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**on making more efficient the enforcement of judicial decisions
within the European Union:**

Transparency of a Debtor's Assets

Attachment of Bank Accounts

Provisional Enforcement and Protective Measures

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List of Abbreviations

Art.	article
All ER	All England Law Reports
BAG	Bundesarbeitsgericht (Federal Labour Court)
BGBI.	Bundesgesetzblatt (Federal Law Gazette)
BGH	Bundesgerichtshof (Federal Court of Justice)
Bull. civ.	Bulletin des arrêts de la Cour de Cassation: chambres civiles (publication of decisions of the French court of cassation)
BVerfGE	Entscheidungen des Bundesverfassungsgerichtes (German Federal Constitutional Court Reporter)
C. A.	Court of Appeal
CCP	Code of Civil Procedure (Greece)
cf.	confer
chap.	chapter
civ.	civil
CJJA	Civil Jurisdiction and Judgements Act 1982
CJPr	Code of Judicial Procedure (Sweden)
CLC	Commercial Law Cases
CMLR	Common Market Law Reports
CNJH	Chambre National des Huissiers de Justice (National Chamber of Bailiffs)
COM	Commission documents (European Commission)
CPC	Codice di Procedura Civile (Italian Code of Civil Procedure)
CPR	Civil Procedure Rules (England)
C.P. Rep.	Civil Procedure Reports
DEE	Dikaio Etairion ka Epichiriseion (greek journal)
Dir.	Directive

EBR	European Business Register
EC	European Communities
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ECJH	European Convention of Human Rights
ECR	European Court Reports
ed.	edition
EEC	European Economic Community
E. L. Rev.	England Law Review
e. g.	for example (<i>exempli gratia</i>)
EG InO	Einführungsgesetz zur Insolvenzordnung (Introductory Law of the German Insolvency Law)
EO	Exekutionsordnung (Austrian Enforcement Code)
et seq.	et sequens
EU	European Union
EuGH	Europäischer Gerichtshof (European Court of Justice)
EuGVÜ	Übereinkommen über die gerichtliche Zuständigkeit und die Vollstreckung gerichtlicher Entscheidung in Zivil- und Handelssachen (Convention of September 27, 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters)
EuJL	European Journal of Law Reform
ex.	example
fn.	footnote
GVGA	Geschäftsweisung für Gerichtsvollzieher (Procedural and Administrative Directive for Bailiffs in Germany)
HGB	Handelsgesetzbuch (German Commercial Code)
H. L.	House of Lords

ICLQ	International and comparative law quarterly
IECL	International Encyclopedia of Comparative Law
ILA	International Law Association
I.L.Pr.	International Litigation Procedure
int.	international
IPrax	Praxis des internationalen Privat-und Verfahrensrechtes
JAI	Aktenzeichen für die Studie
JCP	Jurisclasseur periodique (journal)
JZ	Juristenzeitung
KB	Law Reports King's Bench Division (1891)
LEC	Ley de Enjuiciamiento Civil (Spanish Code of Civil Procedure)
NCPC	Nouveau Code de Procedure Civile (French Code of Civil Procedure)
NJW	Neue Juristische Wochenschrift
nos.	numbers
OGH	Oberster Gerichtshof (Austrian Supreme Court)
OJ C	Official Journal of the European Communities containing Information and Notices
OJ L	Official Journal of the European Communities containing Legislation
p.	page
PD	Law Reports Probate Division (1875 – 1890)
Prel. Doc.	Preliminary Document
QB	Law Reports Queen's Bench Division (1952-)
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
R.C.D.I.	Revue Internationale de Droit Comparé
RdC	Recueil des Cours de l'Academie de la Haye/Collected Courses of the Hague Academie of International Law

Rec.	S.114, Fn. 640
Reg.	Regulation
Revue critique	
DIP	Revue critique de droit international privé
RGZ	Entscheidungen des Reichsgerichtes in Zivilsachen (Reporter of the Federal Supreme Civil Court of the former German Reich)
Riv. Dip	Rivista di diritto processuale civile
RIW	Recht der Internationalen Wirtschaft
Rpl.	Retsplejeloven (Code of Civil Procedure of Denmark)
RSC Ord.	Rules of the Supreme Court order 49
SCHUFA	Schutzgemeinschaft für allgemeine Kreditsicherung
sec.	section
seq.	an the following
Sl.	Sammlung
ss.	
UIHJ	Union internationale des Huissiers de Justice (International Union of Bailiffs)
UKHL	House of Lords of the United Kingdom
VAT	Value Added Tax
WLR	Weekly Law Reports (1953-)
ZEuP	Zeitschrift für Europäisches Privatrecht
ZPO	Zivilprozessordnung (German Code of Civil Procedure)
ZRHO	Rechtshilfeordnung in Zivil- und Handelssachen (Law of judicial assistance in civil and trade matters)
ZZP	Zeitschrift für den Zivilprozess

A. Introduction

I. Harmonisation of enforcement proceedings in Europe

1. Structural differences between the national procedures

Until now, the regulation of enforcement proceedings in Europe has not been touched directly by the Community's activities in procedural law. They are still matters of internal legislation, reflecting the different legal (and procedural) cultures of the Member States¹. At first sight, considerable and structural differences can be seen.² Enforcement in the European countries is carried out differently and much depends on the qualification and the organisation of the enforcement organs (and their staff). Some Member States (eg, Austria, Spain, Sweden) provide for "centralised systems", with a single powerful enforcement organ (often an enforcement court or an central enforcement agency) possessing an all-embracing competence (and responsibility), while others (especially Germany and Greece) confer authority and responsibility for different enforcement proceedings on several organs (bailiffs, courts, public notaries). In Ireland and England, but also in Spain, enforcement proceedings are conducted under the control of the court, while in Sweden and Finland enforcement is carried out by central administrative authorities³ which are also competent for the enforcement of public debts. In some jurisdictions (France, Portugal, the Benelux and Scotland), enforcement is carried out by enforcement agents (*huissiers de justice*) acting as independent professionals, while in other Member States (Germany, Austria) bailiffs are civil servants under the control of the enforcement court. Accordingly, the legal relationships between the creditor, the enforcement organ and the debtor are weighted differently: in some Member States, enforcement agents control the whole enforcement process and have considerable discretionary powers (especially the *huissiers de justice* in France

¹ Tarzia, *Aussichten für eine Harmonisierung des Zwangsvollstreckungsrechts in der Europäischen Union*, 4 *Zeitschrift für Europäisches Privatrecht* 231, 236 et seq. [1996]; Isnard/Normand (ed.), *L'aménagement du droit de l'exécution dans l'espace communautaire – bientôt les premiers instruments* (2003).

² Cf. W. Kennett, *The Enforcement of Judgments in Europe* (2000), ch. 3, pg. 61 – 98; Kerameus, *Enforcement in the International Context*, 264 *RdC*, 215 et seq. (1997)

³ In Switzerland (not an EU Member State) enforcement is also carried out by federal administrative bodies (*Schuldbetreibungsämter*).

and the Benelux and the Austrian enforcement court), while in other Member States (Germany, Greece, Ireland), the creditor initiates and has control over the progress of the enforcement proceedings.⁴

Structural differences also exist in later stages of the proceedings, especially in relation to the distribution of proceeds. Several Member States (Germany, Austria, England, Portugal, Scotland and France in garnishment proceedings) apply a “first in time, first in right” principle, according to which the first creditor gets priority over other competing creditors. The money raised from the assets seized will be made available to the first creditor, later creditors will receive remaining funds depending on the point at which they attached the asset.⁵ However, in several jurisdictions no priority is conferred on the first creditor and therefore enforcement also includes a scheme for the distribution of the proceeds among competing creditors (Italy, Belgium, Luxembourg). In these jurisdictions, the creditors are instead treated as a single body and no individual creditor’s wishes may be given overriding significance. The result is that these enforcement proceedings come close to insolvency.⁶ The different distribution schemes influence the structure of enforcement proceedings considerably.

2. Comparative research on enforcement proceedings

Any European approximation of national enforcement system requires sufficient knowledge of the functioning of the national legal systems. However, until recently, enforcement proceedings have not been a favourite subject of comparative research. This was mainly because of practical difficulties, as legal comparisons must take into account the different enforcement practices and cannot be reduced to a mere description of the enforcement codes.⁷ In some Member States, enforcement proceedings are mainly recorded in a form intended for use by practitioners⁸ rather than as a matter for academic research and therefore reliable information is often

⁴ W. Kennett, “General Report: Enforcement”, in: Storme (ed.), *Procedural Laws in Europe* (2003), p. 81, 94-107, stressing different “enforcement cultures”.

⁵ Cf. Sec. 804 (2) and (3) German Code of Civil Procedure, Kerameus, IECL 10-118 et seq.

⁶ Nevertheless, Member States following the “group principle” also provide additional insolvency procedures, see de Leval, *Seizure and Over-Indebtedness in Europe* (1997).

⁷ Kennett, *Enforcement of Judgments*, p. 61-62; generally Tarzia, *Harmonisation ou unification transnationale de la procédure civile*, Riv. Dip. 2001, 869 et seq.

⁸ This is especially the case in the common law world (England and Ireland).

lacking.⁹ Besides, the traditional distinctions between different “legal systems” (Common law, Romanic legal systems, Scandinavian and Central European legal systems¹⁰) does not provide much guidance for comparative research of enforcement proceedings¹¹.

During the last decade, an increasing interest in comparative studies of enforcement procedures can be detected. In the European Union, the prospect of future harmonisation of enforcement laws (see infra II) has certainly increased comparative research by academics.¹² In the European Judicial Area, where the free movement of judgments is guaranteed, creditors also have a practical need to obtain information about national enforcement proceedings in Europe.¹³ “Enforcement in the International Context” is increasingly discussed in the legal literature¹⁴.

3. Territoriality as a guiding principle

An additional reason for the lack of knowledge of the national laws may be found in the principle of territoriality. According to this traditional approach, enforcement measures are sovereign acts of the states. Therefore, enforcement is strictly territorial; enforcement measures with a trans-border effect are considered an infringement of the territorial sovereignty of the affected state and therefore

⁹ A comprehensive introduction to the Irish enforcement system is contained in the Irish Nation Report, p. 1-12; to the Spanish enforcement system in the Spanish Report, pg. 1 et seq.

¹⁰ This segregation has been reduced by the disappearance of the former “Socialist law family”. However, there are structural differences between the “common and continental” systems.

¹¹ Different opinion Kerameus, *Enforcement Proceedings*, in: IECL XIV, Chap. 10 (2003), distinguishing Romanic, Central European, Common Law and Former Socialistic Systems.

¹² This prospect was raised by Art 12 of the Proposal for a Directive of European Procedural Law („Storme group“) in 1994, see Storme (ed.), *L'approchement du Droit Judiciaire de l'Union Européenne* (1994), 185-219; infra at V 1.

¹³ A useful guide from the practitioner’s perspective is provided by Weißmann/Riedel, *Handbuch der internationalen Zwangsvollstreckung* (loose-leaf edition). Kaye (ed.), *Methods of Execution of Orders and Judgments in Europe* (1996). Important comparative research was undertaken in several seminars organised by the Union Internationale des Huissiers de Justice, Caupain/de Leval (ed.), *L’efficacité de la justice civile en Europe* (1999); Verbeke/Caupain (ed.), *La Transparence patrimoniale – Condition nécessaire et insuffisante du titre conservatoire européen ?* (2000); Isnard/Normand (ed.), *Nouveaux droits dans un nouvel espace européen de justice : Le droit processuel et le droit de l’exécution* (2002); Isnard/Normand (ed.), *L’aménagement du droit de l’exécution dans l’espace communautaire – bientôt les premiers instruments* (2003).

¹⁴ This term was used as a programmatic title of his Hague lecture of 1997 by Kerameus, 264 RdC 181 et seq. [1997].

forbidden¹⁵. The principle has been clearly stated by *F. A. Mann*¹⁶ in his Hague Lecture on: States are not allowed to send troops or bailiffs in a foreign country¹⁷.

Yet, territoriality is not an absolute paradigm. It can be limited or even over-ridden by competing principles. In the Common law world, the principle of comity among nations may overcome the territorial approach to enforcement and favour a mutual cooperation between courts and administrations¹⁸. A striking example is insolvency matters¹⁹, where territoriality lost its significance during recent decades and has been replaced by the principle of “universality”²⁰. According to the concept of “universality” bankruptcy orders are recognised (and enforced) in other states²¹, the administrator is empowered to collect the debtor’s assets located abroad²² and the debtor must disclose the whereabouts of his assets wherever they are located.²³ As the objection and the structures of insolvency and enforcement proceedings are very similar²⁴, it seems (at least in principle) conceivable that the territoriality paradigm in enforcement matters would be replaced by closer cooperation between the national organs responsible for enforcement proceedings.

In the European Judicial Area, the former territoriality paradigm is changing. Creditors are entitled to seek efficient enforcement measures without discrimination (Article 12 EC-Treaty). Further, new Community legislative instruments show that the

¹⁵ Bertele, *Souveränität und Verfahrensrecht* (1998), p. 65 et seq.

¹⁶ F.A. Mann, 132 *Recueil des Cours* 166 [1971].

¹⁷ However, in modern enforcement systems bailiffs are not similar to soldiers (or policemen), but stand between creditors and debtors when collecting debts. Therefore, a modern bailiff is considered as a independent and impartial professional who may (at least to some extent) adjust the relation between the parties when collecting debts – he may act as a “balance wheel” between the competing interests of a creditor and the protective needs of the debtor, see Verbeke, *Execution Officers as a Balance Wheel in Insolvency Cases*, 9 *Tilburg Foreign Law Review* 7, 15 et seq. [2001]. Yet, this approach, which renders enforcement proceedings similar to mediation, is not common to all Member States, Kennett, *General Report Enforcement*, in: Storme (ed), *Procedural Laws in Europe* (2003), p. 81, 94-107.

¹⁸ Schlosser, *Jurisdiction and International Judicial and Administrative Cooperation*, 284 *Recueil des Cours* 9, 334 et seq. [2000].

¹⁹ These developments are described by Schlosser, 284 *Recueil des Cours* 9, 227 et seq. [2000].

²⁰ In the European Judicial Area, territoriality has been largely abandoned by the Council Regulation of 29 May 2000 on insolvency proceedings (“Insolvency Regulation”) n° 1346/2000/EC, OJ L 160 of 30 June 2000, p. 1 – 13.

²¹ Articles 16 et seq., 25 et seq. Insolvency Regulation.

²² Articles 18 et seq. Insolvency Regulation.

²³ Schlosser, 284 *Recueil des Cours* 9, 231-232; infra at B IV 3.

²⁴ Both proceedings are aimed at the collection and satisfaction of the creditor’s claims by access to the assets of the debtor.

principle of territoriality has been modified and, in many respects, superseded by new forms of judicial cooperation²⁵. Principles of Community law such as mutual trust and mutual recognition replace the former principles based on territoriality.²⁶ Recent decisions of the courts of the Member States show that cross-border garnishment within the European judicial area has become a reality.²⁷ There is particular interest in the obtaining provisional and protective measures and their extraterritorial enforcement.²⁸

4. Converging trends in European enforcement procedures

Despite the structural differences between the national enforcement systems, there are several common elements. Most of the European legal systems have deep roots in the Roman legal system.²⁹ During the 19th and early 20th centuries, the French Code of Civil Procedure was the predominant influence on the development of procedural laws (including enforcement systems) in continental Europe.³⁰ In the late 20th century, many Member states faced problems as a result of cumbersome enforcement systems³¹. Consequently, the efficiency of the judiciary, the use of technological innovation (electronic data processing) and the “liberalisation of the judiciary” have become much-discussed subjects³². Austria, Finland, France, Portugal, Spain and, to a limited extent, Germany adopted extensive procedural reforms in order to improve the efficiency of enforcement, while in other Member States (England, Italy, Scotland) reform projects are being discussed³³.

²⁵ Cf. Hess, *Nouvelles techniques de la coopération judiciaire transfrontière en Europe*, 92 *Revue critique de droit international privé*, 215 et seq. [2003].

²⁶ Cf. Hess, *The Integrative Effect of European Civil Procedure Law*, 4 *EuJL Reform* 3 [2002].

²⁷ See *infra* C II 1-2.

²⁸ Stürner, *Generalbericht: Einstweiliger Rechtsschutz*, in: Storme (ed.), *Procedural Laws in Europe* (2003), p. 143 et seq.

²⁹ Baur/Stürner, *Zwangsvollstreckungsrecht* (12th ed. 1995), n° 3.2-3.8.

³⁰ Baur/Stürner, *Zwangsvollstreckungsrecht* (12th ed. 1995), n° 3.20.

³¹ A lack of efficiency is described in the Italian Report Transparency, p. 14; in the Dutch report; in the Greek Report Transparency, p. In Ireland, the enforcement of small claims is problematic, while the enforcement of large claims (especially in fraud cases) has been improved by recent case law, Irish Report, p. 23.

³² See generally Zuckerman, *Civil Justice in Crisis* (1999), p. 3,12 et seq.

³³ Kerameus, 264 *RdC* 181, 217 – 219 [1997]. After the collapse of the communist regimes in Eastern Europe, these reforms were extended to middle and Eastern European states. The Council of Europe and several Member States of the EU coordinate and support these developments.

Convergence is also increased by the growing constitutionalisation of enforcement³⁴. At the international level, the European Court of Human Rights applies Article 6 ECHR to enforcement proceedings³⁵. 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 efficient³⁶. As all EU-Member States are bound by the European Convention of Human Rights they must, under Article 6 ECHR, provide fair and efficient enforcement structures and procedures.³⁷ But debtors' rights are also protected by constitutional guarantees. Their human dignity and privacy are protected by Article 8 ECHR³⁸. Finally, the rights and interests of third parties must be respected³⁹. An additional guiding constitutional principle, which is inherent to enforcement, is proportionality.⁴⁰ Proportionality applies to the "balancing" of the competing rights and interests of the parties.⁴¹ According to this principle, enforcement measures should not unnecessarily infringe upon the debtor and third parties; disproportionate or vexatious measures are not admitted.⁴² Due to the constitutionalisation of procedural law, the national legal systems of all Member States are bound by the same principles and values.

³⁴ Constitutional mandates for enforcement are described by Kerameus, IECL 10-17 et seq. [2003]; Fricéro, *La libre exécution des jugements dans l'espace judiciaire européen en principe émergent ?*, Mél. Normand (2003), p. 173 et seq.

³⁵ Similar constitutional guarantees are contained in Art. 47 EU Charter of Human Rights.

³⁶ Verbeke, *Execution Officers as a Balance Wheel in Insolvency Cases*, 9 *Tilburg Foreign Law Review* 7, 9 [2001].

³⁷ European Court of Human Rights, 19.3.1997, *Hornsby v. Greece*, ECHR-Reports 1997 II 495; 11.1.2001, *Lunari v. Italy*, ECHR-Reports 2001, xx. Fricéro, *Le droit européen à l'exécution des jugements*; *Revue des Husissiers de Justice* 2002, 6 et seq.; Yessiou-Faltsi, *Le droit de l'exécution selon la jurisprudence de la Cour Européenne des Droits de l'Homme : Analyse et Prospective*, in: Normand/Isnard, *Le droit processuel et le droit de l'exécution* (2002), p. 195 et seq.

³⁸ Leroy, *L'efficacité des procédures judiciaires au sein de l'Union européenne et les garanties des droits de la défense, la transparence patrimoniale*, in: M.Caupain/J. de Leval, *L'efficacité de la justice en Europe* (1999), p. 273, 275 – 296.

³⁹ At the "constitutional level", third parties are protected by Article 8 ECHR and by the principle of proportionality.

⁴⁰ In some Member States, the principle of proportionality is expressly stated in the procedural codes, i.e. see 803 (1) ZPO.

⁴¹ Communication of Prof. Tarzia to the General Reporter of July 3rd, 2003.

⁴² The principle of proportionality also applies to data protection in the context of enforcement, see *infra* B IV 2.

II. Practical importance of the problems addressed

1. European standards for national enforcement laws

Current Community instruments on civil procedure address enforcement proceedings only incidentally.⁴³ The Brussels Regulation (Reg. 44/01/EC)⁴⁴ deals with the recognition of judgments and other enforceable instruments⁴⁵. While unifying exequatur-proceedings to a substantial extent, the Regulation largely defers to national laws in respect to enforcement proceedings⁴⁶. The fundamental guarantee of the free movement of judgments within the European Judicial Area does not extend to execution,⁴⁷ which remains subject to the procedural and legislative autonomy of the Member States⁴⁸. Nevertheless, there is no doubt that the principle of non discrimination (Art. 12 EC-Treaty) applies to national enforcement proceedings in the context of the Brussels Regulation.⁴⁹ Therefore, a creditor recovering an enforceable instrument from another Member State must be treated equally with all competing domestic creditors. Additionally, the Community principle of the effective enforcement of EU-law by the Member States, also applies to the enforcement of judgments in Europe.⁵⁰ However, there are considerable

⁴³ Some provisions of the Brussels Regulation, however, address enforcement in the context of the recognition of foreign judgments. Article 47 makes provisional and protective measures available before and after the declaration of enforceability, Art. 46 (3) deals with provisional enforcement and the stay of enforcement measures when an appeal against the judgment in the State of origin has been lodged; Art. 49 allows the recognition and enforcement of penalties. Similar interfaces can be ascertained in the Reg. EC 1348/00 on Matrimonial Matters: Art. 20 and 28 (stay of enforcement when an appeal against the judgment in the State of origin has been lodged). Both instruments address provisional and protective measures (art. 31, art. 12) while largely referring to national laws.

⁴⁴ Council Regulation (EC) 44/2001 of 22 December 2000 (“Brussels’ Regulation”); OJ L 12 of 16 January 2001, p 1.

⁴⁵ As Article 22 n° 5 Reg. EC 44/01 clearly states, proceedings concerned with enforcement remain exclusively in the jurisdiction of the Member State in which the judgement has been or is to be enforced.

⁴⁶ In the case 148/84, [1985] ECR 1981, *Deutsche Genossenschaftsbank v. Brasserie du Pêcheur*, the ECJ expressly held: “The [Brussels]Convention merely regulates the procedure for obtaining an order for the enforcement of foreign enforceable instruments and does not deal with the execution itself, which continues to be governed by the domestic law of the court in which execution is sought.” This legal situation remained unchanged under the Regulation EC 44/01.

⁴⁷ See Vareilles-Sommières, *Le créancier en Europe*, Mélanges Mouly (1998), p. 437.

⁴⁸ ECJ, Case C-20/92, *Hubbard v. Hamburger* [1993] ECR I-3777. For the principle of procedural autonomy of the Member States see *Hess*, 66 RabelsZ 470, 473-475 (2002).

⁴⁹ ECJ, Case C-398/92, *Mund & Fester Haatrex International*, [1994] ECR I-367

⁵⁰ The case law of the ECJ relating to the Community “principle of efficiency” is still uncertain, EuGH, 33/76 (*Rewe*), ECR 1976, 1989, 1998; C-430/93, 431/93 (*van Schijndel und van Veen/Stichting Pensioenfonds voor Fysiotherapeuten*), ECR 1995 I 4705, n° 17; C-312/93 (*Peterbroeck/Belgien*), ECR 1995 I 4599; Rs. C-126/97 (*Ecco Swiss/Benetton International NV*), ECR 1999 I 3055; C-

differences between the Member States concerning the efficiency of judicial enforcement⁵¹. This leads to inequalities between EU creditors as to their ability to recover debts within the European Judicial Area⁵².

In the Internal Market, the differences between the national enforcement systems hinder the free movement of goods, persons and services. Cross-border transactions must be secured by well-operating procedural laws, including enforcement. Without sufficient knowledge of their prospects of recovering debts, creditors will not seek enforcement abroad. Further, bad faith debtors may be encouraged to channel their funds into Member States where they might easily be concealed. As a result, the free movement of judgments within Europe is severely impaired, creditors don't enforce their claims in other Member States, but write them off. Trade associations⁵³ and enforcement agents⁵⁴ have been especially active in highlighting the need to improve the opportunities for creditors to obtain information about the whereabouts of debtors and of improving cross-border garnishment proceedings.

Additional uncertainties arise in relation to provisional and protective measures. These have been revealed in the recent case law of the European Court of Justice⁵⁵. They are insufficiently addressed by Article 31 and 32 of the Brussels' Regulation, which largely refers to national procedures. These provisions tend to encourage an open contest between the national laws offering attractive provisional remedies to

240/98-244/98 (*Océano Grupo Editorial SA*), ECR 2000 I 4941; cf. Hess, *Rechtsfragen des Vorabentscheidungsverfahrens*, 66 *RabelsZ* 470, 473-4 [2002], Much more guidance may be derived from the application of the "constitutional standards" of Art. 6 ECJH, same opinion Kennett, *Enforcement*, p. 27-28.

⁵¹ The European Court of Justice asserted in the case C-398/92, *Mund & Fester Haatrex Internationaal Transport* [1994] ECR-I 367 that the conditions of enforcement within the Internal Market are equal. This opinion is not supported by legal commentators, cf. Schack, *Rechtsangleichung mit der Brechstange des EuGH*, 108 *Zeitschrift für den Zivilprozess* 47 [1994]

⁵² Kennett, *Enforcement of Judgments*, p. 49; Communication of the Commission of Nov. 11, cf. Communication of 26 Nov. 1997, (COM (97) 609final, OJ C 33, January 31st, 1998, para 42.

⁵³ Vincke, *Les entreprises européennes ont besoin de rapprochement*, in Storme (ed.), *Procedural laws in Europe* (2003), p. 15, 20: « Nous constatons donc une contradiction importante entre d'une part la création d'un vaste marché unique sans frontières intérieures avec la libre circulation des marchandises, des personnes, des services et des capitaux et, d'autre part, une mosaïque sans cohérence de droit de la procédure... ainsi une opération transfrontières présente toutes les caractéristiques d'une opération réalisée dans un territoire économique unifié, mais c'est déroulé en fait dans une zone juridiquement morcelée. Le droit qui devrait être un support de l'économie et un stimulant de l'activité, constitue ici de façon potentielle et réelle un obstacle au progrès. »

⁵⁴ Kennett, *Enforcement of Judgments*, p. 203 (describing activities of the Union Internationale des Huissiers de Justice)

⁵⁵ ECJ, C-391/95, *Van Uden Maritime BV/Deco Line et al.*, ECR 1998 I-7091; ECJ C-99/96, *Hans Hermann Mietz ./. Intership Yachting Sneek BV*. ECR 1999 I-2277

(foreign) creditors seeking to enforce large sums of money. Forum shopping for provisional measures has become a common practice within the European Judicial Area⁵⁶.

2. The Community's activities relating to enforcement

In November 1997, the Commission published a communication to the Council and the Parliament on the free movement of judgments and avenues to be explored for an improvement of the administration of justice in the European Union⁵⁷. This communication contained several proposals for the amendment of the Brussels Convention. However, its objectives went further. On the eve of the adoption of Art. 65 of the Amsterdam Treaty, which conferred on the Community a genuine competence for promoting the compatibility of national procedures in transborder relations⁵⁸, the Commission expressed a view in favour of the further harmonisation of procedural and enforcement laws in the European Union⁵⁹. However, the Communication did not propose extensive or immediate harmonisation of enforcement procedures⁶⁰. While stressing the cultural differences between the national enforcement systems, it mainly addressed practical obstacles to the free movement of judgments within the Common Market. As a result the Communication proposed to start a broad discussion and to make further inquiries about the legal and factual situation in the Member States⁶¹. The Commission proposed a "sectoral approach" for the harmonisation of enforcement proceedings. Only matters closely

⁵⁶ Hess, *Die begrenzte Freizügigkeit einstweiliger Maßnahmen im europäischen Binnenmarkt II*, IPRax 2000, 411 et seq. Recent case law has stopped these developments to some extent, see infra D III 5.

⁵⁷ Cf. Communication of 26 Nov. 1997, (COM (97) 609final, OJ C 33, January 31st, 1998.

⁵⁸ The competences of the EU for the implementation of instruments relating to enforcement matters are not addressed in this study. However, it should be mentioned that Art. 65 (c) Amsterdam Treaty contains a competence for "eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States" This competence includes enforcements proceedings insofar as necessary for the proper functioning of the internal market.

⁵⁹ Kennett, *Enforcement of Judgments in Europe*, p. 43-44.

⁶⁰ The Commission proposed the insertion of a new provision 16a and an additional section 6a to the Convention dealing with provisional measures. While Article 18 (1) of the draft restricted the jurisdiction of ancillary provisional measures to the place of enforcement, Art. 18a (2) contained a definition of a provisional measures. The Working Group of the Council which prepared the Reg. 44/01/EC did not take up this proposal. The former Article 24 of the Brussels' Convention remained unchanged in substance as Article 31 Brussels' Regulation.

