 57; *Niemietz v. Germany*, § 37; *Kruslin v. France*, §34 and §35; *Malone v. UK*, §79 and §80.

⁷² Cf. also Hess Report, p. 103 with reference to footnote 516..

⁷³ See Hess report, p. 95

⁷⁴ Hess report, p. 41. See the answers to the questionnaire - If the third-party debtor opposes to the claim, the creditor muss sue for payment in the competent court, Hess report, p 93 with reference to footnote 507.

⁷⁵ Hess report, p. 95, with reference to the legal situation in France, Ireland and England.

⁷⁶ Hess report, p. 41 seq.: Germany.

It will also need to be considered to whom the bank has to provide the information. There are several possible solutions based on the different approaches in the Member States.⁷⁷ The first one would be that the bank communicates the required information to the court granting the attachment order. Alternatively, the information could be addressed to the claimant⁷⁸ or the competent enforcement authority or to any of them⁷⁹. It has to be decided whether the European system should establish autonomous rules on this issue or whether the question should be left to the law of the Member State of the court granting the order, of the Member State where the attached account is located, or of the Member State where the affected bank is domiciled.

As suggested by the Hess report, a new instrument could also deal with the question as to what consequences⁸⁰ should flow from the failure of the bank to provide the requested information or the provision of incomplete or wrong information. In this respect, a European system could choose as an autonomous rule one of the solutions of the above mentioned national laws or could merely refer to the different national rules.⁸¹

5.1.6. *Effect of the attachment order on ongoing operations*

Member States' legislation varies when it comes to the treatment of transactions initiated before the service of the attachment order was effected on the bank. While in some Member States cheques drawn before the service of the attachment order are honoured, they are not in others. In France, for example, the bank is obliged to give a second declaration to the court after a period of two weeks, revealing any “*operation en cours*” at the time of the execution of the attachment order⁸². During this time, the bank is required to draw up a statement of the account and, until that is completed the account is blocked, although the debtor may apply for an immediate release of the part of the account necessary for his everyday needs. In other Member States, however, a debtor's instruction to transfer money out of one account is disregarded, if the transfer has not been performed at the latest by the time of the service of the attachment order on the bank. In order to increase the effectiveness of the European system, it is suggested that an account operation which has not been carried out by the time the order is served on the bank, will not be performed thereafter. As to the question of an attachment order served on the bank by electronic means outside their business hours, see above at point 5.1.3.

5.2. **Protection of the debtor**

The adequate protection of the debtor in enforcement proceedings is one of the most crucial aspects of the new instrument and will have to be considered very carefully. If – as suggested above (at point 3.2.3) the attachment order were granted *ex parte*, it would become even more important to ensure that the debtor has the opportunity to oppose or ask the court to restrict the order immediately after it has taken effect. The issue has been addressed in a general manner under point 2.2.2. Certain aspects of debtor protection have been dealt with above, such as the hearing of the debtor (point 3.2.3), the security to be provided by the claimant (point 3.4) and the amounts exempt from execution (point 4.4). In this section, the remaining

⁷⁷ Hess report, p. 92 footnote 500.

⁷⁸ Answers to questionnaire: Austria and Luxembourg.

⁷⁹ Answers to questionnaire. France and Sweden.

⁸⁰ Cf. the legal situation in the member States, Hess report p. 42 with reference in FN 224 and 225.

⁸¹ See Hess report, p. 95.

⁸² See French Report on the attachment of bank accounts at question 4.1.1.; Hess report p. 66.

questions such as the notification of attachment order to the defendant, his objections against the attachment order and the creditor's liability for damages caused by the attachment order will be regarded in some more detail.

5.2.1. *Notification of the attachment order to the debtor*

In order to give the debtor the opportunity to oppose the attachment order, it is clear that he has to be informed once the measure has been granted and implemented⁸³. In this respect, the question arises who should be responsible for service on the debtor, the court issuing the attachment order or the bank holding the account. While it can be expected that the bank will usually inform the debtor of the attachment order on the basis of its contractual relationship with him, it will remain to be determined whether it would be suitable to request that the banks inform the debtor in all circumstances. It may be argued that the bank is best placed to inform the debtor because it will be in possession of his correct address. On the hand, it can also be argued that only formal service of the attachment order to the debtor by the court will guarantee that the debtor has actually been notified of the measure and can exercise his right of defence.

5.2.2. *Obligation of the claimant to proceed with the principal action*

The Hess report shows that in all Member States there is coexistence between provisional measures securing a claim and the proceedings on the substance of the claim.⁸⁴ No problem should arise in this respect where the case on the merits is already pending, since the court will assess whether the claim is well-founded. Where the creditor applies for a provisional measure prior to commencing the main proceedings, a number of Member States require that the main proceedings be commenced within a definite time period⁸⁵, be that specified in legislation or fixed by the court according to the circumstances. If the creditor fails to comply with this condition, some Member States provide that the provisional remedy ceases to exist *ipso iure* while others require the debtor to apply for the measure to be revoked or empower the court to cancel the measure *ex officio*.

