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CCBE RESPONSE 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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I. INTRODUCTION

The Council of Bars and Law Societies of Europe (CCBE) represents, through its member bars and law societies of the European Union and the European Economic Area, more than 700,000 European lawyers. In addition to membership from EU bars, it has also observer representatives from a further six European countries' bars. The CCBE responds regularly on behalf of its members to policy consultations which affect European lawyers.

This paper is the response of the CCBE to most questions raised in the Commission document regarding the attachment of bank accounts. The CCBE's remarks follow the order of the questions raised by the Commission in its consultation document.

II. ANSWERS TO THE QUESTIONS RAISED BY THE COMMISSION

Question 1: *Do you see a need for a Community instrument for the attachment of bank accounts as a way to improve debt recovery in the EU? If so, should it create a self-standing European procedure or harmonise Member States' legislation on the attachment of bank accounts?*

The CCBE has no data on the issue of whether there has been a statistical increase in cross border debt collection in the EU although this seems likely given the rise in cross border trade attributable to the Euro, and general tendencies toward economic integration. There can be no doubt however that the issue of enforcement of Attachments is a genuine problem, and probably a deterrent to cross border trade. It is logical and defensible that the process should be facilitated by Community action. Such an initiative is consistent with other steps to improve judicial cooperation and clarify jurisdictional issues across the Union currently under consideration. The increasing cross-border trade within EU, the single currency and the enlargement of the EU speaks in favour of improved judicial cooperation within the EU in this area. In our view, the need is imminent and cannot wait full harmonization.

The key issue in considering such an instrument is of course the balance between the need on behalf of the claimant for an effective and expeditious procedure, and the natural and substantive justice to be afforded the debtor, particularly where the action for attachment precedes the judgment on the substantive claim, and where the action is ultimately proved to be unfounded.

The CCBE believes that it is unlikely that the extent of the difficulty justifies full harmonization of Member State law in this area, and that the expectations of purely domestic litigants in relation to established principles and procedures at Member State level should be respected. Moreover, substantial changes to Member State law in this area are likely to delay and possibly jeopardise the initiative. Moreover, the CCBE believes that as a matter of principle harmonisation of substantive Member State law is only merited where the problem is of a magnitude that the continuance of differences even in purely domestic cases would act as a potential impediment to trade or would perpetuate legal uncertainty. This is not the case in the present circumstances. THE CCBE therefore favours a self standing procedure.

It is arguable that dual procedures for domestic and cross border claims may prove confusing to litigants, but the CCBE believes that in practice few difficulties will arise.

Question 2: *Do you agree that a Community instrument should be limited to protective orders preventing the withdrawal and transfer of monies standing to the credit of bank accounts?*

The CCBE agrees that the attachment should be protective only. It should be made clear that the creditor will take no proprietary interest in the assets.

Question 3: *Should an attachment order be available in all of the four circumstances outlined above in paragraph 3.1 or only in some of them?*

In accordance with most Member State law in this area, the CCBE believes that the attachment order should be available at any stage of proceedings. This is a necessary condition of effectiveness from the claimant's point of view.

Question 4: *What onus should lie on the creditor to persuade the court that he has a claim against the debtor sufficient to justify the granting of an attachment order?*

Clearly the claimant must present some sort of a case. There must be a threshold such that there is a certain degree of probability of likelihood already at the outset that the claimant's claim will prevail. It would however defeat the object of the procedure if the standard of proof applicable to the full trial of the claim were to apply where the application for attachment is made prior to or early in the proceedings. It seems likely therefore that the appropriate solution lies somewhere between a normal judicial standard of proof and a bare statement of the alleged facts.

This issue is complicated by a lack of precision in respect of the different approaches to this issue in national law, an issue which may be exacerbated by the establishment of any Community instrument in several languages.

In the view of CCBE, the case, while falling short of the kind of pleading which would be required in a full trial of the merits, needs to present nevertheless convincing legal and evidential arguments to suggest that on balance the case is likely to succeed at full trial.

This may be summed up in the expression applied in English law "a good arguable case." This has been explained as follows:

It indicates that though the court will not at this stage require proof to its satisfaction, it will require something better than a mere prima facie case. The practice, where questions of fact are concerned, is to look primarily at the plaintiff's case and not to attempt to try disputes of fact on affidavit; it is of course open to the defendant to show that the evidence of the plaintiff is incomplete or plainly wrong. On questions of law, however, the court may go fully into the issues and will refuse leave if it considers that the plaintiff's case is bound to fail.