⁶¹ Communication of 26 Nov. 1997, (COM (97) 609 final, nos. 12; 46-47; 60.

related to the existing instruments and to the proper functioning of the internal market were addressed⁶². The proposals were taken up again in the Action Plan of November 30, 2000⁶³. Community measures relating to provisional and protective measures, the transparency of assets and garnishment are part of that program which has been formally adopted by the European Ministers of Justice.

3. Community legislation influencing (indirectly) the national enforcement systems

Apart from the above-mentioned activities of the Community addressing national enforcement systems directly, other Community instruments also exercise an important influence. The transparency of debtor's assets is partly regulated by the first and the eleventh Directives on Companies Law⁶⁴, the Directive on Data Protection applies to the cross-border transfer of information about the financial situation of a debtor.⁶⁵ These instruments guarantee, to some extent, the transparency of assets and protect the privacy and personal integrity of the debtor. Recent proposals for the amendment of the Directive of Consumer Credit provide for the creation of registers of consumers which might also be available to creditors seeking to enforce their claims abroad.⁶⁶ Finally, some Community instruments dealing with cooperation in fiscal and administrative matters may serve as models for an improved cooperation in civil matters between enforcement organs⁶⁷.

The national enforcement systems are also affected by Community instruments dealing with cooperation in civil and commercial matters. The newly adopted Regulations on the service of documents⁶⁸ and on the taking of evidence⁶⁹ also influence enforcement proceedings. The Service Regulation enables national enforcement organs (and creditors) to address persons abroad (e.g. to serve a

⁶² Although these proposals were met with scepticism in the legal literature, the European Council at the Tampere summit adopted the proposed strategy in principle, see Kennett, *Enforcement*, p. 52-58; Hess, *IPRax* 2001, 389.

⁶³ OJ C-12, January 15th, 2001.

⁶⁴ See *infra* at B I 1., at fn. 83 et seq.

⁶⁵ See *infra* at B IV 2., at fn. 194 et seq.

⁶⁶ See Article 7 and 8 of the Proposal for a Regulation on cooperation between national authorities responsible for the enforcement of consumer protection law, COM (2003) 143final of July 18, 2003.

⁶⁷ Cf. Berglund, *Access to information for enforcement and recovery purposes and international cooperation*, Annex to the Swedish Report, p. 8 – 11.

⁶⁸ Council Regulation 1347/2000, OJ L 174 of 27 May 2000, p. 1

⁶⁹ Council Regulation 1206/2001, OJ L 174 of 27 June 2001, p. 1.

garnishment order to foreign garnishees)⁷⁰. The Evidence Regulation may also be relied upon for obtaining information on the whereabouts of a debtor's assets⁷¹. The European Judicial Network in Civil and Commercial Matters may also be used for providing information about enforcement systems of other Member States.

III. Outline of the study

1. *The different strands*

The study follows the structure of the tender (JAI A3 02/2002). It is divided into three strands (transparency of assets, garnishment, provisional and protective measures). These subjects are closely interconnected⁷². In practice, creditors seeking to recover monetary judgments will firstly seek information about the whereabouts of the debtor's assets. As monetary claims are the most promising objects for garnishments, creditors often trace for bank accounts (and the salaries of employees)⁷³. In all Member States, garnishment of bank account and of salaries has become the most important type of enforcement proceeding. An additional advantage of the seizure of monetary claims is that the recovery of a monetary claim does not entail an economic loss for the debtor⁷⁴. Finally, as fund transfers and similar banking operations in international banks are completed instantaneously, there is an increasing need of creditors for provisional remedies allowing an immediate attachment of bank accounts⁷⁵. These remedies (as well as "ordinary" garnishment orders) often help the creditors (or enforcement organs) to get information about additional assets of the debtor within the bank's organisation. They are often used (to some extent as "gapfillers") in cross-border proceedings. Therefore, the strands of the study are closely interrelated.

⁷⁰ See *infra* C III at fn. 253.

⁷¹ The National Report Ireland, p. 21, indicates that foreign creditors (with the help of enforcement organs) can request that the Irish courts assist in obtaining information about debtors with the help of the Regulation 1206/2001.

⁷² See Caupain, in: Verbeke/Caupain, *La Transparence Patrimoniale – Condition nécessaire et insuffisante du titre conservatoire européen ?* (2001), p. 16 – 19.

⁷³ Kerameus IECL 10-113; Münchener Kommentar/Smid, § 829 ZPO Rn. 1.

⁷⁴ An economic loss of up to 60% may be suffered if chattels seized are sold out, see Behr, *Agonie der Zwangsvollstreckung*, Rechtspflegerstudienhefte 1996.

⁷⁵ McLachlan, *The jurisdictional limits of disclosure orders in transnational fraud litigation*, 47 ICLQ 3, 5 [1998].

2. The Comparative Research

The present study has been prepared based on comparative research conducted by national reporters on the basis of 4 questionnaires. The study has been completed with the support of a European network of correspondents who are all specialists in their respective national laws of civil procedure. To this end, the following contributors remained in continuous, close contact with the study's general correspondent and produced national reports.

Austria	Prof. Dr. Paul Oberhammer (University of Vienna/Halle)/Tanja Domej (University of Vienna/Zurich)
Belgium	Prof. Dr. Georges de Leval/Dr. Frédéric Georges (University of Liège)
Denmark	Dr. Achim Müller, Hamburg
Finland	Sirpa Johannsson, LL.Lic. and Researcher (University of Helsinki)
France	Prof. Jacques Normand (University of Reims-Champagne); Me Bernhard Menut (Ancien Président de la Chambre Nationale des Huissiers de Justice, Paris/Poitiers); Jean-Marc Delecci (Juriste de Banque); Dr. Sabine Lacassagne (Université Paris X)
Germany	Prof. Dr. Burkhard Hess (University of Heidelberg)/ Assessor Marcus Mack (Assistant to Prof. Hess)
Greece	Prof. Dr. Konstantin Kerameus/Dr. Stelios Koussoulis (University of Athens)
Ireland	Sean Barton Esq. (Mc Cann Fitzgerald) (Dublin)
Italy	Prof. Dr. Guiseppe Tarzia; Prof. Dr. Elena Merlin; Prof. Dr. Filippo Danovi (Universities of Milano, Milano-Biocca and Como)
Luxembourg	Dr. Thierry Hoscheit (Tribunal de Paix)/Dr. Patrick Kindsch (practicing lawyer).
Netherlands	Dr. Miriam Freudenthal (University of Utrecht)
Portugal	Prof. Dr. Teixeira di Sousa (University of Lisbon)
Spain	Prof. Dr. Correa Delcasso (University of Barcelona)
Sweden	Michael Berglund, Enforcement Director, Enforcement department of National Tax Board, Stockholm/Nicola Hesslen (hussier de justice, Swedish Enforcement Authority Göteborg)
United Kingdom	England and Wales: Dr. Sebastian Kuck, British Institute for International and Comparative Law. Scotland: Prof. Helena Raulus, University of

Aberdeen.⁷⁶

From September 2002 – January 2003 the General Reporter prepared 3 questionnaires (Transparency, garnishment and provisional enforceability) which were circulated among the national reporters. Final drafts were completed (following discussion with the Commission and amongst the national reporters) in February 2003. The questionnaires were answered by the national reporters through to the end of August 2003. A final questionnaire (on provisional measures) was completed in June 2003 and distributed in July 2003, the due date for responses to this questionnaire was September 15th, 2003. On 11th - 12th of July 2003, most of the national reporters met in Heidelberg⁷⁷ and discussed the results of the comparative research as well as possible proposals for Community actions. The general report is based on the answers to the questionnaires as well as on the discussions held at the Heidelberg meeting. However, the general reporter assumes the exclusive responsibility for all results and proposals of this study⁷⁸.

B. The transparency of a debtor's assets

I. The debtor's address

The search for the debtor's address is often the starting point of enforcement proceedings. In most Member States, creditors need this information to initiate the proceedings, because the competence of enforcement organs largely depends on the domicile or the seat of a debtor⁷⁹. However, in most cases the creditor will already know the debtor's address, because he has contractual relationships with the debtor or because the debtor was served when the creditor instituted judicial

⁷⁶ The Scot Report will be available by the end of 2003.

⁷⁷ The seminar was financed by the *Thyssen Foundation*.

⁷⁸ The main conclusions and proposals for Community action are found in the Conclusions (part E) of the study.

⁷⁹ Cf. the answers of the National Reports to question n° 1 "garnishment" overview: 1st column of the Survey Garnishments. The place of enforcement may also be an additional jurisdiction, see Art. 39 (2) Brussels' Reg. 44/01 EC.

proceedings against him⁸⁰. In some Member States⁸¹ enforcement organs (bailiffs) may search the debtor's address when serving the summons⁸².

1. Information available in the commercial registers

The main sources of information are public records, the most important of which is the commercial register⁸³. Within the European Union, commercial registers were partially harmonised by the First Directive on Company Law of 1968 ("Publicity Directive")⁸⁴ and the 11th Directive on Company Law of 1989 ("Branch Directive")⁸⁵. According to Art. 2 (1) Dir. 68/151/EEC, commercial records in the Member States must provide for the following information:

- The constitution and the statutes (if they are contained in a separate instrument) and any amendments to the instruments
- The appointment, termination of office and particulars of the persons who are authorised to represent the company in dealings with third parties and in legal proceedings or take part in the administration, supervision or control of the company.
- At least once a year, the amount of the subscribed capital, the balance sheet and the profit and loss account for each financial year.

⁸⁰ See National Report Spain, p. 28. The Irish Report states correctly that "in practice, in contractual situations, a person opening a line of credit or supply is therefore well advised to obtain security for credit or supplies advanced, or to obtain satisfactory information or assurance from the intending customer as to ability to pay." Irish Report, p. 17.

⁸¹ Especially in Belgium, France, Luxembourg and the Netherlands, cf. UIHJ (ed.), Rapport, Mission de recherche sur la signification des actes dans l'Union Européenne (2003), p. 12 s.

⁸² It may be, however, that "normal" service failed and the legal proceedings were initiated by substituted service.

⁸³ A comparative survey is to be found in: Knechtel/Reichelt/Zib, *Europäisches Handelsregister* (2000); Reichelt (ed), *Europäisches Handelsregister II* (2001).

⁸⁴ First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community, OJ L 065, 14.3.1968.

⁸⁵ Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State, Official Journal L 395, 30/12/1989 p. 36.

The Publicity Directive does not prescribe the particulars that must be recorded in the national registers.⁸⁶ In this respect, it refers to the company laws of the Member States (which nevertheless have largely been harmonised). According to the preamble of Directive 68/151/EEC, Article 2 must be implemented by the Member States in such a way that national provisions provide sufficient information for third parties to ascertain the content of the company's basic documents and all other relevant information, especially the particulars of persons who are authorised to bind the company. The Directives are aimed at providing transparency in business relations in a broad sense, including enforcement proceedings. At present, business registers in the Member States provide detailed information on individual firms (legal status, date of establishment, company capital, text code, sector of activity, corporate bodies and their powers of representation, sometimes even the number of employees).⁸⁷ This information is often recorded in central registers electronically and is accessible online.

The Directives do not, however, provide for the full harmonisation of commercial registers. They only apply to defined commercial corporations and not to individuals nor to business partnerships⁸⁸. The main disadvantages stem from Art. 3 (1) Dir. 68/151/EEC⁸⁹. According to this provision, Member States are free to establish local or central commercial or company registers. Therefore, the organisation of the registers in the Member States has remained fragmented: while in the United Kingdom three central registers cover all information about business dealings, more than 400 registers are run by the local courts in Germany⁹⁰. Central registers are not

⁸⁶ However, Art. 2 (1)(i) Dir. 89/666/EEC prescribes explicitly that the address of the branch must be recorded.

⁸⁷ In Italy, this information is recorded in a central register, which is operated by the Italian Chambers of Commerce and accessible online at www.infocamere.it.

⁸⁸ Comparative surveys show, however, that information about individual businessmen is registered and available in all Member States, cf. Knechtel, in: Knechtel/Reichelt/Zib, *Europäisches Handelsregister* (2000), p. 53.

⁸⁹ Art. 1 (1) Dir. 89/666/EEC directly refers to Art. 3 (1) Dir. 68/151/EEC.

⁹⁰ Van Hulle, *Gemeinschaftsrechtliche Perspektiven für ein Europäisches Handelsregister*, in: Reichelt (ed.), *Europäisches Handelsregister II* (2001), p. 7. The current situation in Germany is problematic: Lacking any central register, creditors must seek information from the local registers. In the future, however, the situation may change. Most of the Federal States are presently reorganising their records and are implementing a centralised structure. A survey about the implementation is to be found at: http://bnotk.de/BNotK-Service/Elektronische_Register/elektronisches_handelsregister.htm.

always accessible to creditors⁹¹. As the Publicity Directive was enacted in 1968, it does not deal with electronic data processing and with online access to commercial registers. Besides, information contained in commercial registers is not always equally reliable: in six Member States⁹² the registry does not examine the information before it is entered in the register.⁹³ In some Member States, information in the commercial register may be outdated, because a company's failure to report changes of its status is not always addressed by sufficient sanctions.⁹⁴

2. The population registers

The position of a creditor seeking the address of a non-professional debtor is more precarious. In most Member States (with the exception of the United Kingdom and Ireland) the addresses of all inhabitants are recorded in the population register. However, these registers are organised in very different ways. In some Member States⁹⁵ they are maintained by local authorities, so a creditor seeking the address of a debtor would have to search all local records across the country – an impossible task. Central registers are often not available to the creditor.⁹⁶ In France, enforcement organs are entitled to get necessary information, but the cooperation between local and central administrations and the enforcement organs is not always fully effective⁹⁷. Reliable information is recorded in tax registers, but these records are – with the exception of Sweden and (to some extent) Spain – not accessible to enforcement organs and private creditors⁹⁸. In Austria, the enforcement court may contact the Austrian Social Insurance Association, in order to find out the employer

⁹¹ In Portugal, the Central Commercial Register is only accessible to the enforcement organ, National Report Portugal, p. 9.

⁹² Examples: Finland, Ireland, Netherlands, United Kingdom.

⁹³ In other Member States, the information is examined and verified by the registrars before being recorded, cf. Knechtel, *Handelsregister in Europa – Ein rechtsvergleichender Überblick*; in: Reichelt (ed.), *Europäisches Handelsregister II* (2001), p. 37.

⁹⁴ Example: ECJ, C-191/95, *Commission v. Germany*, [1998] ECR I 5449.

⁹⁵ Examples: Germany, Italy.

⁹⁶ Exception: Austria, the Central Population Register is available online: www.business.telekom.at.

⁹⁷ Huissiers de Justice are entitled to seek the help of the Procureur de la République pursuant to Art. 39 (1) of Loi 91/650, see Kennett, *Enforcement of Judgments* (2000) p. 102 s. At present, legislation is being implemented allowing the bailiff direct contact with tax authorities when searching the address and bank accounts of a debtor, cf. French Report Transparency, 3.4.

⁹⁸ In Sweden, the enforcement authority may contact the tax register in order to find out the address and the financial position of a debtor. In Italy, similar registers do exist, but they are only accessible if public debts are to be enforced, see *infra* IV 3.

of the debtor⁹⁹. Information about the debtor's employment circumstances is also available to enforcement organs in Finland¹⁰⁰, Belgium¹⁰¹, Luxembourg¹⁰² and Spain¹⁰³. In these jurisdictions, creditors are assisted by enforcement organs and do not need to know the debtor's address precisely.

3. *Additional sources of information*

Additional information about the debtor's address can be obtained from other public records such as the electoral roll¹⁰⁴, motor-vehicle registers¹⁰⁵ or the land registry¹⁰⁶. But this information is not very reliable. Creditors may get more hints by using "informal sources", such as telephone books and data collections by private institutions (especially credit reference agencies and enquiry agents). For the latter information, a higher fee must be paid. However, computerisation allows broad inquiries over the Internet (for example, telephone books¹⁰⁷ are available online and therefore easy to search)¹⁰⁸.

4. *The transborder context*

In the transborder context, creditors' practical difficulties are increased. They normally do not have sufficient knowledge about the information structures in other

⁹⁹ This possibility applies, however, only to garnishment, cf. National Report Austria, p. 55.

¹⁰⁰ See National Report Finland, p. 1.

¹⁰¹ See National Report Belgium, p. 4.

¹⁰² National Report Luxembourg, p. 2 and 6.

¹⁰³ Art. 590 LEC, see National Report Spain, p. 37-38, the court may also seek the assistance of the tax authorities.

¹⁰⁴ This is the case in Ireland and the United Kingdom. The available information is, however, not very reliable, W. Kennett, *Enforcement*, p. 112.

¹⁰⁵ In France, only bailiffs have access to the "*fichier national des immatriculations*". Access presupposes an enforceable title (as a general precondition of enforcement measures of the bailiff), see Montgolfier, French Report Transparency, 3.2.1.

¹⁰⁶ For the search of the debtor's address, land registers must be centralized and information must be accessible by the owners' names; this is not the case in most of the Member States, see *infra* II 1.

¹⁰⁷ Example: <http://www.telefonbuch.com/english.htm> (information and search of telephone books in Europe, Africa, Asia, Australia and America).

¹⁰⁸ See National Report Spain, p. 35.

Member States. Therefore, as access to information must be effected using national resources, creditors will often retain enquiry or credit reference agencies.¹⁰⁹

Once again, the creditor is in a much better position if he seeks information about the address of a company, because much information is available online. In 1992, a project of a European Business Register (EBR) was launched by national public bodies responsible for company registration and legal publicity.¹¹⁰ The EBR provides an internet portal with multi-lingual access to official company data in European records.¹¹¹ Operating as a network, the EBR does not run a data collection of its own, it merely provides access to the national registers of its member organisations. Today, it includes 19 countries of which 14 are Member States of the European Union.¹¹²

The standard EBR extract comprises the following information: company code; address; country; phone number; legal structure; status; main business activities; annual statement of accounts. Information is given in different languages.

This information normally allows a creditor to obtain the debtor's address and to start enforcement proceedings. The costs are reasonable: for one search, the creditor pays about € 2,40 - 4,20. Unfortunately, the EBR does not provide comprehensive information about merchants. Individual businessmen and partnerships, in particular, are still excluded. In practice, information about such persons and entities is normally gathered by private enquiries.

¹⁰⁹ Language problems may also increase the difficulties of creditors. Information in national registers is often only provided in the national language.

¹¹⁰ Additional information is available at: www.ebr.org. This initiative was financed and supported by the European Commission under the first "Information Society Technology" Programme (1998-2002).

¹¹¹ Today, the network is managed by EBR eeg, a multi-partner entity that coordinates the different providers.

¹¹² A central problem is the insufficient organisation of the company registers in Germany. For the EBR it was impossible to collect data from the German local registers, because online access is still not available. Today, relevant data are provided by the private credit reference agency Kreditreform, see Hubalek, *Erfahrungen mit dem European Business Register*, in : Reichelt (ed.), *Europäisches Handelsregister II* (2001), 51, 55.

II. Transparency of the debtor's assets before obtaining an enforceable title

The position of a creditor seeking information about the financial situation of a debtor before initiating enforcement proceedings is similar to the situation described above (concerning the search for the debtor's address). Without an enforceable title,¹¹³ the creditor cannot seek the assistance of enforcement organs and must therefore rely on public registers and try to obtain information from private enquiry entities and from third parties¹¹⁴. This situation may be overcome if the creditor gets provisional relief allowing him to rely on the assistance of enforcement organs.¹¹⁵

The lack of sufficient information has led to the development of alternative practices in international trade. Payments between traders are often effected (and secured) by bank guarantees or letters of credit. In some Member States, banks offer their clients so-called "banker's references" on the credit-worthiness of other clients¹¹⁶.

Finally, creditors who claim maintenance can get information about the financial situation of a debtor during the litigation. In most Member States, the courts hearing maintenance claims are empowered to investigate the financial situation of the debtor and to seek information about the income of the debtor from fiscal, social or like authorities.

1. Information from records

Public records are of utmost importance, because access to these registers does not require the presentation of an enforceable title by the creditor. All Member States provide several registers which are – with the exception of commercial registers –

¹¹³ This situation may change if the creditor has access to provisional remedies enabling him to seek information from the debtor or from third parties. However, this is not the case in all Member States, see *infra* III 1.

¹¹⁴ With the exception of Luxemburg and Italy: As Luxemburg and Italian enforcement procedures do not impose any obligation on a debtor to disclose his assets, pre- and post judgment situations are similar. See Luxemburg Report, p. 7, Italian Report Transparency, p. 14-15.

¹¹⁵ In England, freezing injunctions and search orders give the creditor access to substantial information relating to a debtor's assets. In Luxemburg, the creditor can get information from third parties (garnishees) on the basis of a "saisie arrêt". A similar situation is found in Germany (sec. 928 et seq.). As this situation is similar to the situation of a debtor disposing of an enforceable title, it will be treated *infra* at III 1. However, French and Spanish enforcement organs are not allowed to request information on the debtor's assets on the basis of a provisional title.

¹¹⁶ These references are subject to the prior authorisation of the client, which is often found in standard clauses of a credit contract.

differently organised¹¹⁷. Access to public registers may be expedited and simplified where information is accessible online. However, the prevailing situation in the Member States is fragmented and most records are not kept as electronic data bases. Limitations on access (to enforcement organs or public prosecutors) may also frustrate independent researches by the creditors.

The most promising public records in the Member States are the following:

- Immovable property can be traced through the land registers which exist in all Member States, but in different forms. The main obstacle remains the fact that these registers are often organised according to the location of the plots of land and not according to the names of the owners.¹¹⁸ Some registers are computerized and accessible online (particularly Austria, Finland, Sweden, Scotland), while other Member States only provide land registers at the municipal level (France,¹¹⁹ Germany). There is, however, a current trend to reorganize the land registers as electronic data bases. At the European level, early initiatives have been launched for the creation of a “European Land Information Service (Eulis)” which is to commence operations at the beginning of 2004¹²⁰.
- Records for aircrafts and ships exist in Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxemburg, the Netherlands, Portugal, Spain Sweden, and in the United Kingdom.
- In some Member States¹²¹, motor vehicle registers are accessible to creditors, although in some other jurisdictions, access is limited to applications directly connected with the use of that vehicle¹²².

¹¹⁷ Example: While in England information about bankruptcy proceedings are kept in the land registers, in Austria, Germany, Greece, Denmark and Portugal this information is recorded in separate insolvency registers.

¹¹⁸ This is the situation in England, where the (central) land registry does not provide information about the land owned by the debtor. English Report Transparency, p. 9. A creditor seeking information must therefore know the location of the real estate – often an impossible task.

¹¹⁹ According to the French Report Transparency (2.2.) more than 36,000 “fichiers immobiliers” are maintained at the municipal level. These records can only be used by creditors who know the whereabouts of the debtor’s assets.

¹²⁰ www.eulis.org, see infra at 4.

¹²¹ Austria, Belgium (access is limited to bailiffs), France, Italy, Luxemburg, Portugal, Spain, Sweden, and the United Kingdom.

¹²² This is the situation in Germany, German Report, p. 23.

- The commercial register may contain reliable information about the financial situation of corporations and (in some Member States) share titles¹²³.
- Debtor's lists and insolvency registers may deter creditors from fruitless seizure attempts¹²⁴ while, in other jurisdictions, the enforcement organs (based on their own experience or on centralised records) may prevent the creditors from initiating enforcement proceedings. Creditors may also search the matrimonial register¹²⁵.

In summary, the legal situation in the Member States is very fragmented. International inquiries are burdensome and often not promising. However, fragmentation between the national systems can be overcome by electronic data processing that allows standardised access to the central databases at the national level¹²⁶. Private enquiry agencies and credit reference agencies, such as Schimmelpfennig, Dunn&Bradstreet or SCHUFA¹²⁷, collect data on debtors from public registers and announcements across Europe which are processed and organised in uniform structures – despite the different legal regimes in the Member States. Advanced searches of these records are possible. Indeed, this information is not always accessible to all creditors and, in any case, creditors must pay for it. Additional difficulties arise from differences between the information recorded, the occasional unreliability of the information, as well as restricted (or even prohibitions on) access to genuinely reliable registers (eg, tax registers)¹²⁸.

2. Information from third parties

Outside the enforcement proceedings, third parties are not obliged to disclose information about the debtor's financial situation. The factual situation is quite the reverse. Professional secrets (such as bank secrets) may prevent third parties from

¹²³ Irish Report, 2.3., p. 17.

¹²⁴ Debtor's lists are available in Denmark and in Germany; a list of effected distraints and enforcements in Austria, Greece and Portugal. Insolvency records exist in Austria, Denmark, France, Greece, Ireland, Italy, Luxemburg, the Netherlands, Portugal, Spain Sweden, and the United Kingdom.

¹²⁵ Accessible in Germany, Luxemburg, Netherlands, Sweden.

¹²⁶ Practical problems can be overcome by standard forms used by national registers which detail the content and the reliability of the information that they contain, see *infra* at IV 2 (discussing a proposed multi-lingual standard form by the Union Internationale du Notariat Latin).

¹²⁷ German Report, p. 34;

¹²⁸ This is especially the case in Italy (*anagrafe tributaria*), see Italian Report, p. 10.

providing any information. In all Member States, the professional secrecy provisions may be overcome if the debtor consents. There are some situations, especially in the context of commencing a business relationship or when seeking a credit, that debtors have an interest to disclose information about their credit-worthiness. Accordingly, the authorisation for collecting data about the credit-worthiness of merchants and consumers is often given in practice. This information may be used by (professional) creditors.

a) An additional way to obtain information (normally before commencing a contractual or similar business relationship) is the so-called “banker’s reference”. These rely on information exchanges between banks about the financial position of their clients, especially in relation to lending. The information conveyed from the requested bank is sometimes transmitted (on a voluntary basis) to the creditor (who must be a client of the requesting bank)¹²⁹. This transfer of information is, however, limited by data protection as well as banking secrecy¹³⁰ and therefore subject to the client’s authorisation.¹³¹

In some Member States, bankers references are offered as a stand-alone service in the banking business¹³². In Germany, standard form banking contracts regularly contain an authorisation clause under which private clients (consumers) agree to the transfer of such information. According to customary trade practice, the authorisation of businessmen is generally presumed¹³³. In Austria, however, the Supreme Civil Court held that a customer’s authorisation by simple standard clause is not valid.¹³⁴ The practice in other Member states is different. Most national reports stress the

¹²⁹ German Report, p. 29 – 32; a similar legal situation exists in Denmark, (National Report, p. 10).

¹³⁰ Luxemburg Report, p. 5-6.

¹³¹ See Leroy, *La transparence patrimoniale en droit belge*, in: Verbeke/Caupain, *La transparence patrimoniale* (2001), p. 387-388; see also *infra* IV 1.

¹³² See answers 2.6.2.2. Questionnaire Transparency. For a comparative survey see Hadding/Schneider (ed.), *Bankgeheimnis und Bankauskunft in der Bundesrepublik Deutschland und in ausländischen Rechtsordnungen* (1986) with National Reports of Germany, Belgium, England, France, Netherlands, Austria.

¹³³ German Report, p. 30.

¹³⁴ Judgment of Nov. 19th, 2002, 4 Ob 179/02 österr. Bankarchiv 2003, 141. Austrian Report, p. 43-44. The court referred to sec. 38 (2) n° 5 Austrian Banking Law which prescribes an express authorisation.

importance of banking secrecy, which can only be overcome by the debtor's express authorisation¹³⁵.

b) In the credit sector, the German SCHUFA group offers to its contractual partners information about the financial reliability of prospective buyers or consumers. Access to this information is not open to anybody, but limited to "entitled partners" (normally businesses who regularly engage in credit based transactions¹³⁶). When concluding a credit contract¹³⁷, creditors usually include a so-called SCHUFA clause which contains an authorisation for the credit institution to transmit all data to SCHUFA¹³⁸. The following data are recorded: surname, first name, date of birth, place of birth, address and previous addresses in all countries; type, object and payment terms of the transaction in question;¹³⁹ any matter relating to payment in breach of an existing contract;¹⁴⁰ improper use of an account after prohibition of use.¹⁴¹ Normally, data must be removed after a certain period of time (from 1 to 3 years).

¹³⁵ In France, information is only exchanged between banks and not conveyed to third parties, cf. Ancel, *National Report France*, in: Hadding/Schneider (ed.), *Bankgeheimnis und Bankauskunft in der Bundesrepublik Deutschland und in ausländischen Rechtsordnungen* (1986), p. 105, 124–126.