In order to protect the debtor from merely vexatious attachment orders, it is suggested that the creditor should be obliged to commence the principal proceedings within a specified time frame under a European system. As to the details of such an obligation and the sanctions for non-compliance, it will have to be assessed, whether there is a need for harmonised rules or whether reference to the national law would be sufficient. Given the divergences between Member States' legal systems, it seems to be desirable to establish a European rule for the time limit within which the claimant has to commence the principal action.

5.2.3. *Objections to the attachment order and jurisdiction*

Where an attachment order has been issued *ex parte*, the general principles of fair procedure require that the debtor must have the opportunity to oppose the order. Consequently, all

⁸³ Hess report, p. 64: This corresponds to the situation in most of the national systems (references in footnote 341), see also p. 61 at footnote 313 and p. 103 at footnote 515 (service after the execution of the attachment).

⁸⁴ See Hess report, p. 132 et seq.

⁸⁵ Hess report, p. 133 with further references; see also answers to question 2.8.1 of the national reports from which the following examples are taken.

Member States (EU-15) grant the debtor that possibility⁸⁶. A European system therefore will have to deal with the questions as to the grounds and extent to which the debtor can object to the protective measure.

With regard to the possible grounds of objection, two types can be distinguished: The first type concerns the claim itself and opposes its non-existence or non-enforceability, so as to remove the "*fumus boni iuris*". The other type of objections concerns the urgency or necessity for the attachment order ("*periculum in mora*") (see the conditions of issue at point 3.2.1 and 3.2.2 above). It might also be necessary to distinguish between the situation in which the claimant has already obtained a judgment on the merits and applies for the attachment order while awaiting recognition of his judgment and the situation where he requests the order to be issued prior to such a judgment.

As to the latter type, the debtor should be able to object that "*periculum in mora*" was or is no longer given. In addition, the provision of another security should have an impact on the validity of the attachment order. Even though the claimant may have the right to ensure the enforcement of his claim, this does not encompass the right to have a specific security to cover the amount of the claim. The debtor should therefore be able to have the attachment order revoked if he offers another security to the creditor which is sufficient to cover the claim. In some Member States, the law provides explicitly that the attachment order has to be revoked in the case where the defendant provides another sufficient security.⁸⁷

As to the objections to the claim itself, any approach to a possible solution has to be more differentiated. A clear line of demarcation is necessary between the attachment procedure on the one hand and the proceedings on the merits on the other hand. It seems neither desirable to exclude all objections concerning the substance of the claim within the framework of an appeal to the attachment order nor to admit all of them irrespective of the proceedings on the merits. At the very least the court should have the discretion to recall the attachment order if the defender succeeds in establishing that the claimant has no stateable *prima facie* case on the merits.

If the defendant's objections are successful, the order should be revoked by the court or – as the case may be - be amended or restricted, for instance with regard to the amount to be secured.

On the question as to which court or public authority should be competent to deal with the objections of the defendant to the attachment order, Member States have adopted different solutions.⁸⁸ In some jurisdictions, the court granting the attachment is also competent to deal with the objections. In others, competence for assessing the debtor's objections lies with the enforcement authority. The Hess report revealed one common denominator in the law of Member States, namely that the court hearing the substance of the case always has competence in relation to the supervision of the provisional measures granted in ancillary proceedings.⁸⁹ The issue rather is whether any court other than that which granted the

⁸⁶ See Hess report, p. 64 with regard to final attachment orders.

⁸⁷ See for example section 923 German code of civil procedure.

⁸⁸ Cf. Hess Report, answers to questions 2.8.2 and 2.8.4. With regard to the attachment order, p. 64: "Whether the objections are heard by the enforcements organs, the enforcement courts or dealt with by the ordinary courts depends on the general structure of the enforcement process."

⁸⁹ Hess report, p. 133. As the Hess study shows, the coordination of provisional and main proceedings at the European level has to be improved, p. 135.

attachment order should be competent to consider or grant an application from the defender for recall or restriction of the order.

5.2.4. *Claimant's liability for damages caused by the attachment order*

In the context of protecting the debtor, the liability of the claimant for damages caused by an unjustified attachment order has to be discussed.⁹⁰ The question whether the claimant is liable for damages arises where the court order has been revoked and it is clear that the court would not have granted it on the basis of the then known circumstances.

The first issue to be considered is whether a uniform rule on the claimant's liability is needed. Most Member States oblige the claimant to compensate the debtor for his loss in some way or another⁹¹, which might argue against a harmonised rule. On a closer analysis, the conditions for compensation differ considerably from one Member State to another.⁹² In some Member States the claimant is liable regardless of his negligence or of his fault.⁹³ In these jurisdictions, the claimant's liability is regarded as necessarily resulting from the provisional enforcement of a title⁹⁴.

Other Member States provide for the claimant to be liable only in cases of negligence or intentional fault according to the general provisions on delict and tort.⁹⁵ Whether the claimant should be liable where he applied in good faith for the order depends on the decision as to who should carry the risk of the consequences of applying for an attachment order. If the claimant is to be liable regardless of his fault, he carries the risk that the requirements for the granting of the order were not in fact present at the moment of its granting. If the claimant were only to be liable in cases where he acted in bad faith or with (gross) negligence, the risk of a wrongly granted attachment order would lie with the defendant.