So this is not merely a prima facie case, but a standard that can best be described as a good *prima facie* case. The CCBE supports this approach.

It should be noted that the Green Paper does not make a distinction whether the creditor has or has not an enforceable right. Even with an enforceable right, he/she should request an order from the judge. The justification of a justifiable claim comes therefore from the enforceable right.

Question 5*: Should urgency be a condition for granting an attachment order prior to obtaining an enforceable title? If so, how should this condition be defined?*

The CCBE believes that urgency should be defined in a manner consistent with many States on this issue, namely a real risk that the relevant assets will be dissipated i.e. removed, disposed of or that there is a risk of disloyalty or collusion and as a consequence the claimant would be unable to enforce the claim.

Given that the Green Paper does not seem to have made a distinction between the fact that the creditor has or has not a right, it has neither made a distinction between the condition to be imposed upon him/her. Yet, it seems excessive to impose on a creditor with a right to demonstrate the urgency or the real risk. He/she should be able to enforce it without any condition. One should go till the end of the reasoning and wonder about the use of an order. Does it make things easier than the current situation which enables to have the right recognised in the State where it should be enforced? Maybe the new proposed system is faster? In any case, the question should be addressed.

Question 6: *Should the court have discretion when granting an attachment Order to require the creditor to provide a security deposit or a bank guarantee? How should the amount of any such security deposit/guarantee be calculated?*

The CCBE believes that the law determining the damaged payable for an unfounded attachment should be the law of the domicile of the debtor. This presents an apparent problem if the judge in the court seised (assuming it is not the court of the domicile of the debtor) is unable to make an accurate assessment of damages for the purpose of determining an appropriate level of guarantee. However, it would be wrong in principle for this to be an impediment to the provision of such a guarantee, which may be an essential form of security for the debtor. Something is better than nothing in this respect. The CCBE therefore favours a wide degree of discretion for judges to require appropriate security, and believes that the extent of such guarantee should be calculated according to an approximation of likely losses in accordance with the law of the court seised.

There is a further consideration here which is not raised in the consultation - that of the potential liability of the creditor to third parties who suffer loss as a result of the attachment. This is an important issue which merits further consideration.

Question 7: *Should the debtor be heard or notified prior to the granting of a bank attachment?*

In the situation, in which there is no judgement (adjudication), it is necessary to balance two requirements:

1. The interests of the creditor, to avoid that the debtor should dissipate funds held in foreign bank accounts as soon as the prejudicial initiative has come to his knowledge;
2. The interests of the debtor in defending himself from future actions initiated by the creditor, without grounds, or with the objective of causing disruption (for example in the event that the debtor has funds in the State).

The CCBE believes that a provision that the debtor should be heard prior to the granting of a bank attachment would seriously undermine the effectiveness of the creditor's action. The debtor must be given an opportunity to contest the order, but not in such a manner that would allow the claim to be frustrated. The debtor is offered some protection against illegitimate actions by the onus placed on the

creditor (see answer to Question 4). Potential damages done to the defendant can be balanced by the requirement for a guarantee and the speed of the procedure.

Question 8: *What should be the minimum degree of account information required for the issue of an Attachment Order?*

The CCBE believes that the essence of this question should be to enable the court and banks to identify the debtor or alleged debtor without any risk of mistake. It must be recalled that orders for freezing bank accounts are most appropriate when the bank account(s) is/are a conduit for the proceeds of crime, fraud or dishonest dealing. Precise identification of the alleged debtor is important but not the provision of account numbers or branch numbers which plays into the hands of dishonest businessmen channelling funds through a series of accounts.

Moreover the question raises, in concrete form, a wider: should the remedy act *in rem* (i.e. against the asset in question), rather than *in personam* (i.e. against the person)? Identifying a specific account is, of course, essential if the remedy is *in rem* – execution of the order is dependent upon having the information which is sufficient to identify the specific asset. The argument against requiring that information is that the availability of information regarding bank account numbers varies between Member States, as indeed do the numbering systems themselves. An *in personam* remedy is likely to be more effective in practice and should be accompanied by an information requirement sufficient to identify the person whose assets are to be attached. Then the risk of a bank attaching the wrong account should be very low. Thus, there is minimal risk with an *in personam* remedy, and it avoids an over-concentration on a particular piece of information, namely the precise number of the account(s) to be attached.