¹³⁶ Especially banks, saving and loan companies, credit card enterprises, mail order companies, retailers, telephone companies.

¹³⁷ Normally, the "SCHUFA-Clause" is inserted in the standard contract for the opening of a bank account.

¹³⁸ The actual wording of this clause is as follows: „ I herewith agree that the credit institute may convey data on the application for, the opening of and the closure of this account to the SCHUFA HOLDING AG, Hagenauer Straße 44, 65203 Wiesbaden. Independently thereof the credit institute will convey data to SCHUFA resulting from breaches of contract (f.i. amounts to be claimed after termination, improper account or credit card use). According to Federal Law on Data Protection (Bundesdatenschutzgesetz) these reports may only be conveyed insofar as their transmission is permitted after consideration of all interests concerned. I herewith simultaneously release the credit institute from its duty to banking secrecy.”

¹³⁹ Credit or leasing contract with some total duration as well as premature settlement; opening of a check account, issuance of a credit card; opening of telecommunications accounts; customer accounts at commercial and mail order companies.

¹⁴⁰ Obligations due but not settled even after a reminder was sent; obligations following judicial decisions and their settlement (until the final settlement all obligations are recorded up to the last payment if necessary the current balance is recorded in each instance.

¹⁴¹ Additionally, data from public records and official announcements are collected, especially detention orders to enforce a debtor's declarations, affected debtor's declarations; at judications of personal insolvency proceedings; rejection and discontinuance of consumer insolvency proceedings due to a lack of mass.

3. Information obtained in maintenance proceedings

At the domestic level, creditors seeking to enforce maintenance claims are in a privileged position.¹⁴² As the amount of the claim depends on the financial situation of the debtor, debtors must declare their income in court proceedings in order to give a basis for calculating the maintenance due. Accordingly, in most Member States¹⁴³ family courts are empowered to ask the debtor (*ex officio*) for his income. If the debtor fails to provide this information, the courts are empowered to seek the assistance from social or tax authorities.¹⁴⁴ As the debtor gets this information from the court, he may use it during the enforcement proceedings.

4. The international context

a) In the cross-border context, the difficulties facing creditors increase. Due to the fragmentary nature of the legal situation concerning the organisation of registers in the Member States, creditors usually seek the assistance of private institutions (such as Kreditreform or SCHUFA). They may also conduct their own searches of electronic databases that offer access to the national records¹⁴⁵. However, only few initiatives deal with the open access to public registers in a cross-border context. The Scandinavian Eulis-project¹⁴⁶ is currently developing an Internet-portal which provides access to those national land registers which are maintained in electronic form. At present, public and private institutions of only 5 Member States participate in the project¹⁴⁷ – indeed, the small number of participants highlights the existing fragmentation between the national systems¹⁴⁸. Apart from information provided in

¹⁴² According to art. 5 n° 2 Brussels' Regulation, the creditors may sue in the courts of their domicile.

¹⁴³ This is especially the case in Austria, Germany, Italy (generally in divorce proceedings), Luxembourg, Ireland and Belgium.

¹⁴⁴ Ex.: Sec. 643 ZPO (introduced in 1998), German Report Transparency, p. 12 et seq.

¹⁴⁵ Online access to the Austrian registers is also available to foreign creditors. National Report Austria, p. 63 s.

¹⁴⁶ The project is currently coordinated by the University of Lund. It is sponsored by the eContent Programme of the European Union.

¹⁴⁷ The reference group of Eulis includes participants from Austria, Finland, Netherlands, Sweden and the United Kingdom (England/Wales and Scotland).

¹⁴⁸ The project is currently developing common principles for the collection and storage of information. The main obstacles are the lack of a uniform legal / regulatory framework and common principles for access to information, see Eulis, Project Overview, www.eulis.org (visited August 26th, 2003).

the commercial registers (including EBR), there is no efficient means of access to European registers via the internet.

b) Despite the lack of transparency provided by national judicial and administrative records, private data processing entities offer information about businessmen and consumers from other Member States of the European Union¹⁴⁹. The storage and transfer of such data is not regulated by a comprehensive legal framework. Nevertheless, the conveyance of personal data is addressed by the European Directive on Data Protection¹⁵⁰ as well as by national data protection legislation¹⁵¹. Under these regulations, any transfer of information is subject to the consent of the person concerned. The principles of proportionality and of confining the use of the information to the particular matter must be respected.¹⁵²

c) The particular need to protect maintenance creditors has led to the development of several international instruments which deal mainly with the recognition of support orders¹⁵³. Some instruments also seek to improve the creditor's needs for information about the debtor's assets. In 1990 the European Union Member States negotiated a Convention on the Simplification of Procedures for the Recovery of Maintenance and Payments.¹⁵⁴ Under article 3 of that Convention, central authorities in the Member States shall cooperate in seeking and locating the debtor's assets and in obtaining from state authorities all necessary information regarding the debtor.¹⁵⁵ The model for this provision is to be found in article 7 (2) of the Hague Convention on the International Aspects of Child Abduction which was simply

¹⁴⁹ In international trade, bankers' references are also provided to requesting banks from other Member States.

¹⁵⁰ Directive 95/46/EC, O.J. 1995 L 281, p. 31 et seq.

¹⁵¹ See infra IV 2.

¹⁵² Article 7 lit a) Directive 95/46/EG. See also the national reporters' responses to question 2.6. on the transparency of assets.

¹⁵³ See Schlosser, 284 *Recueil des Cours* 9, 285 et seq. [2000].

¹⁵⁴ Done at Rome on 6th November 1990, O.J. C.

¹⁵⁵ Article 3 (2) on the Convention reads: „On receipt of the application mentioned in article 5 the central authority and the state addressed shall take or cause to be taken without delay all appropriate and useful measures to: (I) Seek out and locate the debtor or his assets (II) Obtain, where appropriate, relevant information from government departments or agencies in relation to the debtor". Applications to the central authorities made by the maintenance creditor (or any person which has a right to represent him) shall according to article 5 (3) of the Convention i.a. contain: "the name, date of birth, nationality and description of the debtor and all other relevant information regarding his identity or whereabouts locations of his assets."

mirrored.¹⁵⁶ According to this provision the central authorities in the Member States may be requested to determine the whereabouts of a child who has been abducted by one of his parents. Under the Convention, the central authorities are entitled to seek the administrative co-operation from police authorities when collecting the requested information.¹⁵⁷

The European Convention on the Recovery of Maintenance has not been successful. While it was signed by most of the Member States¹⁵⁸, it has only been ratified by Ireland, Italy, Spain and the United Kingdom. Until today, it has not yet entered into force. An important reason may be the relatively complicated scheme for co-operation of central authorities. In opposition to the abduction of children (which is generally a criminal offence) the search for debtors and the whereabouts of their assets is usually not a matter of public concern. As a result, in some Member States (for example in Germany) it is difficult to see how central authorities could request the help of other administrative agencies in order to get the required information.¹⁵⁹ In these Member States, the ratification of the Convention would need additional implementing legislation (providing for administrative assistance of social and fiscal authorities).¹⁶⁰

The recent Council Regulation (EC) No 2201/2003 of Nov. 27, 2003, concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility repealing Regulation (EC) No 1347/2000¹⁶¹, does not apply to maintenance matters and does not provide for co-operation between central authorities in maintenance matters¹⁶². From the perspective of maintenance creditors, this situation seems unsatisfactory: their situation in cross-border maintenance recoveries remains precarious. At present, the Hague

¹⁵⁶ Hague Convention on the Civil International Aspects of International Child Abduction BGBl. 1990 II 207.

¹⁵⁷ In Germany, the Federal General Attorney acts as a central authority and is empowered to seek the administrative assistance of the central register (i.e.: register of foreigners) in order to locate the child.

¹⁵⁸ Belgium, Denmark, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal and the United Kingdom.

¹⁵⁹ The legal situation in the case of child abduction is different, because child abduction is usually a criminal offence. Therefore, recourse to criminal investigations is regularly possible.

¹⁶⁰ It seems imaginable to empower the central authorities to seek information from tax registers.

¹⁶¹ OJ L 338 (2003).

¹⁶² According to the 11th recital, maintenance obligations are excluded from its scope of application.

Conference on Private International Law is elaborating a comprehensive Convention on Maintenance claims. This instrument also addresses a direct cooperation between central authorities when enforcing maintenance orders. As yet, a consensus has not been reached on whether this cooperation should include judicial and administrative assistance when the address of the debtor and his financial situation are unknown¹⁶³.

III. The transparency of a debtor's assets on the basis of an enforceable title

The legal situation of a creditor who seeks information about the whereabouts of a debtor's assets is considerably improved, when an enforceable title is obtained. In the Member States there are three different ways of obtaining information. The first consists of the questioning the debtor about his assets. The second is closely related to the first, and empowers the enforcement organs or the creditor to question third parties (especially the garnishee) about the existence of a claim which has been seized. In some Member States, enforcement organs may seek information from registers which are not open to the public (and therefore not accessible to the creditor). While the availability of obtaining a declaration from the debtor as to his / her assets or of requesting public authorities or registers is differently regulated in the Member States, all national jurisdictions (with the exception of Scotland) provide for a declaration by the garnishee¹⁶⁴.

An important distinction must be drawn at the outset: While in most Member States, provisional enforceable titles and provisional measures empower enforcement organs to assist the creditor in seeking information about the financial situation of a debtor (or even to seek it themselves), some Member States (especially France¹⁶⁵ and Spain) do not allow any activity of an enforcement organ of this kind before the

¹⁶³ Duncan, *Towards a global instrument on the international recovery of child support and other forms of family maintenance*, Preliminary Document n° 3 of April 2003 for the attention of the Special Commission on the International Recovery of Child Support and Other Forms of Family Maintenance, p. 19, [www://ftp.hcch.net/doc/maint_pd03e.pdf](http://ftp.hcch.net/doc/maint_pd03e.pdf) (visited on September 7th, 2003).

¹⁶⁴ According to the Scottish Report on Transparency (answer no 2), the Scottish Executive and Law Commission are currently exploring the introduction of a duty of disclosure which shall be vested on the arrestee (i.e. the bank) or on the debtor.

¹⁶⁵ In France, the *huissier de justice* may obtain information from a bank (garnishee declaration) when serving a "*saisie conservatoire*", French Report Garnishment, p. 14 (Cour de Cassation, Nov. 7, 2002).

enforceable title becomes final.¹⁶⁶ For this reason, the following comments relate to (fully) enforceable instruments.

1. The debtor's declaration

Most of the national systems¹⁶⁷ empower enforcement organs to question the debtor directly about his assets. The debtor's declaration may be made in the form of testimony before the enforcement court. The debtor is required to attend an oral hearing where he is questioned by the judge (or a judicial clerk)¹⁶⁸; the creditor then has the opportunity to ask further questions of the debtor¹⁶⁹. In Ireland and England, cross-examination of the debtor may also take place and the debtor must present documentary evidence of his assets¹⁷⁰. However, in other Member States, the debtor's declaration is made by filling out mandatory forms¹⁷¹ – sometimes the role of enforcement organs is simply to help the debtor in filling out the forms. In these Member States, the debtor's declaration is not considered as evidence admitted into court, but rather as a fact gathering by the enforcement organs.

In most of the jurisdictions where a debtor's declaration exists, the debtor must disclose all his assets. However, in Portugal, this disclosure obligation is limited to assets, the value of which would be sufficient for the enforcement of the creditors claim¹⁷². A similar situation exists in Spain, where the debtor will be required by the enforcement court to identify assets for the seizure. In France, the debtor must identify assets if the creditor seeks to enforce a small claim (less than €535) and requests the seizure of movables. In this jurisdiction, the obligation of the debtor to

¹⁶⁶ See French Report Transparency, 3.1.; Spanish Report p. 35.

¹⁶⁷ Austria, Denmark, Finland, Germany, Greece, Ireland, Portugal, Spain, Sweden, United Kingdom (England and Wales), Belgium, France, Italy, Luxemburg, Netherlands and Scotland do not provide for a debtor's declaration. However, in France there is a limited obligation of the debtor to disclose a bank account (Article 51 (2) L of 9 July 1991), in the Netherlands, the enforcement organ can request the debtor disclose his earnings (Article 475g Code of Civil Procedure), in Belgium, the debtor must reveal his assets when applying for a protective order. The introduction of a debtor's declaration is discussed in Italy, Italian Report Transparency, p. 14-15.

¹⁶⁸ This is the case in Austria, Denmark, England, Ireland and Spain.

¹⁶⁹ This is the case in most of the Member States.

¹⁷⁰ Irish Report, p. 20.

¹⁷¹ Austria, Germany, Spain, Sweden (the forms are contained in the annexes to the national reports).

¹⁷² This limitation can be burdensome for the creditor, if enforcement measures fail. The situation in Denmark is similar, as the debtor's declaration only takes place if the debtor does not indicate voluntary assets for enforcement measures.

disclose his assets is strictly limited by the needs of the creditor to get information¹⁷³. In these Member States, a debtor may be requested to disclose his assets on several occasions while in other jurisdictions, where the debtor must disclose all assets, an additional declaration can only be requested after a certain period of time¹⁷⁴.

As a result, two different models of the declaration can be distinguished¹⁷⁵: the first model obliges the debtor to disclose all his assets while the second restricts this obligation to assets sufficient for the recovery of the creditor's claim. At first sight, the latter model seems preferable, because it corresponds to the principle of proportionality. However, from the perspective of the creditor, it might be disadvantageous, because his "free choice" between different assets subject to execution will be limited by the debtor's "preference". Additionally, seen from the perspective of the debtor, a "limited disclosure" might be burdensome if he is requested repeatedly to disclose his assets. In those national jurisdictions, where the debtor must disclose all assets at once, the concurring creditors consult the (former) declaration which is regularly contained in a debtor's list. As a result, the debtor is protected against additional requests (with the exception that the creditor shows that the debtor got additional funds)¹⁷⁶. From a legal-political perspective, it seems advisable to adopt the first model (because all assets of the debtor are subject to enforcement). Information given by the declaration would be kept in a debtor's register; but access to that register would be restricted to enforcement organs.¹⁷⁷

The prerequisites for the obtaining of a debtor's declaration are similar. In all Member States, the declaration is requested by the creditor. Normally, the declaration is only taken after an unsuccessful seizure attempt or if attempts are likely to be unsuccessful¹⁷⁸. Modern enforcement systems (Portugal, Spain) require the declaration to be made at the beginning of the proceedings in order to enable the

¹⁷³ The Italian Report Garnishment, p. 14, indicates that this limitation of the duty to disclose assets corresponds to the principle of proportionality, see also *infra* IV 1.

¹⁷⁴ According to sec. 903 ZPO, the debtor is obliged to give a second declaration only after a period of three years.

¹⁷⁵ Berglund, Annex to the Swedish Report Transparency, p. 5; Tarzia, *Vers un concept européen du droit de l'exécution*, in : Isnard/Normand, *Le droit processuel et le droit de l'exécution* (2002), p. 165.

¹⁷⁶ The example shows that the principle of proportionality may lead to different results according to different perspectives.

¹⁷⁷ This proposal corresponds to the new system in Portugal, Portuguese Report Transparency, See *infra*

¹⁷⁸ Example: Sec. 807 ZPO.

enforcement organs to obtain the necessary information at an early stage. In these systems, a fruitless attempt at seizure is not a precondition.¹⁷⁹

The main problem with the debtor's declaration lies in the fact that the declaration must be given personally¹⁸⁰. If the debtor refuses to disclose his assets, the enforcement organs (with the help of the police) may exercise physical coercion and arrest him¹⁸¹. In Portugal, a reluctant debtor may incur penalties, while in most other jurisdictions, imprisonment (of up to one or even two years) may be imposed on the debtor.¹⁸² The making of an incorrect or false declaration by the debtor is treated as a criminal offence. Therefore, in some Member States, the declaration is sworn under oath as an affidavit¹⁸³.

The debtor's declaration is very detrimental¹⁸⁴ if the declaration is published in an open register. This is the case in Germany, where a public register is maintained at the local courts which lists persons who gave an affidavit or failed to do so (sec. 915 et seq. ZPO).¹⁸⁵ In many local courts the registers are now maintained as electronic data bases and chambers of industry and commerce regularly get copies (or even online access)¹⁸⁶. Thus, the debtor's creditworthiness is a matter of public record¹⁸⁷. In practice, the avoidance of an entry in the debtor's register is a strong incentive for debtors to assist with the judgment. In the legal literature the current situation is criticized, because the debtor's register is not aimed at providing information for the

¹⁷⁹ In Germany, sec. 807 (1) n° 2 ZPO, a debtor's declaration takes place when there are no prospects of a successful enforcement. However, the creditor must prove this by a (written declaration) by the bailiff ("*Fruchtlosigkeitsbescheinigung*"). Therefore, the declaration is normally taken after the failure of enforcement measures, German Report Transparency, p. 19.

¹⁸⁰ Gaul, Neukonzeption der Sachaufklärung in der Zwangsvollstreckung, 108 ZJP p. 1, 8 et seq. [1995]

¹⁸¹ In England and Ireland, the failure to comply with a court order will be a contempt of court

¹⁸² Austria, Denmark, Germany, Greece, Ireland, Portugal, Spain, Sweden, England.

¹⁸³ Example: Sec. 807, 478-483 ZPO. In 1991, an amendment of the Austrian Enforcement Code introduced a new procedure where the declaration is provided without oath. However, the criminal sanction remained unchanged, Austrian Report Transparency, p. 51-52.

¹⁸⁴ The publication of this is a severe incursion into the debtor's right of privacy, see *Verbeke*, Execution Officers as a Balance Wheel in Insolvency Cases, 9 Tilburg Law Review 7, 17 [2001].

¹⁸⁵ According to sec. 900 (3) ZPO, the debtor may present to the bailiff a plan on the payment of the debt (even by instalments) within 6 months. The bailiff must then immediately stay the proceedings, even without the consent of the creditor. With the creditor's consent, the bailiff may collect the payments from the debtor, see Brox/Walker, *Zwangsvollstreckungsrecht* (7th ed. 2002), p. 640 with further references.

¹⁸⁶ National Report Germany, p. 22 et seq.

¹⁸⁷ Debtors who appear in the debtor's list will not have access to credit - they incur the risk that their bank accounts will be terminated by the bank.

creditor but rather at exerting additional pressure on the debtor to comply with the judgment. Pressing the debtor to pay with the threat of putting him in a sort of pillory seems to be irreconcilable with the constitutional principles of proportionality and the protection of the debtor's privacy¹⁸⁸. In this context, the purpose of the registers seems to be unclear. It is not a source of information but rather a mean for pressing the debtor to pay. In Portugal, legislation has been proposed to introduce a debtor's register which will be only accessible to enforcement organs¹⁸⁹. Other Member States provide debtor's registers only in relation to bankruptcy or to effected restraints.¹⁹⁰

The debtor's declaration is unknown in six Member States (including Scotland)¹⁹¹. The reluctance attitude of these jurisdictions may be explained by the fact that the debtor's declaration is similar to a kind of "personal enforcement" (i.e. enforcement against the person of the debtor), which might be sanctioned by imprisonment¹⁹². An additional reason is to be found in the legal nature of the declaration. It can be regarded as a taking of evidence, especially if the declaration is given in an oral hearing of the enforcement court¹⁹³. As most of the Romanic States clearly separate enforcement organs from the court system (although this is not the case in Italy); such a taking of evidence might be considered (particularly for historical reasons) as incompatible with the structures of enforcement.¹⁹⁴ However according to the legal situation in other Member States the declaration may also be taken by the bailiff or other enforcement organs. Besides, the obligation of a debtor to disclose his assets is largely recognised in insolvency and like proceedings¹⁹⁵.

¹⁸⁸ Gaul, 108 ZZZ p. 1, 22 [1995]. However, the German Constitutional Court, stressing the importance of efficient enforcement structures, held that the debtors' register does not infringe the constitutional rights of the debtor, BVerfGE 61, 126, 136; NJW 1988, 3009s.

¹⁸⁹ National Report Portugal, p. 7.

¹⁹⁰ Austria, Denmark, Greece, Italy, Belgium.

¹⁹¹ However, the Scottish legislator is currently debating the introduction of a debtor's or third debtor's declaration, Scottish Report Transparency, Introductory Remark to question 2.

¹⁹² Imprisonment of the debtor was formerly inflicted by so-called "debtor's prisons", which were abandoned during the period of enlightenment. A general trend in European enforcement procedures favoring "personal enforcement" is ascertained by Tarzia, *Vers un concept européen de l'exécution ?*, in: Isnard/Normand (ed.), *Le droit processuel et le droit de l'exécution*, 153, 156.

¹⁹³ Gaul, 108 ZZZ p. 1, 13 [1995].

¹⁹⁴ The legal qualification of the debtor's declaration is widely discussed.

¹⁹⁵ This is the case in Belgium for consumers' insolvency, see Article 1675bis et seq. Code Judiciaire, Belgian Report Transparency, p. 3.

2. Information from registers

With the exception of Italy and Scotland, the legal systems of Member States without a debtor's declaration empower enforcement organs to search state-maintained records for information regarding the debtor's assets. In the Netherlands¹⁹⁶ and in Belgium¹⁹⁷, bailiffs can get information about the debtor's address and employment from social security records. In Luxembourg, a creditor may request the *juge de paix* to contact the social security register in order to find out the debtor's address and employment¹⁹⁸. In France, the legal situation is more complicated as the *huissiers de justice* do not have direct access to administrative assistance, but must request the help of the *Procureur de la République*. In practice, this co-operation does not work efficiently¹⁹⁹. Additionally, the *huissiers* are prohibited from using the information obtained for purposes other than the enforcement of the title held by the creditor.²⁰⁰

Direct access by enforcement organs to non-public registers is not restricted to jurisdictions that do not provide a debtor's declaration. Quite the reverse: Modern enforcement laws open qualified organs access to non-public files. In Austria and in Spain especially, the enforcement courts may request information about the debtor's employment from social insurance registers. In Portugal, the bailiffs must first request the authorisation of the enforcement courts, but an open access is available.²⁰¹ In Spain and in Sweden, the enforcement organs may also directly request information from fiscal records. In these jurisdictions, the efficiency of enforcement proceedings has been considerably improved. Additionally, private and public debts are (at least to some extent) treated equally.²⁰²

¹⁹⁶ Kennett, *Enforcement of Judgments*, p. 102.

¹⁹⁷ National Report Belgium Transparency, p. 4 (bailiffs may directly contact Société Carrefour which indicates the employer of the debtor).

¹⁹⁸ Luxembourg Report Transparency, p. 2 and 6. The creditor must not present an enforceable title.

¹⁹⁹ Consequently, the current situation is to be reformed, French Report Transparency, 3.2.

²⁰⁰ This prohibition corresponds to general principles of the protection of data transfer, see Article 7 Directive 95/46/EC.

²⁰¹ Austrian law gives preference even to information from social registers. A debtor's declaration may only be requested if the social insurance register could not provide any data of the debtor's employment or income.

²⁰² This aspect is discussed *infra* at IV 1.

3. The third debtor's [garnishee's] declaration

In the context of garnishment proceedings, most of the Member States²⁰³ impose on the third debtor (especially banks and employees) a duty to disclose information about the claim seized²⁰⁴. Normally, the prerequisites for such a declaration are an application by the creditor²⁰⁵ and the (valid) service of a garnishment order upon the garnishee.²⁰⁶ However, the declaration itself is given in different proceedings. In some Member States²⁰⁷, the declaration is given orally in a hearing of the court and, in principle, treated as witness testimony. In other Member States, the garnishee must provide for the declaration within a specific period of time (from 1 to 4 weeks)²⁰⁸, the declaration is given on a form²⁰⁹ (or informally in writing²¹⁰). In these Member States, the declaration is delivered as an extra-judicial declaration²¹¹, in France it is taken "on the spot" by the bailiff when serving the garnishment order on the garnishee, while in Germany, the declaration is delivered in a written statement to the debtor.²¹² Nevertheless, from a functional perspective, these differences do not seem to be overly important. Much depends on the content of the declaration which is, in principle, similar in most jurisdictions. The garnishee must indicate the balance seized, declare whether the claim exists (and, if so, to what value), whether competing creditors have already seized the claim and whether other preferential claims exist²¹³. Furthermore, there are different obligations on the garnishee to disclose additional accounts of the debtor, including accounts situated in other

²⁰³ Exceptions are found in Denmark, Finland and Spain because these jurisdictions do not have a specific declaration by the garnishee. Nevertheless, garnishees can be questioned by the enforcement organs about the assets. In Scotland, no duty of the arrestee to give information on the assets seized does exist, Scottish Report, Transparency, 2.

²⁰⁴ In Greece, the previous case law of the Supreme Civil Court, according to which banker's confidentiality was more important than the declaration, has been overturned, *Areios Pagos (plenum)*, decision 19/2001, 8 DEE 2002 190 et seq., see Greek Report Garnishment, p. 5-6.

²⁰⁵ In Austria, France and Sweden, the creditor's application for enforcement measures includes the taking of a garnishee's declaration by the enforcement organs.

²⁰⁶ In Spain the declaration is part of the general examination of witnesses by the court.

²⁰⁷ Denmark, Ireland, Italy, Spain, England.

²⁰⁸ 4 weeks: Austria, Netherlands; 2 weeks: Belgium, France, Germany, Portugal; 1 week: Greece, England.

²⁰⁹ Ex. Austria, sec. 301 EO; cf. Annex Austrian Report Transparency.

²¹⁰ This is the case in Germany, but the object of the declaration is legally specified by sec. 840 ZPO.

²¹¹ National Report Netherlands Garnishment, p. 6.

²¹² French Report Garnishment, p. 14.

²¹³ Member States which adopted a "group system" require additional information from the garnishee which is not needed in jurisdictions following the "first in right" distribution scheme.

branches of a bank²¹⁴ or even in branches abroad.²¹⁵ Much depends on the formulation of the garnishment and/or the disclosure order²¹⁶. If all assets of the debtor within a bank are seized, the bank must disclose all accounts and their balances. A general European trend can be identified in that garnishees must reveal all accounts if the garnishment order embraces all assets of a debtor²¹⁷.

Due to the different garnishment procedures and organisations of enforcement organs, the declaration entails different legal effects. Two models can be identified.²¹⁸ According to the first model, the declaration of the garnishee is treated as an acknowledgment of the claim.²¹⁹ The enforcement court may even order the garnishee to pay the creditor (who gets an enforceable title against the garnishee)²²⁰ or the enforcement organs collect directly the money from the garnishee²²¹. If the garnishee's declaration is given in a hearing, the enforcement court can also hear objections of the garnishee against the claim which are derived from substantive law²²². Member States which adopted an extra-judicial model provide for a more complicated system. In these jurisdictions, the garnishment order transfers the attached claim to the creditor²²³ who must collect the claim from the garnishee. The creditor may summon the garnishee for a declaration. But the declaration is not treated as an acknowledgment. The creditor must sue the garnishee for payment in

²¹⁴ This is the case in France, French Report Garnishment, p. 14.

²¹⁵ This is the case in England.

²¹⁶ In France, the bank must disclose all the debtor's accounts to the *huissier de justice*, even if the garnishment order does not mention the number and the type of the account seized, French Report Garnishment, p. 14.

²¹⁷ Even in Germany, where so-called „search orders“ are prohibited, the bank must indicate all accounts if the garnishment order relates to all assets of the debtor, see German Report Garnishment, p. 30.

²¹⁸ Kerameus, IECL 10-110 – 10-113 distinguishes three models (Roman, English, Central European), but stresses fact that the „Romanic“ and the “English models” are very similar, IECL 10-112.

²¹⁹ This model is found in Belgium, Denmark, France, Greece, Ireland, Italy, Luxembourg, Portugal, England.

²²⁰ In England and Ireland, the court orders the garnishee to “show cause” in a hearing as to whether he contests the claim. If the garnishee does not attend the hearing or does not dispute the debt due, the court may transform its initial order *nisi* in an order absolute. Otherwise, if the garnishee contests the claim, the court may determine the question. According to the new terminology of the CPR, the garnishment order *nisi* is now called an “interim debt order”. The new procedural rules are explained in *Société Eram Shipping Company v. Hong Kong and Shanghai Banking Corp. Ltd*, [2003] UKHL 30 (Lord Bingham of Cornhill).

²²¹ Finland, Sweden.

²²² Ireland, England.

²²³ There exist considerable differences regarding the transfer of the claim and the legal position of the creditor when collecting the claim from the garnishee, see *infra* at C II.

the ordinary courts. However, the costs of that litigation are awarded to the garnishee, if the creditor's lawsuit fails because of insufficient information provided by the garnishee²²⁴. Additionally, the garnishee incurs a liability in tort if he does not correctly inform the creditor or the enforcement organ about the legal status of the claim seized²²⁵.