Given the wide differences in the Member States, it is suggested that the European system should deal explicitly with the question of who has to bear the risk of an unjustified attachment order.

5.3. **Ranking of competing creditors**

The Hess study shows that approaches in the Member States differ as to the effects of a protective order on the ranking of creditors. These differences are due to the diverging structures of their respective enforcement laws.⁹⁶ According to the laws of those Member States whose enforcement laws are based on the "first come, first served" principle⁹⁷, the attachment order can have an impact on the ranking of creditors with regard to the attached account. In these Member States, the time of the implementation of the attachment order is material to the ranking of competing creditors. In some jurisdictions, the claimant acquires a

⁹⁰ Hess report, p. 118 with footnote 759 in connexion with footnote 583.

⁹¹ Hess report, p.102, p. 130 and p. 133.

⁹² See the answers to the questionnaire 2.8.4. – In some Member States the claimant is not liable unless he acted without the "normal prudence".

⁹³ Hess report p. 130 and answers to questionnaire on provisional and protective measures 2.6 and 3.6

⁹⁴ Hess report, p. 107 (and FN 583).

⁹⁵ Answers to questionnaire 3.6

⁹⁶ Hess report, p. 72 et seq.

⁹⁷ Hess report, p. 72: Austria, Denmark, England, Germany, Ireland, Portugal, Spain Scotland and Sweden. France applies the principle in attachment proceedings.

lien on the balance standing to the debtor's credit in the attached funds and the ranking acquired by such lien persists in an ensuing enforcement procedure⁹⁸.

By contrast, other Member States whose enforcement laws are based on a "group principle" treat the claims of those creditors belonging to the same group of creditors equally, irrespective of any protective enforcement measures taken. Under the "group principle", the attachment order does not grant any advantage to the creditor vis-à-vis competing creditors of the same group. In both types of legal system, the issue of the ranking of competing creditors has to take into account additionally that there might be creditors with preferential rights who have to be satisfied prior to others⁹⁹.

In some common law jurisdictions, notably England, Wales and Ireland, freezing orders do not affect the ranking of competing creditors at all: The creditor is entitled only to a security and a freezing injunction does not create any rights in *rem*¹⁰⁰.

Having scrutinised the differences between the legal systems and their impact on an attachment order¹⁰¹, the Hess study holds that the divergences between a distribution according to priority and under group schemes are not in all cases of paramount significance.¹⁰² Even more functional convergence between the systems can be identified when the comparison is extended to creditors who are preferentially treated.¹⁰³ In view of these findings and given that the differences outlined above illustrate that the issue of competing creditors is very complex, the Commission is of the view that it might go too far to attempt a harmonisation of this issue in the context of the creation of a European system for the attachment of bank accounts. Thus, it is suggested that the ranking of competing creditors be left to the applicable national law.

5.4. "Transformation" into an executory measure

The question arises as to whether and if so how an attachment order could be transformed into an executory measure when the claimant wins the case on the substance. From the creditor's point of view, the most important issue in this situation is that he should receive payment of the amounts awarded by the court with as few intermediary steps required as possible. In addition, the solution adopted should allow the creditor to keep his rank vis-à-vis competing creditors in those Member States where freezing orders affect the ranking of creditors (see above at 5.3).

In many Member States, the freezing of bank accounts easily links in with the basic structure of proceedings for the enforcement of a final attachment order. These proceedings are effected in a two-stage process: In a first step, the attachment order is issued and the bank is notified of the attachment; in a second stage, the claim is transferred to the judgment creditor,

⁹⁸ Hess report, p. 131.

⁹⁹ Some Member States have abolished all kind of preferential rights of creditors, see Hess report, p. 50 with FN 268 - As to the maintenance of the debtor's family see under point 4. – As to the treatment of creditors with a claim resulting from public law and those with claims following from private law, see Hess report, p. 51.

¹⁰⁰ See Hess report, p. 131

¹⁰¹ P. 72 seq.

¹⁰² See Hess report, p. 74; 95.

¹⁰³ P. 73 in detail.

who may collect the money from the bank. The provisional seizure of the account corresponds to the first phase of the procedure for the final enforcement of the attachment order¹⁰⁴.

In line with the approach adopted by these jurisdictions, it would be conceivable that a creditor, having obtained an enforceable judgment against the debtor, could apply for a "second stage" executory measure being issued which would "transform" the provisional attachment of the account into a final one which would permit the transfer of the amounts once it is served on the bank holding the account. Member States' legal systems vary as to which court or enforcement authority would be competent to issue such an executory measure. In some Member States, the order can be issued by the court deciding on the merits, in others, it would need to be made to the court at the place where the account is situated or the claimant is domiciled. It would need to be assessed whether this issue can be left to national law or whether a European rule is necessary to avoid that creditors who have used the European system to protect their rights are subsequently disadvantaged in the enforcement stage.

¹⁰⁴ Hess report, p. 61 with further references.