Additionally, the defendant/debtor can be required to swear and file evidence of his assets. The defendant/debtor will then be required to disclose the existence of other bank accounts and, if it/he fails to do so, will be in contempt of court.

Question 9: *Do you agree that the courts having jurisdiction for the merits of the case under relevant Community law and/or the courts where the account is situated should be competent to grant an attachment order? Should the court of the defendant's domicile always have jurisdiction to issue an attachment, even if it does not have jurisdiction under Regulation 44/2001?*

Given that the purpose of the European attachment order is to provide flexibility, convenience and effectiveness to the creditor, jurisdiction should be granted to any of the three jurisdictions potentially linked to the case - that of the debtor, the creditor and the jurisdiction where the bank account is situated. Any court outside his own jurisdiction is likely to be inconvenient for the debtor, but limiting the action to the debtor's court of domicile would seriously detract from the scope and effectiveness of the measure, since there would be no particular advantage of the procedure to the creditor save where the account is located outside the debtor's domicile.

Question 10: *Do you agree that the attachment should be limited to a specific amount? If so, how should this amount be determined?*

For the reasons stated in the consultation, the CCBE agrees that the attached sum should be limited to a specific amount taking into account a reasonable estimate of costs and interest. This would be at the discretion of the judge.

Question 11: *Do you consider that the banks should be paid for the execution of an Attachment Order? If so, should the amount to which they would be entitled be capped? Should the creditor have to pay the bank in advance or should the amount due be deducted from the credit balance of the account seized?*

Banks should be allowed to levy reasonable charges for putting the attachment in place.

However, banks should give details on the charges and therefore the cost of the enforcement of an attachment order. These charges should be known by making them available to the clients. The cost of an attachment should be borne by the debtor.

Question 12: *If an attachment order is to extend to several accounts, how should the sum to be seized be allocated among each of the accounts?*

If a particular fund cannot be put aside through a freezing order, the attachment order would apply to *all* accounts covered by the order. As part of the order, the defendant/debtor should be required to provide formal evidence of his means. False evidence of means should be a contempt of court punishable across the EU. Where the attachment order has been granted without notice to the defendant/debtor, the attachment order should provide expressly for the matter to return to court within a short period (say 7 days) of the order being made. In any event, the attachment order should expressly provide for the defendant/debtor to apply to court on short notice (say 48 hours) to the claimant/creditor.

Question 13*: How should the attachment of joint and nominee accounts be dealt with?*

In the case of attachment of a joint account, the attachment should have effect on the total amount deposited under the principle of merger (fungibility). To make a distinction, under the pretext of safeguarding the rights of the co-holder, opens a door to fraud.

The question of nominee accounts is different. Unless the specific hypothesis can be proved that the account does only receive funds from the attached debtor, the request of authorisation of attachment should only be granted if a third party is party to the proceedings; and it is up to the creditor to put forward the same elements of proof as against the debtor.

Question 14: *Should the question whether amounts are exempt from execution be dealt with ex officio when issuing/executing the attachment or should the onus be on the debtor to object on this ground? How and by whom should the amount exempt from execution be calculated and on what basis?*

Consistent with the law of most Member States, it is important that the bank attachment should not be unnecessarily oppressive. Unlike a garnishee order where a reasonable judgment might be made about the necessary degree of exempt funds, - for example that the debtor should retain a fixed percentage of the attached income -, with respect to attached bank accounts it is not possible to form an accurate judgment as to whether the degree of attachment is oppressive in the absence of comprehensive information about the debtor's finances. The most effective solution is therefore that the onus should be placed on the debtor to apply for relief and to establish that funds are required for alimentary needs and perhaps for the continuance of a business, and that the attachment limits the availability of such funds. However consideration may be given to a generic formula in the Community instrument which defines the categories of needs which may be relevant (such as those referred to

above). This formula could then be applied in the debtor's jurisdiction when the debtor makes his application.

At the issuance of the authorisation of attachment, the judge cannot assess the needs of the debtor who is not heard. But from the enforcement of the attachment on, the debtor cannot use his/her account; and the time necessary to require a grant of a minimum amount would be excessive. The only solution is that this minimum amount is established by the Community text or by each national law and that the application is made automatically by the bank unless the debtor has the possibility to an appeal to claim sums above the minimum amount.