Similarly, the failure of the garnishee to give any declaration is met with different sanctions in different jurisdictions. Those which adopted a court-oriented model of oral questioning provide for fines and contempt proceedings which may also apply against witnesses²²⁶. Other Member States combine elements of sanction with the collection of the debt itself. In France, the failure to give the declaration is sanctioned by a court order against the garnishee for payment of the claim²²⁷. However, the garnishee may recover the sum paid to the creditor from the debtor (in a claim for unjust enrichment)²²⁸. In Ireland and England, the situation is similar. If the garnishee does not respond, he may be liable to execution (in default) as would be a judgment debtor²²⁹. In the other Member States, the creditor is entitled to claim the damage incurred by of the failure to provide the declaration.

The comparative survey reveals that the duty to give a correct declaration may impose a heavy burden on the garnishee. Accordingly, in many jurisdictions the garnishee's costs are reimbursed. In England, the garnishee may deduct an amount as expenses from any money held for the judgment debtor²³⁰. Sec. 302 of the Austrian Enforcement Code provides for fixed fees: the garnishee receives 25 € for a

²²⁴ Austria, Germany, Netherlands, Sweden.

²²⁵ Austria, Belgium, Finland, France, Germany, Greece, Ireland, Italy, Netherlands, Portugal, Sweden. In Scotland the bank is not obliged to give any information. As a consequence, creditors and messengers-at-arms (bailiffs) "fish" for arrestments. The bank incurs a liability if it does not search for the debtor's assets and does not comply with the arrestment.

²²⁶ Belgium, Denmark, Portugal, Spain.

²²⁷ Article 44 of Loi of July 9th, 1991, specifies the particulars of the information that the garnishee has to disclose.

²²⁸ This claim presupposes, however, that the garnishee did not owe payment to the debtor.

²²⁹ National Report Ireland, p. 33; England: According to CPR 72.9 (1) and 72.9.1 the final third party debt order is a valid judgment of the court which can be enforced in the same way as any other order and thus, the judgment creditor can issue execution to enforce payment by the third party.

²³⁰ CPR 72.6: The form of interim third party debt order does contain the words "a bank or building society may deduct an amount from any money held for the judgement debtor, for its expenses in complying with this order...".

declaration relating to multiple claims, 15 € in the case of a single balance²³¹. In Ireland, the costs of the declaration are part of the costs of the enforcement proceedings and, therefore, borne by the debtor²³². By contrast, in Germany the obligation of the garnishee is considered as a genuine legal obligation²³³. According to the case law of the Supreme Civil Court no reimbursement – even pursuant to a contract agreed between the bank and the creditor – is permissible²³⁴. However, this case law and the resulting legal situation is criticised in the legal literature.

The comparative survey shows that tracing inquiries are regularly based on third party declarations. This instrument can be considered as a common in Europe, although there remain considerable differences in the legal effects of the declaration and the sanctions which may apply. These are mainly related to the different structure of the garnishment proceedings. Nevertheless, the obtaining of information from private third parties seems likely to become an accepted part of enforcement activity in Europe²³⁵.

4. *The cross-border context*

In all Member States, foreign creditors are not precluded from seeking information as to the debtor's potential assets²³⁶. Generally, those creditors are treated equally with domestic creditors and have access to information available at the domestic level. The only substantial difference when enforcement is sought pursuant to a foreign enforceable instrument is that such instrument must be declared enforceable domestically. This declaration is effected under the (accelerated) proceedings of Articles 38 et seq. of the Brussels' Regulation²³⁷.

²³¹ According to sec. 302 EO these costs are firstly paid by the creditor, ultimately they are part of the enforcement costs borne by the debtor.

²³² The amount is fixed by the court. Irish Report, p. 33.

²³³ German Report Garnishment, p. 33.

²³⁴ BGH, *Neue Juristische Wochenschrift* 2000, 651 – the case concerned the control of a standard clause of a banking contract.

²³⁵ Same opinion is expressed by Kennett, *Enforcement*, p. 119.

²³⁶ The obtaining of information from public registers is not addressed here, see supra at II 4.

²³⁷ The legal situation is identical in all Member States.

The position of a foreign debtor may be improved if he can seek the support of enforcement organs under Art. 47 (1) of the Brussels' Regulation.²³⁸ However, the application of this provision presupposes that provisional measures are available under the law of the relevant Member State and that these provisional remedies allow the enforcement organs to trace the debtor's assets. The national reports do not reveal much case law on this point; however, it seems that the legal situation in the Member States is fragmented and complicated.

In Germany, a foreign creditor may seek an Arrest Order (Arrestbefehl) (sec. 916 et seq. ZPO) which is an enforceable title and may be the basis for a debtor's declaration (sec. 807 ZPO²³⁹) and for a third debtor's declaration (sec. 930 (2) and 840 ZPO)²⁴⁰. However, if the creditor tries to seize assets of the debtor by a "Vorfändung" (pre-garnishment), which is less expensive than an arrest, he is not empowered to request a debtor's or a garnishee's declaration²⁴¹. Due to this background, a foreign creditor may be well advised first to seek the recognition of the judgment under Article 38 of the Brussels' Regulation and to arrest the debtor's assets according to sec. 47 (2) Brussels' Regulation. Provisional remedies under that article also allow debtor's and third debtor's declarations to be requested.²⁴²

At present, enforcement organs are not able to access directly the (non public) registers of other Member States which are open to the enforcement organs of that state. Therefore, a French *huissier de justice* cannot apply at the Belgian Société Carrefour for information about the debtor's employment, nor can a Spanish court directly access the Austrian social insurance administration according to sc. 294a EO. Access to these registers is strictly limited to national enforcement organs. At present, there exist no international instruments dealing with the exchange of information between national enforcement organs, although there is a growing body of Community legislation dealing with cross-border administrative assistance

²³⁸ This article is discussed in detail infra at C II, at fn. 604 et seq.

²³⁹ A debtor's declaration presupposes, however, that attempts to seize movables of the debtor have failed, supra at.

²⁴⁰ The presentation of the enforceable title of a foreign court will usually establish the existence of a claim which is protected by the Arrest, see infra D I (protective measures).

²⁴¹ German Report on Transparency p. 8, infra at fn. 629.

²⁴² Hess/Hub, Vorläufige Vollstreckbarkeit ausländischer Urteile im Binnenmarktprozess, IPRax 2003, 93, 98 et seq., infra D II 2.

between competent authorities in fiscal, social and similar matters²⁴³. However, the Nordic Countries are planning to adopt an “Agreement on the Exchange of Information in Recovery Matters”. This Convention would be the first instrument allowing direct collaboration between enforcement organs. It will also apply to public debts. This is an exception, though, and for the most part the improved access to registers which has recently been granted to enforcement organs in some jurisdictions remains strictly territorial.

However, the lack of co-operation between enforcement agents and organs in civil matters is contrasted to the close cooperation of fiscal authorities in the European Union. A 1976 regulation dealing with the recovery of claims resulting from the Agricultural Guarantee Funds²⁴⁴ provides a system of a direct exchange of information between national authorities. This regulation has been extended to several other matters, especially the recovery of VAT, import and export duties and other indirect taxes. Under Article 4 of the Directive 76/308/EEC, national authorities may directly request all information which might be necessary for the enforcement of the claim from the requested authority²⁴⁵. The request is refused if the disclosure would relate to a commercial, industrial or professional secret or if the disclosure would prejudice the security or the public policy of the State receiving the request. The exchange of information lays the foundation for the cross border recovery of national instruments (tax bills) which are enforced by the requested authority according to its national law (art. 6 – 14 of Directive 76/303/EEC). Recently, the directive has been

²⁴³ See the overview in the Annex to the Swedish Report, p.6-8. Cooperation in taxation matters is also described by Schlosser, 284 *Recueil des Cours* 333-346 [2000] and by Leroy, “La transparence patrimoniale en droit international”, in: Verbeke/Caupain (ed.), *La transparence patrimoniale*, (2001), p. 145 – 147.

²⁴⁴ Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of the agricultural levies and customs duties OJ L073 of June 19 1976 p. 18.

²⁴⁵ Article 4 of the Directive 76/308/EEC reads as follows: “(1) At the request of the applicant authority, the requested authority shall provide any information which would be useful to the applicant authority in the recovery of its claim. In order to obtain this information, the requested authority shall make use of the powers provided under the laws, regulations or administrative provisions applying to the recovery of similar claims arising in the Member State where that authority is situated. (2) The request for information shall indicate the name and address of the person to whom the information to be provided relates and the nature and amount of the claim in respect of which the request is made. (3) The requested authority shall not be obliged to supply information: (a) which it would not be able to obtain for the purpose of recovering similar claims arising in the Member State in which it is situated; (b) which would disclose any commercial, industrial or professional secret; or (c) the disclosure of which would be liable to prejudice the security of or be contrary to the public policy of the State.”

amended and extended. Since 30 June 2002 the enforcement of tax bills is now conducted according to the principle of mutual recognition (art. 8 Directive 2001/44/EC)²⁴⁶. Requests are executed by electronic data exchange.

There is an additional tension here in that, according to the practice in some Member States (especially in Austria, Germany and England), territoriality does not apply to the debtor's declaration. The obligation of the debtor to deliver an affidavit is not limited to the debtor's domestic assets.²⁴⁷ In fact the debtor has to reveal his entire assets, including those abroad. The obligation to deliver such a "cross-border affidavit" corresponds to the idea of a European Judicial Area, where a free movement of judgments is guaranteed and creditor can apply for enforcement in all Member States.²⁴⁸ Further, it would seem conceivable that this extend the garnishee's (banks) obligation to disclose assets of the debtor to branches within the European Judicial Area where additional accounts are held.²⁴⁹ This is at present the practice in England, but, the national reports reveal that such orders are not common in the Member States.

Additional possibilities for getting information about the financial situation of a debtor or about the whereabouts of assets can be obtained by provisional remedies: In England the famous (and effective) Mareva injunction (freezing order, C.P.R. 25.1 (f)) is usually accompanied by a disclosure order²⁵⁰, pursuant to which the debtor is required to appear before the trial court in order to give a declaration about his assets. Third parties can also be required to deliver such a declaration. In these countries, the creditor can thus obtain from the court of first instance important and necessary information about the prospects of enforcement.²⁵¹ These remedies are mainly applied in "trans-national fraud litigation" (when debtors "robbed" and defrauded assets of companies). An additional question is whether such orders can

²⁴⁶ Commission Directive (2002/94/EC) of 9 December 2002 laying down detailed rules for implementing certain provisions of Council Directive 76/308/EEC on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures, O J L 175, of June 28, 2001, p. 17.

²⁴⁷ Hess, *Auslandssachverhalte im Offenbarungsverfahren*, *Rechtspfleger* 1996, 89 et seq.

²⁴⁸ In insolvency proceedings, the debtor must disclose his « worldwide » assets, see Sec. 97 German Insolvency Act; *Münchener Kommentar/ Passauer*, Sec. 97 InsO (2002), n° 14-15.

²⁴⁹ See *infra* VI 6.

²⁵⁰ Cf. Cuniberti, *Les mesures conservatoires portant sur les biens situés à l'étranger* (2000), no. 160 to 162; McLachlan, 47 *JCLQ* 3, 10-12 [1998].

²⁵¹ Example: Cour de Cassation, Dec. 11, 2001, *Revue critique DIP* 2002, 317.

be recognised in other Member States under article 32 et seq. of the Brussels' Regulation.²⁵²

An avenue for obtaining information from other Member States may be the application of the Evidence Regulation EC 1206/01: An enforcement court may request a court in another Member State to inquire the debtor's assets (i.e. by ordering a hearing with a third debtor).²⁵³ While this possibility seems conceivable for Member States which regard the debtor's and the garnishee's declaration as a taking of evidence, the use of that instrument in enforcement proceedings may be unusual for Member States where enforcement is not effected by courts, but by specialised enforcement organs.

Overall, it can be tentatively stated that the current situation remains largely unsettled. The practical difficulties of a creditor are increased considerably when he or she seeks information about the debtor's assets in other Member States. The recourse to provisional measures under Article 24 Brussels' Convention/Art 31 Brussels Regulations and to requests under the Evidence Regulations shows that effective remedies for tracing the debtors's assets are needed. Therefore, Community action to dismantle these legal and practical barriers to the free movement of judgments seems necessary.

IV. Guiding Principles of the European Transparency of Assets

1. Availability of all sources for information

At present, transparency of debtors' assets is generally achieved through three different sources of information: registers, the debtor's declaration and the declaration of the garnishee. While the basic structures of the national systems appear similar,²⁵⁴ there are considerable differences in the conditions of access, the procedures for obtaining information, the content and in the overall efficiency of the systems. From a comparative perspective, there are two different kinds of techniques providing access to information²⁵⁵. The first one is a system of

²⁵² See infra at fn. 789 et seq.

²⁵³ Irish Report p. 21.

²⁵⁴ However, not all Member States provide all sources of information equally, especially in relation to the debtor's declaration.

²⁵⁵ Similar opinion: Berglund, Annex to the Swedish Report Transparency, p. 5.

declaration of the entire patrimony by the debtor, which is applied in e.g. Germany, Greece and in England. A similar system is found in Portugal and in Spain where the debtor is also obliged to disclose his assets, but only to the extent which is needed for the satisfaction of the claim. Other Member States, especially those where the debtor is not required to disclose his / her patrimony, provide access to research systems which provide for specific information²⁵⁶ In these jurisdictions (with the exception of Italy), the required information is mainly obtained from registers. The system is applied very differently in terms of access to registers and other sources of information and by means of powers of inquiry and examinations. The most striking example of an individually adopted model, which also has a high degree of access to information and confers far-reaching powers of inquiry and examinations to enforcement agents, is Sweden. However, most of the Member States combine features from both those systems, even if a national system overall could be classified as falling under one of those systems.

There is no doubt that cross-border recovery of judgments is impaired by the differences between the national legal systems and that creditors in Europe are not treated equally. However, the similar underlying structures of the Member States' legal systems could be a basis for an approximation by Community action. As an objective, the measures taken by the Community should improve the right of creditors to obtain information. Accordingly, all sources of information (registers, debtor's declaration and disclosure by garnishees) should be available in all national jurisdictions. Equal access to the same sources of information guarantees equal treatment of creditors and debtors in the European Judicial Area.

2. Data protection in enforcement procedures

The creditor's right to efficient recovery is counterbalanced by the debtor's right to privacy.²⁵⁷ Accordingly, the protection of the debtor is not unlimited. As the French Court of Cassation clearly states, a debtor has no right to conceal his address in

²⁵⁶ Example: Scotland, where far-reaching online accessible registers exist, but the judicial system does not provide for a debtor's or third party debtor's declaration, Scottish Report on Transparency, 1-2.

²⁵⁷ See supra at A II 2.

order to avoid enforcement measures²⁵⁸. Similarly, the Greek Supreme Civil Court recently held that the banker's obligation of secrecy is no obstacle to a garnishee's declaration²⁵⁹. At the European level, guiding principles for the protection of the debtor's privacy are prescribed by Directive 95/46/EC for Data Protection which has been implemented by all Member States.²⁶⁰ Under Article 7, data processing and data transfer in judicial and enforcement proceedings are permitted, even without the consent of the debtor²⁶¹. However, any disclosure of data presupposes that the information will only be used in the proceedings, that the disclosure is sufficient to ensure that the objectives for which information is collected can be achieved²⁶²; that the transfer of data will be clearly limited by the need to obtain it, information obtained shall not be transferred to unauthorized third persons²⁶³. According to these principles, the preconditions, the purpose and the proportionality of information necessary for the enforcement of judgments must be precisely defined. Therefore, data protection is not an unsurmountable obstacle for the providing for an efficient transparency of a debtor's assets.

3. Transparency within the European Judicial Area

The transparency of the debtor's assets should, as a matter of principle, not be limited by the territoriality of the enforcement proceedings in the Member States. Transparency should rather be consistent with the principles and guarantees of data exchange and of data protection provided by Directive 95/46/EC. The Directive harmonises data transfers within and between the EU Members States and clearly

²⁵⁸ Cour de Cassation, Civ 1er, 19 mars 1991 *Bull civ. I n° 96*: «cette dissimulation est dictée par le seul dessein illégitime de se dérober à l'exécution de ses obligations et de faire échec aux droits de ses créanciers».

²⁵⁹ Law 2915 of 2001 art. 24; Greek Supreme Court 19/2001, *Hellenike Dikaisosyne* 2002, 79.

²⁶⁰ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data OJ L 281 , 23/11/1995 p. 31.

²⁶¹ Grabitz/Brühmann, *Data Protection, Commentary on Article 7 Directive 95/46/EC*, n° 16. This corresponds to the legal situation in all Member States, see Responses of the national reporters to question n° 3.6.

²⁶² Under these guide lines, the practice in some Member States (especially Germany) of providing a public "debtors list" seems to be problematic. The recording of data related to enforcement should not be used as a mean for pressing a debtor to pay.

²⁶³ Cf. Art. 6 Directive 95/46/EC, OJ L 281, 23/11/1995 p. 40.

distinguishes situations relating to third states.²⁶⁴ A similar distinction should be made between the Member States and third states which corresponds to the territorial scope of the European Judicial Area. Within this area, where a free movement of judgments is guaranteed, all assets of a debtor (within the limits of immunities) are subject to enforcement. Therefore, the obligation of the debtor to disclose his assets, but also the obligation of garnishees to give information about the financial situation of a debtor should apply to all assets within the European Judicial Area. Finally, within Europe public registers should be operated as electronic databases and access via the Internet should be available.²⁶⁵

4. Equal treatment of private and public debtors?

In all Member States, there is a considerable difference between private and public creditors. Due to information recorded in tax and social registers which are accessible to public creditors, public claims receive preferential treatment in enforcement proceedings. This inequality has been highlighted by the Swedish and Italian reporters, although the legal situations in these jurisdictions are quite different. In Sweden, private and public claims are enforced equally, because the Enforcement Authority has access to the tax and social registers.²⁶⁶ In Italy, private creditors cannot access these registers, and alternative means of obtaining information about the financial situation of the debtor do not exist. In response, Italian legal writers have proposed granting the enforcement courts power to obtain information from public registers²⁶⁷. In some Member States, recent reforms of insolvency proceedings derogated former privileges of public (fiscal and social) debts with the result that private and public debts are treated equally²⁶⁸. The comparative research of the national systems shows that recent law reforms in several Member States

²⁶⁴ Chapter 4, Articles 25 et seq., Grabitz/Brühann, Preliminary remark to Art. 25 Directive 95/46/EC.

²⁶⁵ At the Heidelberg meeting of July 11th 2003, the reporters discussed the issue whether an obligation of a debtor to disclose his assets worldwide would be advisable. Most reporters agreed that such a solution might be considered as an infringement in the internal affairs of a third state. In the reverse, debtors within the European Judicial Area should be protected against disclosure orders from foreign courts and administrations. This conclusion does not preclude a cooperation between courts and administrations in this field. This cooperation should be based on international agreements.

²⁶⁶ Swedish Report on Transparency, p. 8-9.

²⁶⁷ Italian Report on Transparency, p. 15.

²⁶⁸ In Germany, the preferential treatment of public debts in insolvency proceedings was withdrawn in 1999 (when the new Insolvency Act was enabled).

gave enforcement organs access to non public records. However, apart from this current trend in some Member States, a general principle that private and public debts must be equally enforced does not exist. Nevertheless, this issue should be discussed further in the Member States.

V. Policy Recommendations

In order to overcome the current obstacles, several proposals are discussed here. The overall recommendation is to pursue a complementary approach aimed at improving various instruments for obtaining and exchanging information for enforcement purposes. A complementary approach seems to be suitable in respect of the national enforcement cultures which provide for different instruments²⁶⁹. In addition to informal measures aimed at improving the general information about the legal situation in the Member States. Proposals 2 - 4 address the situation prior to an enforceable title being obtained and the start of (formal) enforcement proceedings. Proposals 5 - 7 concern the position of the creditor after enforcement (ie on the basis of an enforceable title).

1. *Elaboration of a Manual of European Enforcement Laws*

At present, there is a considerable lack of information about different enforcement systems in the 15 Member States. As a practical step, the Commission should publish (with the help of the Member States) a manual about the enforcement systems of the Member States.²⁷⁰ It should set out all the sources of information about a persons' assets which can be accessed in each Member State. The contact addresses of persons who can obtain access to that information if access is limited, the costs of access and other relevant details. This Manual should be available on the website of the European Judicial Network in Civil and Commercial Matters²⁷¹ and there is a compelling need to treat private and public creditors equally.

²⁶⁹ Therefore, this approach corresponds to the principle of subsidiarity (Art. 5 EC-Treaty).

²⁷⁰ This study (especially the national reports) could be used as an initial point of reference.

²⁷¹ The same opinion is expressed by Kennett, *Enforcement*, p. 122.

2. Increasing information available in public registers

Information about the debtor's address is currently available in the commercial registers which are partly harmonised by community legislation. It is recommended that the First Company's Directive (68/151/EEC) be replaced with a broader instrument applicable to commercial registers generally. This instrument should include the registration of individual merchants and business companies. The information recorded should include the following particulars: company identification code; address; country; phone number; legal structure; status; main business activities. The recording of these particulars should be prescribed by Community law. The traditional system of paper filing and publication of company information should be replaced by electronic data processing, with a view to Europe-wide access to data. Therefore Art. 3 (1) Dir. 68/151/EEC should be replaced by a provision prescribing an electronic data processing which can be accessed via the internet²⁷².

Additionally, the European Union should encourage initiatives by private and public institutions to provide information from registers (land register, business register) available over the internet. Examples of this kind of (informal) co-operation between public and private entities are the European Business Register/European Land-Information Service.

3. Access to population registers

At present, creditors searching for the address of a debtor who is a consumer or individual face serious problems. With the exception of England, Ireland and Scotland registers of population (or of nationals and foreigners) exist in all Member States. However, these registers are differently organised and access to central registers is not allowed in all jurisdictions. This suggests a proposal that enforcement organs should have access to these records. However, the practical efficiency of such a measure would be limited. Because the competence of the enforcement organs in many jurisdictions is determined by the domicile of the debtor, a creditor seeking information on the debtor's whereabouts may not find a competent organ. Additionally, because population registers are not common/known in all Member States, political action at the European level would entail the creation of such

²⁷² The directive should not prescribe the introduction of "centralised commercial registers" in the Member States, but prescribe an efficient access via the internet.

registers and these may not correspond to the legal traditions in those jurisdictions. An alternative would be to give enforcement organs access to police, social insurance or tax records. Such measures have been adopted by several Member States in the last decade and would certainly improve the position of the creditors. However, access to such records is heavily influenced by matters of “public policy” of the Member States²⁷³. A community measure prescribing compulsory access to those registers therefore seems difficult.

4. Access to consumer registers

Recently, the European Commission proposed to set up specific consumer registers as centralised data bases in the Member States²⁷⁴. These records would contain information in connection with the conclusion, management or performance of credit contracts or surety agreements²⁷⁵. Their purpose would be to avoid over-indebtedness of consumers and guarantors. Under that proposal, creditors would consult those records before granting new credit to their clients²⁷⁶. The practical effect of this proposal, if implemented, would be to make available central data collections provided by private institutions (as SCHUFA or Creditreform) to any creditor in the lending business²⁷⁷. If the proposed Directive were to be adopted by the Parliament and the Council, these records should also be available to creditors and enforcement organs²⁷⁸. In order to protect the privacy of the debtor, there would have to be a clear limitation of the information available in the records. Only the address, the location and the number of bank accounts and information about the employer of the debtor should be accessible.

²⁷³ Therefore, a Community measure in this area would be premature. A concurring opinion is expressed by Kennett, *Enforcement*, p. 120 (at footnote 108).

²⁷⁴ Proposal for a Regulation on cooperation between national authorities responsible for the enforcement of consumer protection law, COM (2003) 143final of July 18, 2003.

²⁷⁵ Art. 8 Draft Regulation on cooperation between national authorities responsible for the enforcement of consumer protection law, COM (2003) 143final of July 18, 2003.

²⁷⁶ However, from the perspective of enforcement, this register comes close to a debtor's list. The criticisms earlier expressed concerning such records also apply to that proposal.

²⁷⁷ Accordingly, access to these databases will be available not only the „contractual partner“ of these institutions, but to any creditor.

²⁷⁸ This information should be available before the start of enforcement proceedings and therefore not depend on the presentation of an enforceable title by the creditor.

5. “European Assets Declaration”

After obtaining an enforceable title, creditors in most Member States can trace the debtor’s assets with the support of enforcement organs. As shown above, the main sources of information are the debtor’s declaration of his assets and the garnishee’s declaration. It is recommended to standardise both types of declarations by Community legislation. The introduction of a “European Assets Declaration” would be an innovation in some Member States (Belgium, France, Italy, Luxembourg, the Netherlands and Scotland). However, as shown above²⁷⁹, some of these Member States also require the debtor in specific circumstance to disclose his financial situation²⁸⁰. In other jurisdictions an introduction of the sources of information is being discussed²⁸¹. In principle, the declaration does not impose a heavy burden on the debtor, who can fulfill the obligation simply by filling out a statutory form. Of course, the debtor can always avoid making the declaration by complying with the judgment.

a) It is recommended to establish a “European Assets Declaration”. Such an instrument would achieve the following:

- debtors would be obliged to disclose their assets throughout the European Judicial area (“cross-border” disclosure).
- the declaration would be given on a standard form available in all Community languages.
- minimum standards would be set for the declaration’s conditions, content and related sanctions. This would tend to encourage uniformity across Member States.
- As a result, creditors would have equal access to information about assets within the European Judicial Area, while debtors within the internal market would receive equal protection. In addition, information shopping within the European Judicial Area would be reduced.

b) The instrument should address the following issues:

²⁷⁹ See supra at Footnote 197.

²⁸⁰ It should be noted, that in tax matters, all Member States impose to their citizen the obligation to disclose their annual income.

²⁸¹ Italy, Scotland.

aa) As the instrument should not interfere in the organisation of enforcement organs in the Member States, each Member State should indicate a competent organ/public authority for the taking of the Declaration.²⁸² Disclosure would be made to the creditor or the proper authority as provided by laws of the Member States. Therefore, the declaration should be provided directly to the creditor, to the *huissier de justice*, to the enforcement agency or in the enforcement court. The enforcement organs at the domicile/seat of the debtor should be granted jurisdiction (see Art. 39 (2) Brussels' Regulation). In order to exclude "information shopping", no additional heads of jurisdiction should be open.

bb) The instrument should stipulate the following prerequisites for obtaining a Declaration:

(1) The creditor must present an enforceable title²⁸³

(2) The prospects of seizing assets are limited because the whereabouts of the assets are unknown (this prerequisite might be proved by an affidavit of the creditor)²⁸⁴.

(3) The debtor must always have an opportunity to avoid the obligation of making the declaration by offering payment, or identifying assets that are sufficient for the enforcement. It also seems advisable to allow the debtor to avoid the obligation to make a declaration by offering a payment by instalments, which are secured by a bank guarantee or a similar security²⁸⁵.

cc) The declaration should be made based on a form which is to be filled out by the debtor. It is recommended that the form be mostly filled out by "ticking boxes" (to indicate whether or not a specific type of an asset exists) and by the precise identification of that asset (eg, bank account description, location of the bank, account number). This form should be identically drafted in all languages of the Member States.

²⁸² Creditors seeking such a Declaration should be assisted by the European Judicial Network.

²⁸³ The declaration should be obtained on the basis of a provisionally enforceable judgment and on the basis of a provisional and protective measures such as a preliminary attachment, see *infra* D at. Fn.

²⁸⁴ As the purpose of the declaration is to provide information about the whereabouts of the debtor's assets, it should be taken at the beginning of enforcement proceedings. Therefore, a condition providing for an unsuccessful attempt of seizing the debtor's assets may simply delay the enforcement proceedings.

²⁸⁵ This corresponds to the legal situation in Germany, see sec. 899 (3) ZPO.

dd) Finally, the instrument should provide for sanctions applicable in the case of non-performance. It seems reasonable to provide for fines and the arrest of the debtor. Incorrect statements of the debtor should be sanctioned by criminal law²⁸⁶. However, the Member States should decide whether or not to coerce the debtor by including provision for imprisonment. In order to avoid undue coercion on the debtor, the directive should prohibit the publication of the debtor's declaration in an open register ("debtor' list")²⁸⁷.

c) Such a directive could be structured in different ways:

A first alternative would be a directive similar to Art. 4 of the Late-Payment Directive (2000/35/EC of June 29, 2000)²⁸⁸ simply setting out the obligation of member states to introduce a procedure for the taking of a European Assets Declaration. A model of such a provision has been elaborated by the Storme Group on the Approximation of European Civil Procedures²⁸⁹. However, an instrument only providing for "minimum harmonisation" would have several disadvantages: the differences in the national legal systems would remain; disclosure on the basis of a single, common form would not be possible, there would still be considerable differences in the sanctioning of the non-performance of the obligation.

As a result, the specification of a more comprehensive instrument is recommended. The details of the instrument should be set out in a directive (refer to (a)). The directive would not replace national provisions relating to a debtor's declaration but supplement them. Member States should be free to impose additional obligations of disclosure on the debtor. However, the directive should not be limited to cross-border

²⁸⁶ It seems unnecessary to prescribe how the disclosure is made. If national laws of the Member States sanction an incorrect statement only if it is sworn as an affidavit, this form of declaration can be prescribed by the respective national laws.

²⁸⁷ See supra text at footnotes 175 et seq.

²⁸⁸ OJ L 200 of 8 August 2000, p. 35.

²⁸⁹ See article 12.4 in the proposal from the group of experts in the report Storme (ed.) *Rapprochement du Droit Judiciaire de l'Union européenne*, pp. 210-211.

"For the protection of a judgment creditor who establishes his inability to find sufficient assets in the hands of the judgment debtor for the satisfaction of the judgment, the law of Member States shall provide:

1. that the debtor shall disclose in their entirety the nature and location of his assets. Such disclosure shall be made to the creditor or the proper authority as provided by law;
2. that the proper authority may require third parties to disclose any information relating to the assets of the debtor which is in their possession. "Third parties" includes any institution which holds an account in the name of the debtor.
3. sanctions whereby these obligations may be enforced."

enforcement only in the context of Art. 32 et seq. Brussels' Regulation: As the obligation of any debtor to disclose his assets relates to the European Judicial Area as a whole; creditors in any enforcement proceeding should have the opportunity of cross-border tracing of the debtor's assets in order to obtain sufficient information about the prospect of success of enforcement proceedings abroad²⁹⁰.

6. *European garnishee's declaration*²⁹¹

7. *Exchange of information between enforcement authorities*

An alternative model for the cross-border exchange of information could be based on the direct exchange of information between national enforcement organs. Existing Community instruments of judicial and administrative assistance could be used as models. Two options emerge²⁹². The first alternative would take the Evidence Regulation (1206/2001/EC) as the model of cooperation. Cooperation would take place through letters of request, direct cooperation between enforcement organs would be conducted with the help of central authorities²⁹³. This model seems preferable for national systems where courts are the competent enforcement bodies. In such situations, the taking of a debtor's declaration or the disclosure of a bank account by a garnishee in another Member State can be regarded as a request for taking of evidence.

However, from the perspective of Member States where the debtor's and the garnishee's declarations are made outside of the court-room (often on the basis of a standard form), this approach appears time-consuming and over-complicated. A quicker and easier alternative for obtaining the declaration would be to recognise the

²⁹⁰ As an alternative, the regulation might be restricted to cross-border debt recovery. In this case, the directive would supplement the existing national declaration. A creditor requesting a "European Assets Declaration" must prove that he is preparing (or at least considering) enforcement proceedings in other Member States.

²⁹¹ Cf. *infra* of part C of the study, at fn. 507 et seq.

²⁹² Kennett, *Enforcement*, p. 123, distinguishes a third "type" of cooperation between "regulated professionals" on an informal basis, i.e. between *huissiers de justice* in France, Belgium and the Netherlands who co-operate in informal networks. Such informal exchanges of information are subject to the laws for data protection and therefore strictly limited. It does not seem advisable to set up an instrument which would be based on "informal data transfers" between enforcement organs.

²⁹³ The application of Reg. 1206/2001/EC has been proposed by the Irish Report, p. 21.

foreign judgment²⁹⁴ and request directly that the declaration be taken by the competent enforcement organ. Further, from the perspective of Member States with a non-court oriented enforcement system it seems doubtful whether the Evidence Regulation would be applicable. According to Art. 1 (2), the Regulation applies only to requests by courts and not to requests by enforcement organs²⁹⁵. A possible option for implementing the Community's policy would be to amend the Regulation and enlarge its scope of application to enforcement. Nevertheless, it is doubtful whether the Regulation is adequately framed for the tracing of assets. The proceedings provided for in Art. 4 et seq and in Art. 17 of the Regulation are fashioned for court proceedings (lengthy depositions of witnesses and examinations of experts) and not for routine requests in enforcement matters²⁹⁶.

An alternative model for a mutual cooperation between enforcement organs can be found in Community legislation relating to the administrative assistance in fiscal and social matters²⁹⁷. It has been proposed to set up a community system for the exchange of information in civil enforcement matters which closely follows the cooperation scheme of the Directive 76/308/EEC²⁹⁸. This system could provide for mutual assistance by enforcement organs in the Member States for the exchange of information on the debtor's state of the affairs²⁹⁹. Similar to the proceedings under Art. 4 of Directive 76/308/EEC, enforcement organs of the Member States could directly request the assistance of competent organs in other Member States. The request (and all subsequent communications) should be effected by electronic data

²⁹⁴ Applying the principle of mutual recognition it would seem possible to implement a provision allowing foreign creditors to request the declaration on the basis of an enforceable title of another Member State (without formal recognition).

²⁹⁵ This is the predominant opinion in the German literature, see Jayme, "Extraterritoriale Beweisverschaffung für inländische Verfahren und Vollstreckungshilfe durch ausländische Gerichte", Festschrift Geimer (2003), p.376, 378-9; Schlosser, *Europäisches Zivilprozessrecht*, Commentary (2nd ed. 2003), Art. 1 Reg. 1206/2001/EC, n° 1.

²⁹⁶ However, it is recommended to apply the Evidence Regulation in order to support enforcement proceedings which are conducted by courts of the Member States.

²⁹⁷ This model is to be applied for exchanges of information between enforcement organs of the Nordic States (especially Sweden and Finland). See Nordic Agreement on the Exchange of Information in Recovery Matters, Rto the Nordic Council of Ministers on *Nordiskt samarbete om indivningsfrågor* (Nordic co-operation in recovery matters), pp. 25-30. Annex to the Swedish Report Transparency, p. 21-24.

²⁹⁸ Berglund, Draft proposal on an "International legal instrument on the mutual co-operation between European enforcement authorities in the European Union for the exchange of information for enforcement purposes related to private and public claims (a Euro- Information Assistance System for the exchange of information regarding the enforcement of claims), in Verbeke/Caupain (ed.), *La Transparence patrimoniale*, p. 217-237.

²⁹⁹ Annex to the Swedish Report on Transparency, p. 12 et seq.

exchange. The authorities receiving the request would undertake inquiries in the registers under their internal legislation and transfer the information to the requesting authorities. The setting up of a similar community intranet-system for the transmission “by electronic means of information in matters of assistance between the member states of the European Union for enforcement purposes”, would be useful. According to this proposal the information exchanged would include the status of the debtors, his assets and debts (including a complete investigation pertaining to the enforcement of debts according to domestic law) and the possible status of insolvency. Information received through the co-operation should, in addition to the debtor, should only be disclosed to persons and authorities with a duty to enforce the claims and judicial authorities handling cases regarding the enforcement of claims, e.g. enforcement agents/execution officers and courts, but would also include trustees and official receivers in bankruptcy.³⁰⁰

This proposal is particularly suitable for national systems where the transparency of the debtor’s assets is mainly provided by registers that are accessible to enforcement organs. This system is used in several Nordic countries (Sweden and Finland, but not in Denmark). The access of enforcement organs to (non) public registers has also been improved in other Member States³⁰¹. However, in many Member States, registers are operated by different administrative and private institutions, enforcement organs do not have investigative powers and do not have access to those registers. At present, there is a considerable difference in substance between the information available for enforcement organs. The situation in social and administrative matters is different, because the citizen in all Member States must disclose their financial situation to tax and social authorities. This information is kept in specific registers. However, as demonstrated above³⁰², most of the Member States do not grant free access to those registers to enforcement organs. In sum, this proposal would require considerable changes of the enforcement structures in

³⁰⁰ Berglund, article 3, 10. a)-c) of Draft proposal on an “International legal instrument on the mutual co-operation between European enforcement authorities for the exchange of information for enforcement purposes related to private and public claims in: Verbeke/Caupain (ed.), *La Transparence patrimoniale*, p. 231-232.

³⁰¹ Supra text at footnotes 268 et seq.

³⁰² Supra text at footnotes 196 et seq.

many Member States³⁰³. Even if it would be possible to agree on a system of competent authorities for the cooperation, a parallel harmonisation of the national register laws and of social and fiscal secrecy laws would be necessary. Without such a harmonisation, the volume and quality of the information exchanged between the national authorities would be quite limited³⁰⁴. Even if this proposal is met with reluctance, it seems to be advisable to improve the public registers and to operate these records as data bases for online access.

C. The Attachment of Bank Accounts

I. Current state of the national laws

1. Introduction: Differences and similarities in the national legal systems

In all Member States, garnishment is by far the most important form of monetary enforcement³⁰⁵. In practice, two types of assets are most often targeted: the debtor's earnings and bank accounts. These are closely related, as the earnings, pensions and other regular income of a debtor are nowadays usually transferred to his or her current account.³⁰⁶ As garnishment is central to the national enforcement procedures, it is subject to their general structures. Accordingly, the conceptual divergences between the enforcement systems of Member States are also evident in garnishment proceedings. These differences relate to the competent enforcement organs³⁰⁷ (court³⁰⁸, bailiff³⁰⁹, public notary³¹⁰ or enforcement agency³¹¹), the extent

³⁰³ According to the proposal of M. Berglund, parallel harmonisation of national registers should encompass the following particulars: 1. address or place of location, 2. employer or business, e.g. based on corporate registers, or other sources of income, e.g. private- or social insurance institutions, 3. incomes and other assets in his / her possession to the extent such information is available in the records of enforcement agents/execution officers, e.g. through debtor's registers kept by such officials, 4. assets held in the possession by any third parties, including any financial institution, e.g. bank accounts; 5. declaration of assets made to the enforcement agents/execution officers or in court, 6. the status of indebtedness, e.g. bankruptcy or other collective insolvency proceedings. Annex to the Swedish Report Transparency, p. 11- 12.

³⁰⁴ Same opinion is expressed by Kennett, *Enforcement*, p. 124.

³⁰⁵ Kerameus, IECL 10-104. In France, the seizure of bank accounts is has priority over other methods of enforcement.

³⁰⁶ The question of whether earnings transferred to a bank account are subject to a specific protection is dealt with infra text at footnote 361.

³⁰⁷ Cf. the answers in the national reports to the 1st question of the "garnishment" questionnaire, a comparative overview may be found in the 1st column of the schedule on garnishment.

³⁰⁸ In Austria and Germany, garnishment is effected by court officers (*Rechtspfleger*); in Denmark, Ireland, Netherlands, Spain, England and Wales garnishment orders are issued by the court.

and effect of a garnishment order (affecting the balance of the account at the time of the service, future claims, or even claims on other bank accounts³¹²). There are also differences regarding distribution proceedings (priority or group principle) and the remedies available to the creditor, the debtor and the garnishee. Variations are also evident in relation to the immunities protecting the judgment debtor and his family.

Despite these differences, the basic structure of garnishment is similar in all jurisdictions. As the creditor is seeking to collect a claim from the garnishee, who is indebted to the judgment debtor, the garnishee must be informed about the attachment and pay the sum to the creditor (or to the enforcement organ). The parties to garnishment proceedings are therefore generally the creditor and the garnishee.³¹³ Hence, personal service of the garnishment order on the garnishee is pivotal. Some systems (Belgium, France and Italy) expressly exclude substituted service³¹⁴. In terms of its legal effects, garnishment comes close to assignment of a claim: the judgment debtor (as the former beneficiary of the claim) is replaced by the judgment creditor as the new party to the attached claim. Any payment made by the garnishee to the judgment creditor will also extinguish the liability to the judgment debtor. The protection of the third party is a guiding principle of garnishment procedures in all Member States.³¹⁵

In all Member States, garnishment is effected in a two-stage process. In a first step, the garnishment order is issued and the garnishee is informed about the attachment. The enforcement organ will enjoin any payment by the garnishee to the judgment debtor. At the end of this first stage, the garnishee must declare a willingness to pay or indicate an intention to object to the claim. In a second stage, the claim is either transferred to the judgment creditor, who may collect the money from the

³⁰⁹ Belgium, France, Portugal. In Greece, Italy and Luxembourg the bailiff mainly serves the garnishment order which is drafted by the creditor, a (later) confirmation by the court may be needed.

³¹⁰ Greece (for the distribution of the proceeds among several creditors).

³¹¹ Finland (according to the new legislation); Sweden.

³¹² See *infra* at 3. As the effects of garnishment are closely connected with the operation of bank accounts; their legal status is included in this study.

³¹³ The debtor is nevertheless informed about the proceedings. He is also entitled to object to the garnishment and to apply for protective orders.

³¹⁴ In the European Judicial Area, cross border service is effected under the Service Regulation 1348/2000/EC, see *infra* at footnote.

³¹⁵ This idea was clearly expressed by the House of Lords in *Société Eram Shipping Company v. Hong Kong an Shanghai Banking Corp. Ltd.* [2003] UKHL 30 ; 3 W.L.R. 21, HI.

garnishee³¹⁶ or the enforcement court or the ordinary courts will decide upon the objections of the garnishee. At the end of the second stage, the creditor either gets an enforceable title against the garnishee or the garnishment order is set aside. The basic structure of garnishment proceedings favours the enforcement of provisional measures. In most of the jurisdictions, provisional measures only allow the seizure of assets.³¹⁷ The seizure of assets is analogous to the first phase of the garnishment procedure.

Several Member States have changed the legal framework of garnishment recently. Extensive reforms are being enacted in Portugal³¹⁸, Greece³¹⁹ and Finland³²⁰, while the recent reform of the English system was mainly aimed at introducing more comprehensible language³²¹. During the last decade, reforms also took place in several other Member States³²². The most important reform was enacted by France in 1991³²³. In Italy, structural reforms of enforcement procedures, including garnishment have been proposed since the 1980s³²⁴. As a result of these reforms, judicial proceedings and enforcement are clearly separated in most of the Member States³²⁵ and the usual prerequisites for obtaining a garnishment order (as for enforcement generally) is the presentation of an enforceable instrument by the creditor³²⁶.

³¹⁶ In some jurisdictions (Finland, Sweden), the collection is not effected by the creditor, but by the enforcement organs.

³¹⁷ See *infra* text at footnote 619 et seq.

³¹⁸ The new Portuguese Act on Enforcement will enter into force on September 15th, 2003. National Report Portugal (Garnishment), p. 1.

³¹⁹ Law 2915 of 2001 art. 24; Greek Supreme Court 19/2001, *Hellenike Dikaisosyne* 2002, 79; Greek Report Garnishment, p. 1-2.

³²⁰ Finish Report Garnishment, Preliminary note p. 1

³²¹ See Part 72 of the Civil Procedure Rules 1998, in effect since 25 March 2002. The new procedural rules as well as the legislative history are detailed in *Soci t  Eram Shipping Company v. Hong Kong and Shanghai Banking Corp. Ltd*, [2003] UKHL 30 (per Lord Bingham of Cornhill). The Irish system has remained unchanged, Irish Report, n  17 et seq.

³²² In Scotland, the Scottish Executive and Scottish Law Commission are currently discussing considerable changes of the existing system, Scottish Report on Transparency, answer 2.

³²³ Kerameus, IECL 10-106.

³²⁴ Italian Report Transparency, 4.2.

³²⁵ With the exception of Spain, where enforcement is still regarded as a genuine judicial function which, according to constitutional law, must be exercised by the judiciary, Spanish Report, Preliminary Remark.

³²⁶ Kerameus, IECL 10-130. According to the former system, the creditor did not need an enforceable instrument, but simple documentary evidence of the creditor's claim against the debtor. Therefore, a judicial confirmation of the garnishment was necessary.

2. The procedure for obtaining a garnishment order

The formal requirements and the procedures for the obtaining of a garnishment order are as follows. In most of the Member States, the creditor must present an enforceable instrument when applying for garnishment. However, the extent to which the request is formally checked depends on the structure of the enforcement process. In Greece³²⁷ and in Luxembourg³²⁸, the creditor himself issues the garnishment instrument which is served by the bailiff to the garnishee. No formal examination takes place³²⁹. In the other Member States, a genuine garnishment order is issued by the (enforcement) court³³⁰ or by the bailiff³³¹ and served to the garnishee. In these Member States, the prerequisites to the making of a garnishment (i.e. presentation of an enforceable instrument) are examined. However, differences exist relating to the specification of the asset to be seized. In those Member States where the enforcement organs are empowered to inquire into the debtor's assets, the creditor is not required to identify the account to be seized (Belgium, Finland, France, Spain and Sweden). Other Member States (Luxembourg, Portugal, Scotland) allow "search orders" pursuant to which the creditor may apply for the seizure of "all accounts" of the debtor held by all banking institutions which are located in the bailiff's district. In Scotland, where no duty of the debtor or any third party to disclose the whereabouts of assets exists, "fishing arrestment" is a common practice³³². However, England and Germany do not allow those practices³³³- a creditor must specify the bank where the account is located. Most Member States allow a general description of "all accounts" held by a specific bank to be seized in the creditor's application (Austria, Belgium, Italy, Luxemburg, Netherlands, Portugal, Spain, Scotland). Accordingly, the garnishment order embraces "all accounts" of the

³²⁷ Greek Report Garnishment, answer 1.1.: The garnishment order is drafted by the creditor, the bailiff acts as a simple service organ when delivering the order to the third party.

³²⁸ Luxembourg Report Garnishment, 2.1.1.

³²⁹ Seen from a „structural perspective“, these jurisdictions still adhere to the traditional enforcement model. According to that system, garnishment is initiated by the creditor and confirmed by the court. The court could also decide on the existence of the creditor's claim. Therefore, an enforceable instrument is not a mandatory prerequisite for garnishment.

³³⁰ Irish Report Garnishment 1.1, 3.1.

³³¹ For example, France. See French Report Garnishment, 1.1, 3.1.; England Report Garnishment, 1.1, 3.1.

³³² According to a common practice, arrestments are regularly served on (4) major clearing banks. Yet, those successful in attaching any funds varies between 6% and 35%, Scottish Report Garnishment, 2.2.

³³³ German Report Garnishment, 2.2.1.1.; England: 72 PD 1.3.

debtor. As a consequence, the garnishee must disclose the debtor's assets³³⁴. Until recently, German law took the opposite approach: the creditor had to provide particulars of the bank account to be seized. However, according to recent practice, the account number does not have to be specified³³⁵. In England and Ireland, the creditor is required to identify the affected account by its particulars (i.e. number)³³⁶. However, this requirement is regarded mainly as a matter of practicality.³³⁷

The seizure is perfected by the service of the garnishment order on the garnishee, prohibiting him from making any payments to the debtor. As explained above, a broad consensus exists that garnishment proceedings mainly concern the creditor and the garnishee. Therefore, in 12 of the 15 Member States (Scotland included³³⁸)³³⁹ the garnishment order is granted without any prior hearing of the debtor.³⁴⁰ However, in most of the national systems, the garnishment order is also served on the debtor.³⁴¹ In Austria and Germany, the order formally prohibits the debtor from collecting the claim from the garnishee. Further, the debtor is obliged to disclose any information about the claim seized which might be useful for the collection of the claim³⁴². In all national systems, the debtor has an opportunity to oppose the garnishment. Whether the objections are heard by the enforcement organs, the enforcement courts or dealt with by the ordinary courts depends on the general structure of the enforcement process.

³³⁴ Luxembourg Report Garnishment 2.2. No obligation to disclose assets existing in Scotland, Scottish Report on Transparency, answer n°2; Scottish Report on Garnishment, 2.2.1.1.

³³⁵ German Report Garnishment, 2.2.1 and 2.2.2 citing BGH *Wertpapiermitteilungen* 1988, 950, 953. This is also the legal situation in Denmark, Danish Report Garnishment, 2.2.1.

³³⁶ In these jurisdictions, creditors will normally get information about the debtor's financial situation with the help of a (provisional) disclosure order.

³³⁷ Irish Report Garnishment, 2.2.

³³⁸ Scottish Report on Garnishment, 2.4.

³³⁹ In Denmark, Finland, Spain and Sweden, the enforcement court/authorities contact the debtor at the beginning of the proceedings in order to get a voluntary payment or to reach a settlement. In Denmark and Spain, the debtor is obliged to indicate assets to be seized.

³⁴⁰ In Denmark, the debtor is informed by the court (normally in a hearing), it is up to the creditor to inform the garnishee about the garnishment in order to avoid a payment to the debtor, Danish Report Garnishment, 3.1 and 3.2.

³⁴¹ Austria, Belgium, Denmark (an informal notification to the debtor is sufficient, Danish Report Garnishment, 2.5.), Finland, France (after the attachment), Germany, Greece (service must be effected within 8 days), Ireland, Italy, Luxembourg (in the validation of the order which is heard by the court), Netherlands (within 8 days after the garnishment). In Portugal, the debtor is informed by the bank. In Spain, the debtor is (as the defendant in enforcement proceedings) notified at the beginning of the enforcement. In Sweden and in England the debtor is informed by the enforcement authority/enforcement court.

³⁴² Sec. 836 (3) ZPO, German Report, 4.3.2.

3. The object of the attachment

a) Attachment of the current balance and additional balances

As a rule, the account in its current state is “blocked”, ie the balance at the moment of the service is seized.³⁴³ However, most of the national systems allow the seizure of additional balances or even of additional accounts (held at the same bank). Future balances may be covered in Germany³⁴⁴, Greece³⁴⁵, Italy³⁴⁶, Scotland³⁴⁷ and Spain³⁴⁸ on the condition that they are expressly mentioned in the garnishment order. The position in Belgium, France and Luxemburg is that debts which exist “*en germe*” can be seized if they are mentioned in the garnishment order³⁴⁹. In the other Member States, future balances are exempt from the seizure. This may be explained by the fact that the debtor could always open a new account where future payments would be honoured³⁵⁰, so the application to future balances would not be very efficient³⁵¹. In Austria and Germany, the attachment of future claims strictly prohibits the debtor and the garnishee from depositing these claims in a new account.³⁵² However, all jurisdictions provide (at least to a limited extent and often in specific proceedings) for the attachment of earnings.³⁵³ In these proceedings, future claims are also affected.

b) Attachment of current accounts

As bank accounts are often operated as current accounts, national laws determine the sums affected in different ways. Most of the legal systems (with the exception of

³⁴³ Cf. answers to the question 6.2.1. However, the “moment of the seizure” may be defined differently, see text infra.

³⁴⁴ German Report Garnishment, 4.1.2.

³⁴⁵ Greek Report Garnishment, 4.1.4.

³⁴⁶ Italian Report Garnishment, 4.1.

³⁴⁷ Scottish Report Garnishment 4.1.5.

³⁴⁸ Future balances are seized if their inclusion is expressly ordered by the judge. In practice, future claims are seldom affected. Spanish Report Garnishment, p. 4.1.

³⁴⁹ French Report Garnishment, 4.1.3. (article 47 Law of July 9, 1991).

³⁵⁰ Kennett, *Enforcement*, p. 257.

³⁵¹ In Germany, the inclusion of future balances is necessary, because of the legal structure of current accounts. Because current accounts can only be closed in periods, the future balance of the relevant period must be attached in order to secure the payment of that balance, German Report Garnishment, 4.3.2.

³⁵² German Report, 4.1.4. The legal situation in Scotland is the same, Scottish Report Garnishment, 4.3.3.2.

³⁵³ Cf. the Swedish Report Garnishment, 4.1.2 and 7.2.

Germany and Austria³⁵⁴) include incoming payments that have already arrived at the bank but which have not yet been credited to the account.³⁵⁵ Conversely, as a central element of the seizure, payments from the account after the seizure are not permitted.

However, there are differences in the legal positions relating to transactions initiated before the service of the garnishment order was completed. While in France and Luxemburg checks drawn before the garnishment are honoured, they are not in Ireland. In Germany and Austria only cheques guaranteed by the bank remain unaffected. In France, the bank is obliged to give a second declaration to the court after a period of 2 weeks, revealing any “*operation en cours*” at time of garnishment³⁵⁶. During this time, the bank is required to draw up a statement of the account and, until that is completed, the account is blocked.³⁵⁷ In Ireland, a debtor’s instruction to close the account and to transfer the money is reversed by the order *nisi*, if the transfer has not been performed at the moment of the service.

c) Attachment of several accounts

An important extension of the seizure takes place when several accounts of the debtor can be targeted at once. This is the case when the garnishment order served on the head office of a bank attaches all accounts in the local branches of the bank (within the Member State). With the exception of Greece³⁵⁸, all Member States permit this form of (extended) garnishment. However, this legal effect presupposes that the local branches lack a distinct legal personality. As a consequence, the accounts held by the branch are attributed to the head office. According to this approach, garnishment orders do not affect accounts held by separate branches. Therefore, a “piercing of the corporate veil” (in the sense of the separation between branches of the same bank) is not permitted.

There are variations in the positions of the Member States relating to legal effects of garnishment orders which are served to local branches. In Belgium, Denmark,

³⁵⁴ Austrian Report Garnishment, 4.1- the issue is debated ; German Report Garnishment, 4.1.

³⁵⁵ In Italy, payments into the account are included until the bank discloses the status of the account to the court, Italian Report Garnishment, 4.1. and 4.2.4.

³⁵⁶ French Report Garnishment, 4.1.1.

³⁵⁷ The debtor may apply for an immediate release of the part of the account necessary for his everyday needs, see *infra* at footnote 367.

³⁵⁸ Greek Report Garnishment 4.2.

Finland, France, Greece, Portugal and Sweden garnishments against a local branch do not affect any account held in other branches or at the head office. In Austria, Denmark, England, Germany and the Netherlands, a garnishment affecting the branch may also target other accounts held in the head office and in other branches. In these jurisdictions, the branch without a legal personality is not considered as a garnishee and the effect of the garnishment is attributed to the head office³⁵⁹. In Denmark and Germany, the garnishment order must describe precisely the affected accounts³⁶⁰.

4. The protection of the debtor

It goes without saying that modern enforcement systems protect the means of subsistence of the debtor and his or her family.³⁶¹ This protection is effected in two different ways. Some national legislation explicitly provides for immunities. In these jurisdictions, a certain proportion of earnings, pensions and other forms of regular income are exempted from attachment. The amount is fixed by legal provisions which must be respected by all parties involved in the proceedings (Enforcement Organs, third party, creditor). Other Member States allow an attachment of all assets of the debtor, but include specific remedies. The debtor must request a (partial) release of the account in order to access adequate means of subsistence.

An important issue is raised in relation to the protection of the debtor's earnings after a transfer to a bank account. While some Member States (especially Austria, Spain, Germany) also apply the general immunities protecting the debtor's everyday needs to the garnishment of bank accounts, others (Portugal) generally exclude parts of the account (national minimum wage) from the seizure. But there are also Member States (Belgium, Denmark, Ireland, Italy, Luxembourg, Netherlands and Scotland³⁶²) where the earnings of the debtor are not protected after deposit into a bank account.

³⁵⁹ This question is often decided by the national laws of the service of documents: If service on a branch is permitted, the issue of trans-border service must not be addressed.

³⁶⁰ German Report Garnishment, 1.2.1. (at p. 4). The account number must not be indicated.

³⁶¹ Cf. the answers in the national reports to question 7.1.

³⁶² Scottish Report Garnishment, 7.1. – noting that the area is currently under review.

In these jurisdictions, the situation of a debtor might become precarious, although the debtor may apply for a protective order (Denmark, Ireland)³⁶³.

a) Protection by intervention of the court

In many Member States, the intervention of the (enforcement) court is needed for the protection of the debtor's means of subsistence and of the maintenance obligations to his or her family³⁶⁴. In Portugal, Spain and Finland and Sweden, the enforcement court/authority deducts *ex officio* (ie without any application of the creditor) the requisite means of the creditor and his or her family.

Other Member States have adopted a mixed system, especially those where the claim seized is automatically transferred to the creditor. In Austria and Germany, the immunities are determined by detailed legal provisions and must be calculated and deducted by the employer³⁶⁵. In practice, businessmen and employers complain that the calculations required are too expensive and burdensome³⁶⁶. However, tables annexed to the ZPO and the EO facilitate the calculation and the garnishee can also apply for a protective order by the enforcement court. In Germany, the garnishee may deposit the amount in the court (sec. 372 BGB) and the calculation and the payment are made by the court officer. In Austria, a deposit is only possible in case of multiple creditors, sec. 307 (1) EO). If the money has been transferred to a bank account, the bank is prohibited from paying it out to the creditor within a period of 2 weeks (Sec. 835 (3) ZPO; 292i (2) EO). During this time the debtor may apply to the enforcement court for a protective order. The court will calculate and deduct the immunities protecting the debtor and release the remaining funds to the creditor³⁶⁷.