Question 15: *Do you agree that the exequatur procedure should be abolished for the attachment order?*

Question 16*: How should an attachment order be transmitted from the issuing court to the bank where the account is situated? What time limit should the bank have to respect in order to implement an attachment? What should the effect of an attachment order be on ongoing operations?*

Question 17: *Do you agree that upon receipt of an attachment, it should be the duty of the banks to inform the enforcement authority whether and to what extent an attachment has successfully secured the monies liable to be paid by the debtor to the creditor?*

In relation to these questions the CCBE comments that it is important that the bank is placed under a legal duty to execute the attachment as soon as is reasonably practicable. This is imperative to ensure that the creditor's action is effective and cannot be frustrated by bank inefficiency. Since the bank may be potentially liable to the creditor for any delay in executing the order, the appropriate standard of response should be clearly defined. The question of bank liability is not addressed in the consultation, yet is clearly relevant and merits further consideration.

Furthermore, the interest of the banks, payors' and payees' interest must also be taken into account. We think the starting point should be the relevant policies, provisions or rules governing the payment systems. Only such payments that have not passed the point of no return in the sense that the payor can no longer stop them, should be allowed to be executed by the bank, on the other hand such payments that have not passed the point of no return should be stopped by the bank. The relevant point of time when a duty arises on the bank to stop payments should be when they have been served the attachment order by the court. We also agree that the bank's liability should be considered.

Question 15: the exequatur procedure should be abolished for the attachment order.

Question 16: with regard to effects on ongoing operations, it does not seem possible that the attachment opposes them. The creditor who has received a payment before the attachment, i.e. a usual payment, must not have it withdrawn because another creditor performed an attachment (except for fraud).

Question 17: it is necessary that the bank informs the enforcement authority of the existence, or on the contrary the absence, of funds sufficient on the date of the attachment. This will enable the creditor to stop paying useless charges, or in the other case to opt for other measures of enforcement. If such obligation of information is not put on the bank, no one could criticise multiplying attachment for security reasons.

Question 18: *When and by whom should the debtor be notified formally that an attachment has been granted and taken effect?*

The CCBE agrees that the debtor should be notified by the court or enforcement authority.

However, the bank notifies it, but it is necessary that the information agent does so as well without delay so that the debtor can claim his/her rights.

Question 19: *Should the attachment be revocable or lapse automatically if the creditor does not file the principal action within a specific time period?*

The attachment should be revocable on the application of the defendant/debtor to the ordering court. One ground for revocation would be the failure by the claimant/creditor to serve a detailed substantive claim within a reasonable time. A reasonable time will not be a fixed time, and will vary according to the complexity of the substantive claim. For this reason, it is undesirable for any time-frame to be fixed; nor is it desirable that the attachment order should lapse automatically.

Question 20: *On what grounds and to what extent should the debtor be entitled to object to the order for an attachment? Which court should be competent to hear the debtor's objection against an attachment?*

It is logical that the grounds for disputing the attachment should be harmonised in the Community Instrument.

The debtor should be able to contest an authorisation on the basis of the same criteria as those which enable its issuance.

The CCBE questions the wisdom of widening the competence to hear the debtor's objection beyond the ordering court. It could prove problematic to have two different courts deciding on the issuance and the revocation of the attachment.

Question 21: *Should the creditor's liability in case the attachment proves to be unfounded be harmonized on a European level and, if so, how?*

The CCBE believes that the creditor's liability should be determined in accordance with the law of the debtor's domicile. This accords with both party's expectations.

Besides, the Community instrument whose creation is considered in the Green Paper, concerns a specific enforcement means. Its scope of application must be limited by its object. Yet, the question of responsibility has another nature. A simple procedural law cannot address questions such as the nature of the fault required to claim damages or the extent of these damages. These issues must be left to national laws for the time being.

Question 22: *Should there be European rules that determine the ranking of competing creditors? If so, which principle should apply?*

The justification for the European Attachment Order is a particular problem relating to enforceability. There is neither need nor justification on the basis of any difficulties arising from a lack of harmonization for considering the separate issue of ranking of creditors. This issue is not strictly relevant for the purpose of facilitating enforcement. As for question 21, this goes beyond the procedural law. It is linked for example with the rank of privileges which can't be address through this means.

Question 23: *How should an attachment order be transformed into an executory measure once the creditor has obtained an order which is enforceable in the Member State where the account is situated?*

Obtaining an enforceable right should automatically be transformed without new judicial proceedings.