In France, the claim seized is automatically transferred to the creditor after a period of 15 days. During that period, the debtor may indicate that the account is held as a

³⁶³ Irish Report Garnishment, 7.3., 1.1. In France, earnings are not subject to garnishment under the Loi of July 7th, 1991, but to a special regime.

³⁶⁴ This protection often takes place in the second stage of the procedure when the enforcement court/authority decides on the assignment of the claim.

³⁶⁵ Austrian Report Garnishment, p. 14-16. According to sec. 836 (3) ZPO, sec. 292i EO a bank is not allowed to pay the creditor in a period of two weeks. During this period, the debtor may request a protective order of the enforcement court.

³⁶⁶ According to the case law of the BGH, the expenses incurred by the garnishee are not reimbursed, supra at fn 234. See also Kennett, *Enforcement*, p. 261 about the duties of financial institutions)

³⁶⁷ A garnishee incurring difficulties in calculating the amount due may also ask the enforcement court to calculate the amount due without depositing the money, Stöber, *Forderungspfändung* n° 1057; sec. 292k EO.

salary/pension account and request the enforcement court grant a release³⁶⁸. An additional, immediate release may be obtained under a Regulation of 11 September 2002, according to which a sum corresponding to the minimum income for maintenance needs (*montant de première nécessité*) may be immediately released from the bank following a simple (written) application³⁶⁹. In Ireland and England, the matter is dealt with by the court when making the garnishment order absolute.³⁷⁰ However, the amount is determined at the court's discretion on application of the debtor. Similar solutions are found in Denmark, Greece and in Italy. In Belgium and Luxemburg, no specific provisions exist, but the debtor is protected in the cantonnement proceedings.

b) Limitation of the garnishment to the amount enforced

In addition, debtor protection is also effected by limiting the creditor's access to his assets in regard to the amount open for the seizure. In eight Member States³⁷¹, access to the account is limited to the amount of the enforcement title³⁷². "Secondary claims" (interests and costs, including the costs of the enforcement proceedings³⁷³) are also recoverable. Other jurisdictions³⁷⁴, especially those distributing the affected assets between competing creditors according to the "group principle", do not limit the attachment up to the amount of the enforceable instrument. In these jurisdictions, it is up to the debtor to apply for a release of the account. The procedures are different. In Spain and the Benelux countries, the garnishment affects the whole account which is (also) reserved for additional creditors. In the Benelux countries,

³⁶⁸ The release is limited to the amount of the respective periodical payment, see Articles 43, 44 L of July 9, 1991; French Report Garnishment, 7.3. Additionally, the debtor must prove that the accounts relates to his salary or like income.

³⁶⁹ French Report Garnishment, 7.3; Salati, *Revue des Huissiers de Justice* 2003, 4 - 9.

³⁷⁰ Additionally, the debtor may seek provisional protection.

³⁷¹ Denmark, Germany, Greece, Ireland, Portugal, Spain (including enforcement costs up to 30% of the amount due), Sweden, England.

³⁷² In Germany any "over-seizure" by the creditor is strictly forbidden by legal provision, see sec. 803 (2) ZPO. However, as there is often uncertainty as to whether the garnishee will be able to pay and whether he will acknowledge the claims due to the debtor, the creditor is entitled to seize the whole debt (or considerable parts) comprising an amount considerably higher than the amount of the enforceable instrument, see German Report Garnishment, 4.2.3.

³⁷³ Reimbursement of the enforcement costs is not guaranteed in all Member States, see Kerameus, IECL 10- with further references.

³⁷⁴ Austria, Belgium, Finland, France (for a period of two weeks); Italy (a draft which is currently discussed by parliament provides an upper limit of 150% of the claim), Luxemburg, Netherlands and Scotland.

the debtor may obtain a release in the “*cantonnement*” procedure, which limits the seizure to a sum determined by the court as adequate to satisfy the alleged debt.

c) The attachment of joint accounts

Divergent approaches also exist in relation to the attachment of joint accounts. In five Member States, the whole account may be attached, but the spouse may apply for a release of his or her part³⁷⁵. Some national systems provide a presumption against ownership by the other spouse.³⁷⁶ In other jurisdictions, the garnishment order only affects half of the balance and the onus is on the creditor to apply for additional access³⁷⁷. In England and Ireland, a joint account is not attachable by a garnishee debt order relating to one of the spouses³⁷⁸. As a rule, salary of the other spouse paid into the account cannot be seized for the purposes of execution in relation to the debts incurred of the other spouse³⁷⁹.

5. The collection of the claim

a) Recovery by the enforcement organs or by the judgement creditor

The national systems take different approaches to the realisation of the attached claim. In Finland and Sweden, where the enforcement authorities have a strong position, the debt is collected by the enforcement agency and paid to the creditor. However, if the garnishee objects to the claim seized, the dispute is decided by the civil courts³⁸⁰. The situation is similar in Denmark and Spain, where the debt is recovered by the court.³⁸¹ In most Member States, especially in Austria, Germany and France³⁸², the claim is assigned to the creditor who collects the debt directly from the garnishee. The legal situation of a garnishor is similar to that of a creditor. However, the transfer of the claim to the creditor is not regarded as a full

³⁷⁵ Austria (the matter is disputed in the legal literature); Belgium, Denmark, France, Germany (there exists some uncertainty about the remedy available to the affected spouse).

³⁷⁶ This is the case in Germany, cf. sec. 739 ZPO.

³⁷⁷ Greece, Italy, Portugal, Spain, Sweden.

³⁷⁸ Cf. CPR 72 PD.3 (3.1.), the court may, however, decide otherwise.

³⁷⁹ Kennett, *Enforcement*, p. 259.

³⁸⁰ As an alternative, the enforcement authority may seize additional claims or other assets of the debtor.

³⁸¹ In England and Ireland the debt may be paid to the creditor or into court.

³⁸² In France, the creditor obtains a certificate from the court registry providing sufficient authorisation for the collection of the claims, Kennett, *Enforcement*, p. 264.

assignment. Therefore, the garnishee is not allowed to operate a set-off against the garnishor³⁸³.

The recovery may be expedited if the debtor's declaration is treated as an acknowledgment of the claim (France, Greece, Ireland, England³⁸⁴ and Scotland³⁸⁵). In addition to this, even the failure of the garnishee to make a declaration may be considered (or rather be subject to sanction) as an "acknowledgment" with the result that any objections are precluded at the later stages of the proceedings (or in proceedings for payment instituted in the courts of justice). Therefore, the legal position of the creditor is considerably improved. This situation pertains in Belgium, England, France, Ireland, Luxemburg and the Netherlands³⁸⁶.

However, in Austria, Denmark, Germany and Portugal the legal position is quite the opposite. In these jurisdictions, the garnishee's declaration is not treated as an acknowledgment of the claim but as a simple statement providing factual information. Accordingly, the creditor collecting the claim must sue the garnishee for payment, regardless of the declaration³⁸⁷, and the garnishee may raise any objections in these proceedings. A missing or incorrect declaration of the garnishee is sanctioned by the obligation of that party to reimburse the costs of the litigation to the creditor³⁸⁸. Additionally, the garnishee incurs tortious liability based on the non-performance of his duty to inform the creditor comprehensively about the assets seized.

b) Adjudication of the third party's objection

If the garnishee contests the debtor's claim it is up to the creditor to take further procedural steps and to sue for payment. However, these matters are decided by different organs in the Member States. In the national systems where the courts are responsible for enforcement, the garnishee's objections are heard immediately by

³⁸³ Kennett, *Enforcement*, p. 264. In Germany, the third party debtor may set off the attached claim with his claim against the creditor, Thomas/Putzo, *Commentary on sec. 836 ZPO*, n° 4.

³⁸⁴ In England and Ireland, the non-appearance of the garnishee in the court hearing is considered an acknowledgement by default. Consequently, the court declares the garnishment order *nisi* as final, Irish Report Garnishment, 6.3.1.; English Report Garnishment 6.3.

³⁸⁵ In Scotland the recovery is effected by a secon action „on forthcoming“ which is adjudicated by the enforcement court, National Report, 8.1.

³⁸⁶ See supra B III 3.

³⁸⁷ In Germany, the debtor must assist the creditor and provide to him the documentation necessary for the recovery of the claim, sec. 836 (3) ZPO.

³⁸⁸ The different systems are explained in detail supra at B III 3.

the enforcement courts. In these jurisdictions, the creditor may even immediately obtain an enforceable title against the garnishee (England, Ireland and Scotland).³⁸⁹ The situation in France is similar. If the garnishee contests the claim, the matter is brought to the enforcement court which determines whether or not the objection is well-founded and orders accordingly. As a result, the creditor gets an enforceable judgment against the garnishee.³⁹⁰ However, in the Member States where enforcement and judicial proceedings are strictly separated, the lawsuit against the garnishee is heard by the civil courts according to the general rules of civil procedure (Austria, Germany, Finland and Sweden).

c) The occurrence of multiple garnishments

The situation is more complicated if several creditors attach the account. As a rule, the national jurisdictions allow several attachments of the same account before the funds seized are transferred to the first creditor³⁹¹. However, the distribution of the attached claim among the competing creditors is implemented differently. Most Member States (Austria, Denmark, England, Germany, Ireland, Portugal, Spain, Scotland, Sweden and France in garnishment proceedings) apply a “first in time, first in right” principle,³⁹² according to which the first creditor gets priority over other competing creditors. The funds raised from the assets seized will be made available to the first creditor; later creditors will receive remaining funds based on when they attached the asset.³⁹³ However, in other national systems no priority is conferred on the first creditor, and therefore enforcement also includes a scheme for the distribution of the proceeds among competing creditors (Belgium, Finland, Greece, Italy, Luxembourg and the Netherlands).

While the legal literature often stresses the divergences between the distribution schemes³⁹⁴, the issue must be considered in some detail. The differences are less

³⁸⁹ As a consequence, the jurisdiction of the courts in garnishment proceedings depends on the location (domicile or presence) of the garnishee within the jurisdiction. The claim must be recoverable in Ireland (or England), Irish Report, 8.1.

³⁹⁰ French Report Garnishment, 8.1.4.1.

³⁹¹ Kerameus, IECL 10-116.

³⁹² Cf. the answers in the national reports to question 8.2.1.

³⁹³ Cf. sec. 804 (2) and (3) German Code of Civil Procedure, Kerameus, IECL 10-118 et seq.

³⁹⁴ In Germany, during the 1980s, a discussion took place as to whether the priority principle was compatible with the constitutional guarantee of equal treatment of all citizens (article 3 Basic Law). In the result, the majority view supported the priority principle, because distribution according to the „first in time, first in right“, principle corresponds to the distribution of assets in a market economy.

significant, because most of the Member States adhering to priority provide for substantial modifications of the principle³⁹⁵. The first difference relates to the relevant time of the application of priority: Germany focuses on the moment when the service on the bank is effected (“strict priority”³⁹⁶), while in Austria (sec. 300 (3) EO), Denmark, France and Scotland all creditors seizing the account at the same day are treated equally (“modified priority”)³⁹⁷. This situation is not very different from the position of Greek law (which adheres to the group system) where all competing creditors who attach the account within 8 days, are discharged equally.³⁹⁸ In Sweden, the decisive moment occurs when the Enforcement Authority makes the decision on the attachment. Under the English and Irish systems, the court has discretion as to whether to declare a garnishment order absolute. In this regard, the court will look at the positions of competing creditors. However, as a rule, the claim is assigned according to the priority principle³⁹⁹.

More functional convergence between the systems can also be identified when the comparison is extended to creditors who are preferentially treated. Maintenance creditors are particularly privileged. Different ways of protecting their priority exist in the national systems. In Austria, Germany and Portugal, maintenance claims are protected by legal immunities; in Greece, the salary of the debtor (including when transferred to a bank account) can only be attached by maintenance creditors. In Finland (which follows the group principle), the maintenance claims of minors are generally privileged and (as a rule) one third of the debtor’s earnings is exempted from the attachment.⁴⁰⁰ In France, the priority principle does not apply to the

See Schlosser, 97 *Zeitschrift für den Zivilprozess* 121 [1984], Stürner, 99 *Zeitschrift für den Zivilprozess* 291 at 326 [1986], recently Knoche, *Neue Juristische Wochenschrift* 2003, 476.

³⁹⁵ In addition, it should be noted that the priority principle is modified to some extent by the bankruptcy/insolvency laws of the Member States. In Germany, a creditor may lose its lien (and the priority conferred by it) when the receiver opposes the seizure (which has been effected 3 months before the application for the bankruptcy), sec. 129-132 law on insolvency.

³⁹⁶ Even in Germany, the principle of “strict priority”, is modified when current accounts are attached, Staub/Canaris *Commentary on the Commercial Code*, Sec. 357 HGB (1998), n° 5 with further references. Also, while the exact moment of service is relevant for priority, this moment can be strongly influenced by the decision of the bailiff when to serve (cf. sec. 168 n°1 GVGA), see German Report Garnishment 5.3.2., Baur/Stürner *Zwangsvollstreckungs- Konkurs und Vergleichsrecht* Vol I. (1995) § 6, n° 6.39 and Knoche, *Neue Juristische Wochenschrift* 2003, 476.

³⁹⁷ Cf. answers 5.3.2. of the National Reports Garnishment.

³⁹⁸ Greek Report, 8.2 – the period is extended to 30 days, if the creditor is domiciled abroad or his domicile is unknown.

³⁹⁹ English Report Garnishment, 5.3.2.

⁴⁰⁰ Finish Report Garnishment 7.3.1., 8.2.1.

garnishment of salaries. In Ireland, the court (on a motion of the debtor) decides the matter individually according to the specific circumstances.⁴⁰¹ As a result, in most of the Member States the position of the judgment creditor is often critical, because the privileged creditors get access to most of the debtor's salary.⁴⁰² From this perspective, the difference between a distribution according to priority and under group schemes is not of paramount significance. However, the divergence between priority and group principles is more important if assets of merchants are targeted. Nevertheless, the priority of competing creditors (including the bank) who dispose of securities in relation to the account, is largely recognised. Additionally, the bank may operate a set-off for preferential claims against the debtor.

Divergences are also found between the national systems which distribute the proceeds according to the group principle. As a rule, the creditor who took the initiative in enforcing the debt is not privileged. In order to allow other creditors to join the proceedings, the levy must be published. Additional information is provided by the garnishee (who is often obliged to inform competing creditors)⁴⁰³ and by public registers.⁴⁰⁴ As a rule, these registers are searched by the enforcement organs. Competing creditors with registered securities are invited by the enforcement organs to join the distribution proceedings. However, there are differences relating to the period after the seizure, during which additional creditors may join the distribution proceedings. In Belgium, the relevant period is 15 days⁴⁰⁵, while in Greece the period is 8 days⁴⁰⁶. In Finland, Italy and Luxembourg⁴⁰⁷ competing creditors may join the enforcement proceedings until the bailiff/court conducts a hearing on the distribution plan. Creditors who join the enforcement proceedings in time are treated equally with the creditor who initiated the proceedings. Finland and Italy allow additional attachments until the money attached is paid out to the first creditor⁴⁰⁸.

⁴⁰¹ Cf. Irish Report Garnishment, 7.3. and 7.5.

⁴⁰² Cf. French Report Garnishment (CNHJ), n° 7.

⁴⁰³ Luxembourg Report Garnishment, 8.2.2.1.

⁴⁰⁴ In Belgium, a law passed in 2000 created a central register providing information about all attachments/seizures, delegations and insolvency proceedings. Belgian Report Garnishment, 5.3.1.

⁴⁰⁵ Belgian Report Garnishment, 8.2.2.3. – additional creditors may join the proceedings after the end of that period.

⁴⁰⁶ Greek Report Garnishment, 8.2.2. referring to art. 974 CCP.

⁴⁰⁷ National Report, 8.2.2.3.

⁴⁰⁸ Finish Report Garnishment 5.2.; Italian Report Garnishment 8.2.2.3.

If several attachments occur, the sum will be distributed equally among all creditors, while privileged creditors (with registered securities) receive preferential treatment. The distribution requires the intervention of the bailiff⁴⁰⁹, the notary⁴¹⁰ or the enforcement court.⁴¹¹ Creditors who do not join the proceedings in time, can only attach the remaining assets of the debtor⁴¹². Their legal position does not differ from the position of a competing creditor in a jurisdiction adhering to the priority principle.

6. Assessment

On the basis of the above results, some fundamental divergences between the national systems must be noted. While the basic structures of garnishment proceedings are similar (especially the two-stage structure of the procedure), the details are different in all Member States. Even in similar national systems (such as Luxembourg and Belgium), considerable divergence exists. Accordingly, it does not seem to be possible to categorize the national systems into “legal families”. Due to the principle of territoriality, the attachment systems in the Member States have been isolated from each other.

Despite these differences, common basic approaches can be identified. While national systems achieve garnishment in a two-stages process, there are two different approaches to organising the progress of the proceedings. Under the first approach, the attachment of the account is effected by the creditor in a rather “private” way by serving an instrument on the garnishee. The validation of the order is necessary if the garnishee objects or/and, if other creditors join the distribution of the proceeds. This second stage of the proceedings requires the intervention of an enforcement organ (court, bailiff, notary). The second type of garnishment is characterised by the intervention of the enforcement organ in the first stage of the proceedings. However, the nature of the involvement differs. While in some jurisdictions, the enforcement organ seeks to determine the whereabouts of the

⁴⁰⁹ Dutch Report Garnishment, 8.2.1.

⁴¹⁰ In Greece, Greek Report, 8.3.

⁴¹¹ Italian Report, Garnishment, 8.2; 8.2.2.1.

⁴¹² As a result, these systems also form different groups of creditors in terms of time, see Kerameus, IECL 10-127.

debtor's assets (and to collect the claim in the second stage)⁴¹³, other jurisdictions limit the intervention to a more or less formal checking⁴¹⁴. Because of these differences, the garnishee's obligation to support the proceedings (by acknowledging or opposing the claim, disclosing the status of the debtor's asset(s) and informing competing creditors) also differs. Nevertheless, all national systems require the intervention of the enforcement organ.

Additionally, there are considerable divergences relating to the distribution schemes, e.g. immunities of the debtor, preferential rights of concurring creditors (including the bank) and the extent of the attachment (actual and future claims).

II. Transborder Garnishment

From the traditional perspective, enforcement proceedings are based on the principle of territoriality and, therefore, strictly limited to the territory of the enforcing state.⁴¹⁵ Thus, the jurisdiction of the enforcement organs is determined by the place of enforcement and by the presence of assets "within the jurisdiction". In a trans-border context, a creditor, seeking the execution of a foreign judgment, must apply in another Member State for the recognition of his enforceable instrument at "the place of enforcement" (cf. Art. 39 (2) Brussels' Regulation) – that is, as a rule, the place where the assets to be seized are located. The current situation is disadvantageous for the foreign creditor: as cross-border attachment is excluded, the creditor must seek attachment of all the debtors' bank accounts in several Member States until he obtains satisfaction. The current situation also creates the risk of preventing the debtor from pursuing income-earning activities and hence of jeopardising the chances of recovering the debt. The current fragmentation of national garnishment procedures entails additional delay, costs and effort for foreign creditors. At the same

⁴¹³ This is especially the case in Sweden.

⁴¹⁴ For example, in Germany the limited investigation powers of enforcement organs (bailiffs) is regarded as an incident of the principle of "formalisation" According to this principle, only documentary evidence is admitted in enforcement proceedings.

⁴¹⁵ This view is still predominant in many Member States. According to the Swedish Report, p. 3 (preliminary remarks) "It has been a widely known fact that an enforcement authority is only entitled to take measures within its own country. The limits of competence of the Swedish enforcement service are the Swedish borders. If the debtor has assets in Sweden, the Swedish enforcement service is entitled to attach those assets even if the debtor is living in another country or is a foreign legal entity."

time, the discrepancies between the national systems may encourage “enforcement shopping” within the European Judicial Area⁴¹⁶.

However, in garnishment proceedings, territoriality is difficult to apply, because the location of pecuniary claims and of bank accounts is difficult to determine. As garnishment relates to a claim which is owed from the garnishee to the debtor, most national systems locate the claim at the domicile/seat of the garnishee⁴¹⁷. A similar solution has been adopted by Article 2(g) Regulation 1346/00/EC on Insolvency Proceedings⁴¹⁸. A different solution is applied in England. According to English private international law, the situs of a debt is the place of its performance or payment⁴¹⁹. If the parties (e.g. the judgment debtor and the bank) agree that the bank’s obligation to repay is to be performed primarily at the branch where the account is kept, the situs of the debt is the place where the branch is located⁴²⁰. There are also national systems which locate the situs of the debt at the domicile of the debtor⁴²¹. The different conceptions lead to different results: under the first conception, the obligation of a bank to repay will be located at its headquarters, while under the second, the situs is the place where the branch is located. The location of bank accounts has also proved difficult. If an account is held by a (dependent) branch of the bank, it may be located (in a more or less fictitious way) at the seat of the (headquarters of the) bank. Nevertheless, regulation by the Member State where the branch is located, may also affect the account, i.e. regulations on bank secrets, securities or prudential supervision. Therefore, several national jurisdictions locate the account at the place of the branch.

There are three different issues that must be addressed in this context. The first relates to the heads of jurisdiction for transborder garnishment. The second concerns the question of whether a debtor or a garnishee abroad can be served in

⁴¹⁶ Cf. the examples explained by Schlosser, 284 *Recueil des Cours* 12, 209-214 [2001].

⁴¹⁷ If the garnishee is a trader, a bank or similar corporation, its residence is the place wherever it carries on business, Dicey & Morris, *The Conflicts of Laws*, (13th ed. 2000), pp. 925-6.

⁴¹⁸ According to this provision, “the Member State in which assets are situated” shall mean, in the case of ... claims, the Member State within the territory of which the third party required to meet them has the centre of his main interests as determined in Article 3 (1).

⁴¹⁹ An additional head of jurisdiction is derived from the place of enforcement, Dicey & Morris, *The Conflicts of Laws* (13th ed. 2000), rule 114.

⁴²⁰ *Société Eram Shipping Ltd et oth. v. Hong Kong and Shanghai Banking Corp.*, [2003] I.L.Pr. 36 (H.L.).

⁴²¹ This approach applied until recently in Switzerland, cf. Nagel/Gottwald, *Internationales Zivilprozeßrecht* (5th ed. 2003), § 17 n° 60.

order to include him or her in the (domestic) garnishment proceedings.⁴²² The last issue relates to the recognition of foreign garnishment orders. While no international instrument addresses this question, recent case law of the Member States shows that there is a practical need for a kind of “recognition” of foreign garnishment orders and increasing practice in this field.

1. Heads of jurisdiction

Traditionally, the jurisdiction of enforcement organs has not been addressed in the context of a cross-border context, but simply regulated as a purely domestic issue. In the national systems, four different heads of jurisdiction for garnishment proceedings can be ascertained. In those Member States (especially Austria, Finland, Germany, Portugal, Sweden) where enforcement proceedings are commenced by an enforcement order of the enforcement court (or authority), the domicile or the seat of the debtor is the main head of jurisdiction.⁴²³ In addition to this, the domicile/seat of the garnishee is a supplementary or even an alternative basis of jurisdiction⁴²⁴. An additional head of jurisdiction may be derived from the location of (tangible) property that is security for the claim. Other Member States, especially those where enforcement proceedings are initiated by the creditor serving an instrument on the garnishee (which is later validated by court order) place more emphasis on the jurisdiction at the domicile/seat of the garnishee⁴²⁵. A different conception is found in England and in Ireland. English law allows a garnishee order to be made against any person “within the jurisdiction” who is indebted to the judgment debtor. However, this does not mean that a garnishee must be domiciled within the jurisdiction, mere presence in the jurisdiction is sufficient⁴²⁶. This relatively strict approach can be explained by the approach taken by English enforcement law that the garnishee is

⁴²² This question is now addressed by the EC Regulation (1348/00/EC) on the Service of Documents in Civil and Commercial matters.

⁴²³ Cf. Kerameus, 264 RdC 180, 387-8 [1997].

⁴²⁴ This model is expressly stated in sec. 828 German ZPO as follows: “(1) Court proceedings which have as their object the garnishment of debts or enforcement out of other intangible property are to be dealt with by the enforcement court. (2) The local court (*Amtsgericht*) for the place where the defendant has its domicile is competent as enforcement court and in the absence of such domicile it is the *Amtsgericht* in which a claim can be brought against the defendant under sec. 23 that has jurisdiction.”

⁴²⁵ This is the legal situation in Belgium, Greece (Greek Report Garnishment 1.2.2.), Luxembourg, the Netherlands and Scotland.

⁴²⁶ This head of jurisdiction is derived from the common law concept of “physical presence”, see

summoned to appear in the court and to give a declaration about his willingness to pay⁴²⁷.

Finally, Member States where the courts of justice are also responsible for the enforcement proceedings address the jurisdictional issues according to the general rules of jurisdiction. Therefore, in Spain, the ordinary courts are responsible for enforcement proceedings, the jurisdiction in enforcement proceedings follows the general rules (Art. 504 LEC)⁴²⁸. However, a Spanish court may request the judicial assistance of other courts within the country for enforcement proceedings, especially of those courts where the assets to be seized are located⁴²⁹. The legal situation in Denmark is similar, because the jurisdiction is derived from the heads of competence of the ordinary courts.⁴³⁰

The comparative overview shows that, theoretically, the national systems raise several possibilities for giving garnishment orders a cross-border effect.⁴³¹ As the heads of jurisdiction relate to the location of the debtor or of the assets seized, the presence or even the domicile of all affected persons (the debtor and garnishee) within the jurisdiction is not required. It seems to be sufficient, if one of these persons is located within the jurisdiction. In an international context, this legal situation may be a starting point for cross-border garnishments⁴³². Recent practice in Austria and Germany shows that the courts allow cross-border garnishment in these situations.⁴³³

Systematically, two different mechanisms of cross-border attachment exist. The first is found in the English case law. While English private international law requires the garnishee to be “within the jurisdiction” (CPR 72.1(1)), English courts have allowed

⁴²⁷ Kennett, *Enforcement*, pp. 265-266.

⁴²⁸ Spanish Report 1.2.1. Therefore, in trans-border cases, jurisdiction is determined according to Article 2-30 Brussels' Regulation (44/01/EC).

⁴²⁹ Cf. Spanish Report, Annex n° 6.

⁴³⁰ Danish Report Garnishment, 1.2.

⁴³¹ This is the predominant opinion in the German legal literature, cf. Nagel/Gottwald, *Internationales Zivilprozessrecht* (5th ed. 2003), § 17, nos 64-65; Geimer, *Internationales Zivilprozessrecht* (4th ed. 2001), nos, 408, 408b; Schack, *Internationales Zivilverfahrensrecht* (3rd ed. 2002), n°982.

⁴³² Not all Member States require the presence or domicile of the debtor within the jurisdiction.

⁴³³ See text *infra* at footnote 452.

the service of a garnishment order on the English branch of a foreign bank.⁴³⁴ According to this practice, bank accounts located abroad were also affected and the “foreign” bank was required to disclose the financial situation of the debtor also with regard to his assets held by the foreign branches of the bank.⁴³⁵ A similar approach (allowing cross-border garnishment within banks acting at an international level) is taken in several Member States where the service of a garnishment order on the headquarters of a bank may include all assets and accounts held in the branches of the bank, even if those branches are located abroad⁴³⁶. However, there exists only limited experience in practice in the Member States. Most case law relates only to “transnational disclosure orders” or is confined to domestic proceedings, where nationwide garnishments within banks are generally allowed.⁴³⁷

The admissibility of a cross border garnishment has been recently addressed by the House of Lords in *Société Eram Shipping Co Ltd. v. Compagnie Internationale de Navigation and others*⁴³⁸. In that case, the judgment creditor had obtained a judgment in the Commercial Court in Brest which was not satisfied by the judgment debtors. The judgment was registered in the English High Court under sec. 4 of the Civil Jurisdiction and Judgments Act⁴³⁹. One of the judgment debtors held a bank account in Hong Kong with HSBC Bank (which also operates a network of branches in the UK). The debt was due by the bank to the judgment debtor in Hong Kong and governed by the law of Hong Kong. The judgment creditor could have sought the garnishee in Hong Kong against the bank, but instead sought and obtained an interim garnishee order in England.

⁴³⁴ *SCF Finance Co. Ltd v. Masri (n° 3)* [1987] 1 QB 1028; CPR 72.1.1., English Report Garnishment 1.2.2; Scottish law, however, does not allow the attachment of a bank account which is held in England by serving the arrestment on a Scottish bank, *Steward v. The Royal Bank of Scotland, lc* (1994) SLT (Sh. Ct.) 27.

⁴³⁵ A similar decision (allowing a cross-border effect of garnishment) is Cour de Cassation 5/30/1985, *Revue Critique* 1986, 329 (annotation *Battifol*), although this decision only set out an obligation *in personam* to furnish information across borders, cf. annotation of *Battifol*.

⁴³⁶ See the answers in the National Reports Garnishment at 1.2.

⁴³⁷ Example: Luxembourg, National Report 1.2.1.1., nationwide garnishments are allowed, cross-border garnishment is strictly forbidden, see Tribunal d'arrondissement de Luxembourg, 12/2/1999, *Droit et Banque* 2000, 65 (annexed to the Luxembourg Report). In Portugal this question has not yet been decided, National Report Portugal 1.2.

⁴³⁸ Judgment of June 12th, 2003, reported in *ILPr.* 2003, 468; [2003] 3 W.L.R. 21 (H.L.).

⁴³⁹ Sec. 4 gives effect to Articles 34 et seq. Brussels Convention (now Article 38 et seq. Regulation 44/01/EC).

On the *inter partes* hearing at first instance, the garnishment order was set aside, on the grounds that, because the English garnishee order would not operate to extinguish the bank's debt in Hong Kong to the judgment debtor, there was a risk that the bank would be compelled to pay twice.⁴⁴⁰ However, the Court of Appeal reversed this decision. The court rejected the suggestion that a garnishment order would be an infringement of the sovereignty of Hong Kong by saying that it would simply be ordering the bank to pay money in London. The Court held that the decision to make a garnishment order nisi absolute was discretionary; the obligation of the garnishee to pay the judgment creditor would operate mainly *in personam*.⁴⁴¹ At the end of the day, the Court discounted the danger that the bank would have to pay twice because a restitutionary remedy (based on unjust enrichment) was available to the bank in Hong Kong.⁴⁴²

Finally, the House of Lords reversed the Court of Appeal and set aside the garnishment order. The Law Lords gave several reasons why the garnishment order could not be allowed. While Lord Bingham of Cornhill was satisfied that the English Courts could make a garnishment order personally against a legal person subject to English jurisdiction, he rejected the argument that an English court should make an order which lacked the power to establish a necessary consequence, i.e., that where the making of an absolute garnishment order in respect of a foreign bank account would not, under the local law which governed the bank account, extinguish the debt due by the bank to the judgment debtor. In such a situation no order should be made⁴⁴³.

Lord Hoffmann and Lord Millet expressly rejected the view that a garnishment order simply operated *in personam*. They considered the order as operating *in rem*, being an equivalent of the seizure of a tangible debt⁴⁴⁴. As a consequence, they considered the garnishment of a debt held on an account in Hong Kong as an

⁴⁴⁰ *Société Eram Shipping Comp. Ltd v. Compagnie Internationale de Navigation*, [2001] CLC 685, Tomlinson, J.

⁴⁴¹ *Société Eram Shipping Comp. Ltd v. Compagnie Internationale de Navigation*, [2001] C.P. Rep. 112, at. 41.

⁴⁴² According to the Court of Appeal, the bank could set off the restitutionary claim (against double payment) if the judgment debtor sues for payment.

⁴⁴³ The reasoning mainly referred to principles of private international law.

⁴⁴⁴ Both Law Lords referred to old English case law, especially to *Martin v. Nadel* [1906] 2 KB 26, where the Court of Appeal did not allow the garnishment order against a judgment debtor living in Berlin and a bank in Berlin where the judgment debtor held an account.

extraterritorial act of seizure which was not permitted by public international law⁴⁴⁵. As a result, the judgment of the Court of Appeal and the garnishment order were set aside.

In a second judgment of 12 June 2003, the House of Lords also reversed the decision of the Court of Appeal in *Kuwait Oil Tanker Corp. v. Qabazad*⁴⁴⁶ which dealt with a garnishment order nisi against the London branch of UBS Switzerland⁴⁴⁷. According to this order, the Swiss bank had to provide information about all assets of the debtor (its client), especially about an account located in its Geneva branch⁴⁴⁸. The House of Lords reversed the decision, stating that a garnishment order relating to a bank account in Switzerland was not admissible. Further, the House of Lords referred to Article 16 (5) of the Lugano Convention⁴⁴⁹ which confers exclusive jurisdiction in enforcement proceedings on Swiss authorities.⁴⁵⁰ The House of Lords concluded that it was quite understandable that a UBS Swiss law expert should have said that a Swiss court would regard the order as a clear infringement of its sovereignty.

According to this recent case law, a more restrictive attitude of the English judiciary relating to cross-border garnishments can be observed. There are considerable differences between the approaches of the Court of Appeal and the House of Lords. While the Court of Appeal addressed the issue from the perspective of private international law, the House of Lords clearly preferred principles of public international law. However, it remains to be seen whether this restricted approach will also apply to provisional relief as such as freezing orders (CPR)⁴⁵¹. At present, there exists considerable divergence between the restrictive approach of English

⁴⁴⁵ *Société Eram Shipping Comp. Ltd v. Compagnie Internationale De Navigation*, [2001], n°54, 59 (per Lord Hoffmann) ; nos 78-88 (per Lord Millett).

⁴⁴⁶ *Kuwait Oil Tanker Co. v. Qabazard*, [2002] I.L.Pr. 29 (C.A.).

⁴⁴⁷ *Kuwait Oil Tanker Co. v. Qabazard*, [2003] I.L.Pr. 45 (H.L.)

⁴⁴⁸ The Court of Appeal had remitted the case to the first instance judge for further consideration as to whether Swiss law would recognize a restitutionary claim, such as that the court in the Eram case had considered (the garnishee would be able to set-off against a claim for payment of the debt.)

⁴⁴⁹ This provision corresponds to Art. 22 (5) of the Brussels' Regulation (44/01/EC)

⁴⁵⁰ This corresponds to the predominant opinion in Germany, Schlosser, *Commentary on Article 22 Brussels' Regulation* (2nd ed. 2003), n° 25.

⁴⁵¹ As a result, the House of Lords stopped an increasingly common practice of applying at the English courts for cross-border garnishment which came close to "garnishment shopping".

courts in relation to garnishment orders and the more flexible standards applied by the same courts in the context of provisional measures⁴⁵².

2. Cross-border service of a garnishment order

A different approach in extending garnishment across borders is found in Austria and in Germany. In these Member States, the traditional practice did not allow trans-border garnishments. While complying with the wording of sec. 828, 23 ZPO, a cross-border garnishment was – in principle – possible if the debtor or the garnishee were domiciled within the jurisdiction⁴⁵³, trans-border service of the garnishment order did not take place. This situation was explained by the fact that the judicial authorities that were competent for the service of documents abroad were not allowed to serve garnishment orders on parties abroad⁴⁵⁴. This practice was explained by considerations of public international law, because any service of an enforcement act was considered an infringement of the principle of territoriality and the sovereignty of the state addressed⁴⁵⁵.

However, this opinion has been criticized in the legal literature⁴⁵⁶. In 1998, the German Regulation on Judicial Cooperation in Civil and Commercial Matters (ZRHO) was amended and the cross-border service of garnishment orders is now allowed⁴⁵⁷. At the same time, the Austrian Supreme Court (*Oberste Gerichtshof*) had to decide on the validity of a trans-border garnishment⁴⁵⁸. In this case, the applicant had obtained an enforceable default judgment in Austria against the debtor company. This company had two garnishees with their seats in Germany. The creditor applied

⁴⁵² Same opinion Kennett, *Enforcement*, p. 274; the different approaches are defended by Briggs, [2003] MCLQ 418, 424-425.

⁴⁵³ See the text of sec. 828 supra in footnote 424.

⁴⁵⁴ Secs. 28, 59 of the Regulation dealing with trans-border cooperation in civil and commercial matters (ZRHO – *Rechtshilfeordnung in Zivil- und Handelssachen*) explicitly excluded any service of garnishment orders.

⁴⁵⁵ Kennett, *Enforcement*, p. 269.

⁴⁵⁶ Nagel/Gottwald, *Internationales Zivilprozessrecht* (5th ed. 2002), § 17 n° 65 with further reference; Geimer, *Internationales Zivilprozessrecht* (4th ed. 2001), para 406; Schack, *Internationales Zivilverfahrensrecht* (3rd ed. 2002) para 982 et seq; Oberhammer in: Angst (ed.) *Commentary on the Austrian Exekutionsordnung* (2001), sec. 294, n° 5.

⁴⁵⁷ Reported by Gottwald, in IPRax 1999, 395.

⁴⁵⁸ OGH, [1998] ILPr. 248, 254 et seq., see Kennett, *Enforcement*, p. 270-271, Austrian Report Garnishment, p. 18-20.

for a trans-border garnishment. The Supreme Court came to the conclusion that the views expressed in the modern doctrine should be endorsed. It held that

“Respect for the territorial sovereignty of states only precludes acts of state abroad by which the territorial sovereignty of the foreign state is infringed without its authorisation or without the existence of any other legal ground recognized by public international law; whereas, therefore, enforcement jurisdiction is subject to the boundaries formed by the territorial sovereignty of states, the same does not in principle apply to a judiciary jurisdiction which is not subject to any (significant) limitations. An order to abstain from a particular cause of conduct, is not regarded as an act of enforcement. There are therefore no public international law constraints on the issue of a garnishee order against a third party with its domicile (seat) abroad.”

The court then stated that the service of a garnishment order to a garnishee was mainly aimed at informing the latter that any payment into the hands of the judgment debtor would not be recognized in Austria.⁴⁵⁹ Therefore, the service of the garnishment order was mainly regarded as an “act of information”, not as an “act of sovereignty”. According to the Supreme Court, the garnishment operated in a restricted way, because the judgment creditor obtained a position through the garnishment order which enabled him to seek for payment from the garnishee. If the garnishee refused to pay, the creditor would have to sue him for payment in the competent German court⁴⁶⁰. Therefore, it was for the German courts to recognize the transfer of the claim by the Austrian garnishment order. The liberal practice of the Austrian Courts is not isolated. It has been reported that also German local courts (*Amtsgerichte*) acting as enforcement courts will order the service of garnishment orders on third party debtors abroad (especially in Austria and France)⁴⁶¹.

Since 31 May 2001, the legal situation of a garnishor seeking the service of a garnishment order abroad, has been considerably improved. Under art. 14 and 15 of the European Regulation on the Service of Documents in Civil and Commercial Matters, the garnishment order may be served directly by post to a garnishee in

⁴⁵⁹ [1998] ILPr. 248, 256-258.= Juristische Blätter 1998, 382, see Austrian Report Garnishment, 10.

⁴⁶⁰ If a basis of jurisdiction exists under Art. 5 et seq. of the Brussels' Regulation, the judgment creditor may also sue the third party debtor for payment in Austria. There is no doubt that an Austrian court would recognise the garnishment as valid.

⁴⁶¹ Factual information obtained by the General Reporter from practicing lawyers and court officers (Rechtspfleger). This information has been confirmed by J. Isnard, president of the UIHJ in a Paris conference on cross-border garnishment in October 2002.

another EU-Member State. Cooperation by the authorities of the requested state is not required.⁴⁶²

Therefore, a German creditor who may, under sec. 828 ZPO, serve with the support of a bailiff, the garnishee order to the garnishee, is not required to request the support of the German central authorities for the cross-border service. **Of course, this only applies, if the State of domicile of the garnishee has not opposed to the service of judicial documents in its territory under art. 15 (1) Service Regulation (see art. 15 (2)). Else, a German creditor will have to address the administration of the local court under sec. 828, 192 (3), 194 (1) S.1⁴⁶³, 183 (3) ZPO after having received the order from this court in order to qualify for art. 14 Service Regulation. The court administration will then demand the bailiff to serve the garnishee order by post.**

The problem is more pertinent in the context of “pre-attachments” under sec. 845 ZPO (which is a kind of announcement of a future garnishment of the claim to the garnishee)⁴⁶⁴, allowing German creditors to directly attach bank accounts in other Member states⁴⁶⁵. However, as the document is not drafted by the court but by the bailiff or even the creditor himself, one might doubt whether the simple fact that the bailiff is charged with delivery by the intermediary of the court, transforms this document into a “judicial document” in the sense of art. 14.

It has been reported that banks in Austria and France are regularly targeted by German creditors who seek to enforce pre-attachments. It seems that many garnishees comply with the order of their own accord. However, until now, no judgment has been reported dealing with the (crucial) question of whether the transfer of a claim to a garnishor in a cross-border context can be recognised as the entitlement of the judgment creditor for the recovery of the debt⁴⁶⁶.

⁴⁶² Cf. Hess, *Neues deutsches und europäisches Zustellungsrecht*, NJW 2002, 2483 et seq. Whether additional formalities must be observed depends on the declarations of the Member States (see Article 14 (2) Reg. Service 1348/2000).

⁴⁶³ Sec. 192 (3) ZPO applies to enforcement proceedings, see Münchener Kommentar – *Wenzel* ZPO sec. 192 n°4. See also sec. 829 (2) S. 3 ZPO.

⁴⁶⁴ Cf. German Report Garnishment, 1.1.

⁴⁶⁵ A copy of such a German instrument, which might be served on a garnishee domiciled in Vienna, is annexed to the Austrian Report on Garnishment.

⁴⁶⁶ If jurisdiction over the garnishee exists in the first state (where the garnishment order was issued), the garnishor may bring a lawsuit against the garnishee in this state. Jurisdiction is determined by Articles 2 - 30 Reg. 44/01/EC, cf. Kennett, *Enforcement*, p. 271.

3. The recognition of foreign garnishment orders

It remains an open question whether a foreign garnishment order must be formally recognised by the competent authorities in the state addressed. As a starting point, it may be stated that only sparse case law exists which addresses this issue directly (rather than as obiter dicta)⁴⁶⁷. The question has most often been addressed in the context of provisional proceedings where the creditors sought a trans-border garnishment order⁴⁶⁸. However, in the Austrian⁴⁶⁹, English⁴⁷⁰ and German⁴⁷¹ legal literature the issue is heavily debated⁴⁷².

There exists a controversy about the applicable instruments: According to the case-law of the ECJ in the *Denilauler*-Decision, a consensus exists that recognition under article 32 Brussels' Convention is excluded, because the garnishment order is issued *ex parte* (without the debtor being heard)⁴⁷³. However, some scholars have proposed the application of the (parallel) provisions of national laws dealing with the recognition of foreign judgments by analogy⁴⁷⁴.

The application of the general provisions may lead to uncertainties and conflicts. In a recent case heard by the German Supreme Labour Court⁴⁷⁵, a Texas court had seized the earnings of an American citizen who was employed in Germany. The debtor worked at the German base of an American airline in Frankfurt. The Texas "writ of income withholding the Employer" was served to the American base of the airline. The debtor, who did not receive the whole of his earnings, sued the American employer for payment. The German Supreme Labour Court held that the garnishment order could not be recognised under secs. 828 (2) and 802 ZPO

⁴⁶⁷ See the answers in the National Reports Garnishment at 10.3.

⁴⁶⁸ Kennett, *Enforcement*, pp. 278-279 (describing the English case law).

⁴⁶⁹ Austrian Report Garnishment at 10.2., (p. 19).

⁴⁷⁰ English Report Garnishment at 10.3.

⁴⁷¹ German Report Garnishment at 10.3 with further references to the case law and the debate in the legal literature. In the early 20th century, the *Reichsgericht* addressed the question of whether a foreign garnishment order could be recognized if a prior attachment of the same debt had taken place in Germany. The court relied on sec. 803 (2) ZPO and did not recognize the garnishment, RGZ 36, 355.

⁴⁷² See also Kennett, *Enforcement*, pp. 278-282.

⁴⁷³ ECJ, Case 125/79, *Denilauler/Couchet Frères*, ECJReports 1980, 1553. A critique of this case law can be found infra at footnote

⁴⁷⁴ Schack, *Internationales Zivilverfahrensrecht* (3rd ed. 2002), para 990.

⁴⁷⁵ Bundesarbeitsgericht (BAG), 3/26/1996, Praxis des internationalen Privat- und Verfahrensrechts 1997, 335; similarly Reichsgericht, Nov. 3rd, 1911, RGZ 77, 250.

because the debtor was domiciled in Germany and therefore, the (exclusive) competence for garnishments was attributed to the German enforcement courts. As a result, the American employer had to pay twice⁴⁷⁶.

This example shows that the recognition (or non-recognition) of a garnishment order is not sufficient for effective protection of the garnishee. The non-recognition even increases the risk that the garnishee will have to pay twice. In the French and Belgian literature it has been proposed that the obligation of a garnishee to pay twice should be regarded as a case of *force majeure*⁴⁷⁷. The House of Lords even set aside an English garnishment order (nisi) which was based on an English judgment, as the garnishee showed that there was a real risk of being made to pay twice (because the payment in England would not be recognised)⁴⁷⁸.

As an alternative, an analogy to articles 16 and 25 of the Regulation on Insolvency (1346/00/EC) seems to be the better avenue⁴⁷⁹. According to these provisions, any judgment opening insolvency proceedings and related decisions handed down by a court of a Member state shall be recognised by all jurisdictions within the European Judicial Area. As a result, the power of a liquidator appointed by a court to collect the assets of the debtor is recognised in all Member states (cf. Article 18 (1) Regulation on Insolvency). This includes the power to bring an action in order to collect any claim relating to the realisation of assets⁴⁸⁰.

The main purpose of formally recognising the garnishment order is to protect the garnishee. Recognition of a foreign garnishment order may enable a garnishee to avoid paying twice - once to the creditor and to the debtor. The non-recognition should be largely excluded⁴⁸¹. Additionally, the standing of the garnishee to sue in

⁴⁷⁶ The judgment of the BAG has been criticised in the literature, German Report Garnishment, 10.1. with further references.

⁴⁷⁷ Kennett, *Enforcement*, p. 277 (with further references).

⁴⁷⁸ The decision was based on the discretionary power of the English Courts to make an order nisi absolute (RSC Ord. 49 – now C.P.R. (1)), *Deutsche Schachtbau – und Tiefbaugesellschaft v. Ras Al Kaimak National Oil Co., Ltd.* [1998] 2 All E.R. 833 (H.L.).

⁴⁷⁹ A similar opinion is expressed by Geimer, *Internationales Zivilprozessrecht*, n°3283 (who proposes an analogy to sec. 102 EG InsO (*Einführungsgesetz zur Insolvenzordnung* which deals with the recognition of foreign insolvency orders under the autonomous German law).

⁴⁸⁰ Burbidge, Cross border insolvency within the European Union: dawn of a new area, [2002] 27 CMLR 589, 596.

⁴⁸¹ Article 26 of the Reg. on Insolvency preserves the right of the Member States to refuse the recognition of a foreign order relating to insolvency which is contrary to public policy. However, this article should not apply when the non-recognition of the foreign order would entail the risk of a

the State addressed for payment would be formally recognised. While the limited German case law is split on this point, there is a growing consensus in the legal literature that recognition of foreign garnishment orders should be allowed⁴⁸². However, in the European context it seems doubtful whether formal recognition is needed. If the creditor sues the garnishee for payment in the ordinary courts, his entitlement (standing to sue) might be implicitly recognized by the court. The entitlement of the garnishor might also be proven by a standard form on the garnishment⁴⁸³.

4. Assessment

The different solutions adopted by the Supreme Courts in Austria and in England show divergent approaches to trans-border garnishment. The Austrian Court adopted reasoning which is mainly based on principles of private international law and, therefore, treats the transfer of the claim seized by the garnishee order as being similar to an assignment of the claim. From this perspective, the protection of the third party debtor is crucial: any risk of double jeopardy must be excluded. By contrast, the reasoning of the House of Lords is guided by an analogy to public international law: as garnishment is considered an act of seizure, it is subject to any limitation of sovereignty in public international law. The reasoning of the House of Lords did not, however, deal with the trans-border effect of a garnishment order within the European Judicial Area. In Europe, trans-border garnishment may be assessed differently, because the principles of mutual trust and efficient cooperation between the authorities of the Member States may override the former conception of sovereignty under general public international law⁴⁸⁴. At the least, a Community instrument, allowing cross border garnishment between the national jurisdictions may derogate from general public international law⁴⁸⁵.

double payment by the garnishee, because this result would clearly infringe the property rights of the garnishee.

⁴⁸² See Austrian Report Garnishment, 10 (p. 19); German Report Garnishment, 10.4.

⁴⁸³ A similar solution is found in article 19 of the Reg. on Insolvency.

⁴⁸⁴ Hess, 92 *Revue Critique*, 215, 228 et seq. [2003].

⁴⁸⁵ The current situation is discussed by Hess, La procédure dite „Arrest“ en droit Allemand, in: Isnard/Normand (ed.), *L'aménagement du droit de l'exécution dans l'espace communautaire – bientôt les premiers instruments* (2003), p. 223, 241 – 252.

III. Policy Recommendations

1. Is a community instrument needed?

The present state of affairs in the European judicial area is largely unsatisfactory. In some Member States (especially Germany, Austria and Greece), trans-border garnishment is permitted, while others (the vast majority) rely strictly on territoriality (Belgium, Denmark, Finland, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Scotland and Sweden)⁴⁸⁶. As a result, garnishors within the European judicial area are treated differently. While this result might be acceptable as a consequence of the differences between non-harmonized national systems, the current fragmentation does not meet the needs of commercial actors within a single market. Thus, a direct consequence of the current state of affairs might be “garnishment shopping” within the European Judicial Area⁴⁸⁷.

Additionally, the situation of the garnishee is marked by considerable legal uncertainty. In practice, garnishees are in a precarious situation. They may be served by a foreign garnishment order requiring abstention from paying the debtor and, instead, the payment of the money into the account to the creditor. Several questions are left open: What law applies to the garnishment order, to the legal position of competing debtors and, to the protection of the debtor? Is the debtor obliged to seek redress abroad in the jurisdiction where the attachment was obtained? How can a garnishee avoid the risk of double jeopardy?⁴⁸⁸ Additionally, similar uncertainties relate to the legal positions of the creditor and the debtor. As a result, it must be noted that, at the least, a clarification of the admissibility of trans-border garnishment and of the applicable law is urgently needed. Moreover, a European system of garnishment must avoid the risk of the garnishee having to pay twice.

However, it seems that it would be possible to promulgate a European instrument on cross-border garnishment. Different models of alignment and harmonization of garnishment proceedings at a European level are imaginable. The most modest

⁴⁸⁶ Cf. the answers in the National Reports Garnishment to question 10.1. and 10.3.

⁴⁸⁷ Cf. Kennett, *Enforcement*, p. 284; Schlosser, 284 RdC 2, 211 et seq. [2000] citing several examples of the case law relating to provisional measures.

⁴⁸⁸ According to the Austrian Report Garnishment, the legal consequences of trans-border garnishment according to private international law are still largely unsettled, Austrian Report, 10 (p. 19).

option for the European legislator would be a further improvement and simplification of exequatur proceedings. - In this context, the impact of the accelerated proceedings under Art. 38 et seq. Reg. 44/01/EC⁴⁸⁹ as well as the proposed instrument for the European Enforcement Order for Uncontested Claims⁴⁹⁰ should be examined. Due to the considerable simplification of procedures achieved by those instruments, foreign creditors are now generally treated equally with domestic creditors in all Member States. Thus, further simplifications in the field of exequatur-proceedings do not seem conceivable. Nevertheless, these instruments still largely refer to the national enforcement procedures. Therefore, reliable information on the national enforcement systems should be easily accessible. A practical solution would be to provide for comparative information to be available on the web site of the European Network in Civil and Commercial Matters.⁴⁹¹

As a second option, considerable improvements could be derived from a genuine European instrument dealing with cross-border garnishment. This instrument should be modelled on the European Insolvency Regulation which approximates the national procedures⁴⁹². As the national legal systems in both fields (insolvency and garnishment) diverge considerably, a complete harmonisation of these matters would be too ambitious and premature. This is the reason why the Insolvency Regulation adopted a restricted approach which simply coordinates the national proceedings to some extent⁴⁹³. In garnishment proceedings a closer coordination of the national systems seems possible. This coordination should mainly relate to the first stage of garnishment proceedings⁴⁹⁴. That is, the seizure of the account and the obligation of a third-debtor party to provide information about the situation of the

⁴⁸⁹ Nagel/Gottwald, *Internationales Zivilprozessrecht*, § 12, n° 5 et seq.

⁴⁹⁰ COM (2003) 341 final, cf. Coester-Waltjen, *Einige Überlegungen zum künftigen europäischen Vollstreckungstitel*, Festschrift Beys (2003), p. 183 et seq.; Jeuland, *Le Titre Exécutoire Européen: un jalon perfectible*, Gazette du Palais 18. novembre 2003, 10 et seq.

⁴⁹¹ Decision 2001/470/EC of May 28th, 2001, OJ L 174 of June 27th, 2001, 15.

⁴⁹² Burbidge, 27 CMLR 589, 592-594 [2002].

⁴⁹³ See especially articles 27 et seq. providing for secondary proceedings which are conducted under the laws of the "second Member State".

⁴⁹⁴ The questionnaire on garnishment proposed as a possible model a "direct cross-border attachment" of bank accounts by notification of enforcement instruments on the third-debtor party abroad. This would entail the extraterritorial application of the enforcement laws of the Member State of origin. While this model corresponds to existing practice in Austria and Germany, it would not be an appropriate European model, because the differences between the national systems are too great.

account and on his willingness to pay should be addressed by a Community instrument.⁴⁹⁵

The most ambitious proposal would be the creation of a European instrument which would comprehensively unify garnishment proceedings. A similar, but more modest, proposal would be to allow cross-border garnishment generally and to set up minimum standards for European garnishment⁴⁹⁶. However, due to the considerable divergences between the national systems which were explained above, such a model does not seem feasible⁴⁹⁷. At present, it would be unwise simply to harmonise enforcement proceedings which are deeply embedded in the structures of enforcement agents/enforcement courts in the Member States. Moreover, such an instrument would not only apply to cross-border garnishment, but include domestic proceedings. It seems doubtful whether such an ambitious instrument would be covered by the Community's competences derived from Article 65(c) EC Treaty. As a consequence, the study does not include such an ambitious proposal.⁴⁹⁸

2. A European system for the attachment of bank accounts

a) Outline

The first option would be to set up a European instrument on trans-border garnishment (European Garnishment Order) which would operate on a unified claim form⁴⁹⁹ issued by the enforcement organs of the Member State of origin and served on a garnishee situated in another Member State. The European Garnishment Order would directly attach the bank account in another Member State (up to the amount of the judgment enforced). The garnishee party would be enjoined from paying the debtor and would be required to give information about the debtor's assets held by the bank (institution, account numbers, balance) to the creditor and/or the

⁴⁹⁵ Different models for a cooperation are imaginable. They are explained in more detail *infra* 2-4.

⁴⁹⁶ See Kennett, *Enforcement*, p. 284.

⁴⁹⁷ The same opinion is expressed by de Leval, *Une harmonisation des procédures d'exécution dans l'Union européenne est-elle concevable*, in: de Leval (ed.), *Seizure and Overindebtedness in the European Union* (1997), p. 595, 619-620.

⁴⁹⁸ The proposals of the Storme Commission relating to enforcement (Art. 12) also addressed specific issues and did not propose a large harmonisation of the different national systems, cf. Storme (ed.), *Approximation of Judiciary Law in the European Union* (1994), p. 150, 209-211.

⁴⁹⁹ Available in all languages of the Member States.

enforcement organ of the Member State of origin⁵⁰⁰. Additionally, the declaration should include an indication of the willingness of the garnishee to pay. If the bank volunteers to pay out the sum seized to the creditor, the creditor's ability to collect the claim should automatically be recognized in the Member State addressed⁵⁰¹. However, this recognition should be reduced to the legal entitlement of any creditor to take legal action under the garnishment procedures in the Member State addressed. As a consequence, in jurisdictions where the claim is collected by the enforcement organs, the creditor must apply to these organs.⁵⁰² In Member States where the creditor is entitled to collect the claim on its own initiative⁵⁰³, the legal capacity of the creditor to sue the garnishee for payment in the ordinary or the enforcement courts should be (automatically) recognized.⁵⁰⁴ However, if the garnishee objects the seizure and refuses to pay, the garnishment procedures of the state addressed shall apply. Therefore, the creditor must apply to the competent organs in the Member State addressed for further measures. In those Member States where the enforcement organs are entitled to collect the claim seized (especially Sweden and Finland), the collection of assets abroad should be conducted by an appointed person (receiver or the garnishor)⁵⁰⁵. These proceedings should be conducted accordingly to the procedural law of the Member State addressed, especially in the case of Member States that provide for collective distribution of proceeds (group principle). In those Member States where the priority principle is applied, the foreign creditor may seize first and be entitled to collect the

⁵⁰⁰ Whether the information should be provided to the enforcement organ (as in France and Sweden) or to the creditor (as in Austria and Luxembourg) should depend on the applicable law in the Member State of origin.

⁵⁰¹ This corresponds to the empowerment of a liquidator under articles 16 and 18 of the Reg. on Insolvency (1346/00/EC)

⁵⁰² This would be the case in Finland, Sweden, Denmark and Spain.

⁵⁰³ Austria, France, Germany, Ireland, England and Portugal.

⁵⁰⁴ Technically, a formal recognition is not needed, because the "recognition" operates at the "level" of substantive law, see article 17 (1) and 18 Reg. on Insolvency; cf. Rheinstejn, *Die inländische Bedeutung einer ausländischen Zwangsvollstreckung in Geldforderungen*, *RabelsZ* 1934, 277, 306 et seq.; German Report Garnishment, 10.4.1. Different opinion Kennett, *Enforcement*, p. 283.

⁵⁰⁵ The Swedish Report Garnishment, p. 4-5, expresses doubts about whether an "EU Enforcement Regulation" should make it possible for Officers or Enforcement Authorities to travel around Europe in order to attach vehicles, boats, racehorses or other movable assets. This would not be rational. However, the possibility of directly initiating enforcement proceedings in other Member States may considerably improve the financial prospects of a creditor. In addition, an alternative for the creditor would be the recognition of the enforceable instrument under articles 38 et seq. Reg. 44/01. Seen from this perspective, it seems possible to mandate that the creditor collect the claim directly under the new Community instrument (but under the enforcement systems in the Member State addressed).

claim as a whole⁵⁰⁶. If the garnishee opposes to the claim, the creditor must sue for payment in the competent court (which – as a rule - will be a court in the Member State addressed⁵⁰⁷).

From a theoretical perspective, the proposed European Garnishment order is mainly based on the guiding principles of mutual recognition (of enforcement orders of other Member States) and “universality”, because a cross-border validity of a garnishment order would be explicitly allowed. However, the application of these principles is restricted to the first stage of enforcement proceedings, i.e. the seizure of the account. Therefore, the second stage of garnishment proceedings (collection, distribution of the claim and protection of the debtor as well as the decision on the objections of the garnishee) remains completely subject to the enforcement laws of the Member State where the garnishment is effected⁵⁰⁸. In a literal sense, the “European Enforcement Order” operates as a “door opener” allowing a creditor to institute enforcement proceedings immediately abroad which are, however, conducted according to the applicable laws at the place of enforcement. An additional advantage of the proposed instrument is that it would also allow the inclusion of provisional and protective measures⁵⁰⁹.

b) The necessary content of a European instrument

A European instrument should firstly address the conditions and the procedures for obtaining a European Garnishment Order. The instrument should only apply if the seizure of an account located in another Member State is sought⁵¹⁰. Jurisdiction should be exercised at the domicile/seat of the debtor and/or in the Member State (of

⁵⁰⁶ A key advantage of this option relates to the cross-border effects of priority. A foreign creditor may directly target the bank account abroad and therefore improve his chances of seizing the account first in time.

⁵⁰⁷ The jurisdiction is determined by articles 2 – 30 of the Brussels’ Regulation, 44/01/EC.

⁵⁰⁸ In comparison with the legal effects of insolvency proceedings under Reg. 1346/00/EC, the proposal is more limited. While insolvency proceedings operate with an extraterritorial effect across Europe (see articles 4 (1) and 16, 25 Reg. 1346/00), the “trans-border effect” of a garnishment order remains restricted to the (simple) attachment. The main difference relates to the legal effects of the recognition. While the recognition of an insolvency order leads to the application of the insolvency law of the Member State of origin (article 4 Reg. 1346/00), the “extraterritorial effect” of a European Garnishment Order would be the seizure of the account and the recognition of the entitlement of the creditor or (the foreign enforcement organ) to collect the claim.

⁵⁰⁹ See *infra* at footnote 806. *et seq.*

⁵¹⁰ The location should be defined primarily by the location of the branch where the account is held (and operated).

origin) where the judgment against the debtor was given⁵¹¹. As a prerequisite, the creditor must present an enforceable instrument (as per article 32 Regulation 44/01/EC)⁵¹². The debt to which the enforceable instrument relates must be due and the creditor must be entitled to recover it by the enforceable instrument. These preconditions should be checked by the national enforcement authorities of the Member State of origin which are competent for issuing the European Garnishment Order⁵¹³. The garnishment order shall be issued based on a harmonised form drafted in all languages of the Member States. The copy of the garnishment order which is served on the third-party debtor should be issued in the languages of the Member State of origin and of the Member State addressed⁵¹⁴. The order should be served directly under the Regulation 1348/00/EC on the garnishee⁵¹⁴. The claim form should contain additional information for the garnishee about the nature and the effects of the instrument, the options for opposing it (including information about the competent court/enforcement organ in the Member State addressed). In addition, the enforcement order should also be served on the judgment debtor⁵¹⁵.

The legal instrument, which is served on the garnishee should also contain a second standard form relating to the obligation of the garnishee to give information about the account seized (amount of the balance, whether preferential creditors exist) and about his willingness to pay.⁵¹⁶ This declaration should be given within a defined period of time (between two to four weeks)⁵¹⁷. It should be published in a

⁵¹¹ This corresponds to the legal situation in many Member States, see *supra* text at footnote 637. According to Kennett, *Enforcement*, p. 283, "the domicile of the garnishee seems to be an obvious contender as a basis of international jurisdiction, but for the creditor who is interested in Europe-wide enforcement, this is an unnecessary restricted approach."

⁵¹² As to the question of whether provisionally enforceable instruments should be included, see *infra* D at footnotes 637

⁵¹³ Even in Member States (Italy, Greece, Luxembourg) where the enforcement organs do not investigate the preconditions of a garnishment, the imposition of a formal investigation (based on documents) by a Community instrument does not seem too burdensome.

⁵¹⁴ In practice, article 14 of that Regulation, which allows direct service by post, may often apply. It should be noted that this form of service is not undisputed, see Jeuland, *Gaz. Pal.* 2003, n°320, 10, 13-14.

⁵¹⁵ If service abroad would be necessary, such service should also be affected under articles 2-18 of Regulation 1348/00/EC. As a rule, the debtor should be served after the performance of the attachment of the account.

⁵¹⁶ A model form for this type of declaration is annexed to the Austrian Report Garnishment. The form is mainly filled out by simple crossing.

⁵¹⁷ Given the trans-border context, a period of four weeks seems appropriate.

standardised form such that it can be completed by simply crossing relevant boxes (or inserting names and numbers).

Besides, the European instrument should address the legal nature of the garnishee's declaration. Several options are to be found in the national systems. One option would be to treat the declaration merely as a formal acknowledgment of the claim seized; at the other end of the scale, the most far-reaching proposal would even be to treat the declaration as an enforceable instrument in favour of the creditor against the garnishee⁵¹⁸. Another option would be a simple reference to the different national laws of the Member States⁵¹⁹. A more balanced solution would be an obligation on the garnishee to compensate the debtor for any damage which results from his obligation to inform the creditor about the factual and legal situation of the account⁵²⁰. Finally, the European instrument should provide for (modest) compensation of the garnishee's costs incurred in obtaining and providing that information⁵²¹.

Furthermore, the instrument should address the legal effects of the garnishment order. Its main effect relates to the seizure of the bank account which is effected according to the law of the Member State addressed. The account in its current state (i.e. the balance at the moment of the seizure) should be blocked. If a national system provides for the seizure of additional accounts held in the same branch of the bank or the seizure of future balances, these effects should apply according to the enforcement law of the Member State addressed.⁵²² The application of that law means that in Member States where the creditor obtains a lien, the creditor has a

⁵¹⁸ Articles 32, 57 and 58 of the Brussels' Regulation could apply. This consequence corresponds to the legal situation in France, Ireland and England, see *supra* at footnote.

⁵¹⁹ This option does not seem preferable. As the Member States provide different solutions (acknowledgment, enforceable title, shift of the burden of proof, simple factual information without any further consequences, obligation of the third party to compensate the creditor), garnishees within the European Union would be treated differently and a considerable uncertainty about the legal consequences of the European instrument would exist.

⁵²⁰ If the creditor sues the third party for damages, jurisdiction is to be determined according to article 2 *et seq.* of the Regulation 44/01/EC, especially article 5 n° 3 of that Regulation. According to the case law of the European Court of Justice, the courts of the Member States where the garnishee is domiciled, will regularly be competent.

⁵²¹ It seems preferable to adopt a solution similar to the legal situation in Austria, cf. Austrian Report Garnishment, p. 14.

⁵²² See *supra* text at footnotes 333 -343

preferential right⁵²³. However, in Member States where the group principle applies, the creditor is treated equally with all other competing creditors in that State⁵²⁴.

In addition, the instrument should address the legal capacity of the creditor to collect the money from the garnishee (according to the garnishment proceedings of the Member State addressed). A formal recognition procedure (*exequatur*) would not be required.⁵²⁵ The creditor should be in a position to prove his or her entitlement for the collection of the claim by simply presenting a standard form⁵²⁶.

In order to protect the debtor, the instrument should provide for the safeguards described here. There might be a danger that creditors, who seek garnishments abroad, seize several accounts of the debtor at the same time in different Member States and thereby receive more protection than needed. In order to protect the debtor against such an event, the instrument should provide that a creditor, who seeks to attach⁵²⁷ several accounts of the debtor (in different Member States) should provide security before obtaining multiple enforceable copies⁵²⁸. In addition, the instrument should create an obligation on the creditor to compensate any damage the debtor suffers for “overseizure”. If the creditor seizes several accounts of the debtor, the debtor may ask the court for a release of those accounts which are not necessary for the satisfaction of the judgment’s claim. Which assets ought to be released is a matter for the creditor to decide. If the creditor does not designate the assets within a short period of time, the court should order the release the assets.

⁵²³ For example, in Sweden the foreign creditor must apply at the National Enforcement Authority if the garnishee refuses to pay.

⁵²⁴ Example: In Luxembourg, a foreign creditor may (directly) serve the European Garnishment Order on the garnishee. The “Cantonnement” is effected by the competent court according to the Luxembourg procedural code.

⁵²⁵ This corresponds to article 18 (1), 19 Reg. 1346/00 on Insolvency proceedings. For a contrary opinion, see Kennett, *Enforcement*, p. 283 (formal recognition would be necessary).

⁵²⁶ A similar provision is found in article 19 Insolvency Regulation 1346/00/EC.

⁵²⁷ A similar provision is contained in sec. 733 German Code of Civil Procedure: According to this provision, the delivery of an additional enforceable copy of the judgment is an exception, the creditor must motivate why he needs the additional copy. The copy is expressly designated as “additional” and the *Rechtspfleger* may even hear the debtor before issuing a second copy.

⁵²⁸ It does not seem to be necessary to prescribe how the security must be provided. It should depend on the national legal system whether the provision of a security should be prescribed by express legal provision or whether the court should impose an undertaking of the creditor. As a rule, the imposition of a security should be regulated in the same ways as the provision of a security for the enforcement of a provisionally enforceable judgment. Therefore, the creditor must produce the security before applying for European Enforcement Order.

After all, the instrument should clearly state that the protection of the maintenance needs of debtor and his family, the collection of the claim and all additional questions are subject to the enforcement law the Member State addressed. However, before the garnishee is formally served on the third debtor, any payment to the judgment's debtor would be considered valid.⁵²⁹

c) Practical improvements of the proposed instrument

The right to secure a direct attachment of a debtor's bank account located in another Member State would improve the creditor's situation considerably. Any application for recognition of the enforceable instrument would no longer be required. In addition, the creditor would obtain current and reliable information about the financial situation of the debtor through the garnishee's declaration. As a result, the foreign creditor is treated equally with all other creditors within the Member State addressed. The cumbersome, time-consuming and costly proceedings which currently exist in the Member States would no longer apply⁵³⁰.

Additionally, the legal situation of the garnishee would be improved. As the garnishment order of the Member State of origin is explicitly recognized in all other Member States, the risk that a garnishee would have to pay twice would be reduced⁵³¹. Finally, the existing uncertainties relating to the applicable laws would be resolved, because application of the enforcement law of the Member State of origin would be limited to the questions of whether a national enforcement organ is competent to issue the European enforcement order. As a rule, the law of the Member State where the account is located would apply. This solution corresponds to the established principles of the *lex rei sitae* and (to some extent) of territoriality in private international law⁵³² and in cross-border enforcement.

⁵²⁹ This corresponds to the protection of a garnishee according to article 24 of the Insolvency Regulation.

⁵³⁰ In its effects, this proposal comes close to the result achieved by article 47 (1) of the Brussels' Regulation. But there are considerable differences: Article 47 (1) of the Brussels' Regulation is embedded in the context of *exequatur*-proceedings. Therefore, a creditor must still apply for the recognition of the foreign judgment before collecting the assets seized. Under the proposed instrument, recognition of the judgment is not needed.

⁵³¹ As the "entitlement" of the garnishor to seize and collect the claim is automatically recognised, a lawsuit by the judgment debtor aimed at the collection of the seized claim from the garnishee must fail, because the judgment debtor has no standing to bring the claim in court.

⁵³² The main reasons for the referral to the garnishment law of the Member State addressed are the considerable divergences between (all) national laws, see *infra* at footnote 302 et seq.

3. Cross-border attachment of bank accounts held at the European level

a) Overview

As an alternative, a system of cross-border garnishment within financial institutions that have pan-European operations would also be an option.⁵³³ Such a system presupposes that the garnishment order would be issued by the enforcement organs in the Member State where the financial institution is headquartered and would be served on the head office.⁵³⁴ This service of the attachment order on the main office of the bank would effect access to all bank accounts, including those located in foreign branch offices⁵³⁵. As the garnishee, the bank would be required to give information on all accounts held by its branches within Europe (with the exception of those accounts which are held by independent branches). The applicable law on the garnishment would be the law of the Member State where the headquarters are located⁵³⁶. As the legal effects of the order operate “within the financial institution”, other enforcement laws would not be applicable and the “extra-territorial effect” of such an order would remain limited. It would also be possible to spell out in more detail the preconditions and the effects of such an order. Such an instrument would provide the following advantages: only one enforcement law would be applicable, the creditor would obtain effective access to all assets of a debtor, the time-consuming and costly proceedings of recognition and enforcement of the different Member States would no longer apply.

b) Arguments against and in favour for such a proposal

Nevertheless, there are some considerations which stand against such a proposal. First, the tracing of all accounts of a bank with multiple branches might impose a particular burden on those institutions which (successfully) operate Europe-wide⁵³⁷. In addition, it seems possible that an account which has been seized by a “central

⁵³³ It is the practice in some Member States to allow “trans-border garnishment” within banks, see national reports France, 10.3.; Germany, 1.2.1, 10.1.; Greece 10.1.; the Netherlands 10.3.2.; Portugal 10.1.1.; Spain 10.1., but no case law has been reported.

⁵³⁴ The head of jurisdiction is derived from the domicile/seat of the garnishee’s headquarters.

⁵³⁵ An even more expansive approach would be to allow the seizure of bank accounts held by a bank with world-wide operations by simply targeting a (dependant) branch.

⁵³⁶ In this respect, the effect corresponds to the solution provided by article 4 (1) Reg. 1346/00.

⁵³⁷ This might be a kind of indirect discrimination against those institutions, cf. Irish Report Garnishment, 10.7. A different opinion is expressed by Schack, *Internationales Zivilverfahrensrecht*, 988; German Report Garnishment, 10.6.: A cross-border garnishment might be “the price” for operating at the European level.

garnishment order” might be targeted by an additional garnishment order issued by a competent organ of the Member State where the account is located. In this situation, the European instrument must address the questions of which seizure prevails and of whether the enforcement laws of the Member State where the account is located or the enforcement laws of the Member State of origin apply⁵³⁸. Moreover, a debtor who lives in the Member State where the account is held would be protected by the immunities of another Member State (the Member State of origin, that is where the headquarters of the bank are located). This legal regime might not adequately protect the judgment debtor (whose livelihood depends on the circumstances and the living conditions in the Member State of his domicile). Additionally, this consequence might not be acceptable for the Member State where the debtor lives. If the debtor only receives reduced protection (compared with the applicable law in the effected Member State) this Member State may have to pay social welfare/assistance to the debtor.

As an alternative, the debtor protection laws of the Member State addressed could apply. However, this proposal would not work in practice, as the enforcement organs in the Member State of origin would be required to apply several enforcement laws of the (different) locations of the accounts. A European regime would become very complex.

Nevertheless, it would also be possible to mitigate the effects of such a garnishment order in a similar manner to that already proposed in regard to the European Garnishment Order⁵³⁹. Under this model, the legal effects of the garnishment order served on the headquarters of a financial institution would be reduced to the (mere) seizure of all accounts held by that institution within the European Union⁵⁴⁰. As garnishee, the bank would be obliged to give information about all the debtor’s accounts operated within the European Union and to declare its willingness to pay. The second stage of the garnishment proceedings (i.e. the collection of the claims) should be supervised by the enforcement organs of the Member States of location and under the garnishment laws of those Member States. The alignment between

⁵³⁸ This issue is very difficult to resolve, because it relates directly to the different distribution schemes (priority, group principle) in the Member States.

⁵³⁹ Cf. the proposal of the German Report Garnishment, 10.3.4.2. See supra at footnote .

⁵⁴⁰ The enforcement organ of the Member State where the headquarter of the bank is located should be competent for the enforcement proceedings.

the enforcement systems of the Member State of origin and the Member State addressed could operate as follows: on presentation of the garnishment order to the enforcement organs of the Member State addressed, a creditor could apply for collection of the claim. The collection of the funds (as well as the protection of the debtor, competing creditors and the garnishee) would be subject to the enforcement proceedings of the Member State where the account is held.

4. Direct cooperation between national enforcement organs at the European level

A final option would be to base a European Garnishment System on (formal) cooperation between enforcement agencies and courts. This cooperative process would work in a similar manner to the judicial and extra-judicial assistance between national authorities in civil and commercial matters⁵⁴¹. An enforcement organ which gets information about the debtor's assets in another Member State should directly request the enforcement organs of that State to attach the assets. The cooperation between the enforcement authorities would be implemented through letters of request (based on standard forms). Direct cooperation between the competent authorities should be allowed and central authorities in the Member States should assist in this regard. In the result, two enforcement proceedings would take place. A (principal) proceeding in the Member State of origin and an (ancillary) second proceeding in the requested Member State. The funds collected by the requested authority would be transferred to its counterpart in the Member State of origin and paid out to the creditor.

This cooperative process, which would be based on a similar model to that which exists under the Service⁵⁴² and the Evidence⁵⁴³ Regulations, seems to be appropriate for Member States where enforcement is conducted by one competent enforcement authority (especially Sweden and Finland, but also France and the Netherlands) or by an enforcement court (Austria, England, Ireland and Spain). However, this model does not seem appropriate for national systems which follow a "decentralised enforcement structure" and confer the responsibility for the progress of the proceedings on the creditor who must apply for the garnishment at the (locally)

⁵⁴¹ A model of such a cooperation could be found in article 31 Reg. on Insolvency.

⁵⁴² OJ L 174/1 of June 27, 2001.

⁵⁴³ OJ L 160/37 of June 30, 2000.

competent organ (Germany, Greece and Portugal). In these systems, the competence of the enforcement organs is mainly concentrated in the place where the enforcement is effected⁵⁴⁴. Therefore, this model might operate between Member States with a centralised system. It may be a basis for a “closer cooperation” of these jurisdictions within the European Judicial Area. However, it seems doubtful whether a European model based on cross-border cooperation between enforcement authorities would be more efficient than direct application⁵⁴⁵ by the creditor to the enforcement authorities in the Member State where the garnishment is to be effected.

D. Provisional Enforceability and Protective Measures

I. Introduction

While the European instruments on civil procedure do not address enforcement measures, provisional enforceability and provisional measures are partially included, particularly in the Brussels’ Regulation. According to Article 32 Reg. 44/01, the finality (*res judicata*) of a judgment is not a prerequisite for its recognition in other Member States and, therefore, provisionally enforceable instruments are recognized under the 3rd Chapter of the Regulation⁵⁴⁶. However, as long as exequatur-proceedings have not been terminated, the enforcement of a foreign instrument is restricted to protective measures which do not allow any realisation of the claim (art. 47 (3) Reg. 44/01). As a consequence, the Regulation provides a genuine concept of provisional enforceability which is mainly aimed at securing the creditor’s prospects for enforcement proceedings which will be undertaken until (or if) the decision, which is recognised in another Member State, has become *res judicata* in the country of origin⁵⁴⁷. This concept⁵⁴⁸ is more limited than the scope of provisional enforcement in

⁵⁴⁴ Cf. for example, Sec. 828 (2) ZPO, text supra in footnote 424.

⁵⁴⁵ Such an application presupposes the recognition (*exequatur*) of the enforceable instrument under article 38 et seq. Brussels’ Regulation.

⁵⁴⁶ It should be noted that most of the Member States do not provide for recognition of provisionally enforceable judgments outside the scope of the European instruments, cf. French Report on Provisional Enforcement, 7.5. referring to C. Cass., 21-5-1997, *Revue critique droit int. privé* 1998, 306 (note Muir Watt).

⁵⁴⁷ ECJ, Case C-432/93, *SIBRO/Ampersand*, [1995] ECR I-2269, n°38; König, *Aufschiebung der Zwangsvollstreckung vor Rechtskraft der Vollstreckbarerklärung*, *Österreichische Richterzeitung* 2001, 267 et seq.

most of the Member States where “full enforcement” (including the realisation of the assets seized) is allowed⁵⁴⁹.

Provisional and protective measures are mainly addressed in articles 31 and 32 of the Brussels’ Regulation which largely refer to the national laws. According to article 31 Reg. 44/01, the heads of jurisdiction, the available remedies and the procedures for the obtaining of provisional relief are subject to the national laws of the Member States⁵⁵⁰. Art. 32 Reg. 44/01 includes provisional and protective measures in the Community’s guarantee of the free movement of judgments. On account of the lack of minimum harmonisation of provisional remedies between Member States, the ECJ limited the free movement of provisional measures.⁵⁵¹ The ECJ has interpreted Articles 31 and 32 Reg. 44/01 (relevantly Art. 24 and 25 Brussels’ Convention) narrowly, for the protection of defendants⁵⁵². According to this case law, provisional remedies are those which “preserve a factual or legal situation so as to safeguard rights, the recognition of which is sought elsewhere from the court having jurisdiction as to the substance of the matter”⁵⁵³. Additionally, the debtor must be heard before the judgment granting provisional relief is given⁵⁵⁴.

At the European level, several similarities between provisional and protective measures can be identified. First, both remedies are aimed mainly at protecting the creditor, in that they allow the attachment of the debtor’s assets and secure the future realisation of the (final) judgment. Second, the legal effects of both remedies are limited to protective measures⁵⁵⁵. Third, as the measures are provisional, they may be amended later during the course of the proceedings. Therefore, the courts deciding the main or appellate proceedings may order a stay of enforcement or even order a release of the assets seized. Finally, the creditor must compensate the debtor if the provisional measure or the judgment is set aside. Additionally, the

⁵⁴⁸ See *infra* at fn.607.

⁵⁴⁹ See the comparative survey *infra* at II 1. The restriction to protective measures does not apply if the judgment is appealed in the Member State of its origin, art. 46 (3) Reg. 44/01, *infra* II 2 b)

⁵⁵⁰ See *infra* at II 2.

⁵⁵¹ In connection with this see Hess, Die begrenzte Freizügigkeit einstweiliger Maßnahmen im Europäischen Binnenmarkt II (re ECJ, Case C-99/96 *Mietz*), IPRax 2000, 370 et seq.

⁵⁵² ECJ Case C-391/95 *Van Uden* [1998] ECR I-7091; Case C-99/96 *Mietz* [1999] ECR I-3637.

⁵⁵³ ECJ, Case C-261/90, *Reichert and Kockler v. Dresdner Bank AG* [1990] ECR I- 2149, at para. 34.

⁵⁵⁴ ECJ, Case 125/79, *Denilauler/Couchet Frères*, [1980] ECR 1553.

⁵⁵⁵ However, most of the national laws provide for the full enforcement of provisionally enforceable judgments, *infra* at fn. 554 et seq.

(likely) claims of the debtor for reimbursement or compensation are secured by security given by the creditor which is (normally) fixed by the court⁵⁵⁶.

In the framework of the Brussels' Regulation, provisional enforceability and provisional measures form part of a homogenous system which operates during different phases of the proceedings⁵⁵⁷. If the creditor seeks protective measures prior or during the proceedings on the merits, Article 31 of Reg. 44/01 applies and the protection of the creditor is effected by provisional measures. These measures might be obtained from the court hearing the main proceedings or from another court (where enforcement proceedings take place)⁵⁵⁸. After the judgment is handed down (and when it is recognised in other Member States) the protection of the creditor is guaranteed by provisional enforceability as long as the judgment or the *exequatur*-decision are appealable (cf. Art. 47 Reg. 44/01). Therefore, the Brussels' Regulation is structured as a two-tier framework: it principally addresses main proceedings, but also provides for complementary cross-border protection through provisional remedies⁵⁵⁹.

This regulatory scheme corresponds to international practice where provisional measures have increasingly become part of international commercial litigation and cooperation⁵⁶⁰ (but also of conflicts⁵⁶¹) between national courts⁵⁶². However, international practice also tends to replace the (lengthy) main proceedings with the more flexible provisional remedies (as interim payments, *kort geding*, *référé provision*). This development does not correspond to the framework of the Brussels' Regulation which addresses provisional remedies only in part⁵⁶³. Because of this, the

⁵⁵⁶ Details on the preconditions and the proceedings for obtaining a security can be found in the answers of the National Reports to Provisional Enforcement, question n° 4.

⁵⁵⁷ Kennett, *Enforcement*, p. 130-1, distinguishes three different phrases: (i) prior to the handing down of a judgment (ii) after the judgment has been delivered but prior to obtaining *exequatur* in another Member State and (iii) following *exequatur*, as long as an appeal is available against the judgment or the enforcement order.

⁵⁵⁸ ECJ, C-391/95 *Van Uden* [1998] ECR I – 7091.

⁵⁵⁹ Hess/Hub, Die vorläufige Vollstreckbarkeit ausländischer Urteile im Binnenmarktprozess, IPRax 2003, 93.

⁵⁶⁰ Cf. Schlosser, RdC 284 (2000), 13, 173 et seq.

⁵⁶¹ A recent example of conflicts between national courts is found in the decision of the ECJ of June 6, 2002, *Italian Leather SpA v. WECO Polstermoebel GmbH & Co.*, [2002] ECR I-4995.

⁵⁶² Kennett, *Enforcement*, p. 130; Kramer, [2003] 40 CMLR 953.

⁵⁶³ As provisional measures are not subject to the jurisdictional rules of the 2nd Chapter of the Brussels' Regulation, many applicants used jurisdictional rules which are (for main proceedings)

ECJ had to adjust and delineate the scope of the Regulation and to exclude non-provisional remedies of the national systems from the scope of the Regulation dealing with protective relief⁵⁶⁴.

Until now, provisional remedies have only partly been regulated by the Brussels' Regulation⁵⁶⁵. Accordingly, the interfaces between the Regulation and the different national laws have been addressed on several occasions by the ECJ, but its case-law appears rather piecemeal and many issues are still disputed. The last part of the study is intended to, firstly, present a comparative survey on the different structures of the national systems on provisional enforceability and provisional measures and, secondly, to address possible improvements that could be made to the current situation⁵⁶⁶.

II. Provisional Enforceability

1. Different structures in the national systems

a) Systematic considerations

In the national jurisdictions, the question of when a judgment becomes enforceable relates mainly to enforcement proceedings (which as a prerequisite require an enforceable title). However, the issue is also closely related to the rules on judgments and the operation of appeal, because provisional enforceability takes place as long as a judgment is still appealable⁵⁶⁷. Additionally, provisional enforceability is also closely related to questions of *res judicata*, because the latter

forbidden by article 3 (2) and Annex I of the Regulation. This development had the potential to undermine the Convention/Regulation's system, cf. Kennett, *Enforcement*, 131-135.

⁵⁶⁴ ECJ Caes C-391/95 *Van Uden* [1998] ECR I-7091; Case C-99/96 *Mietz* [1999] ECR I-3637, infra III 5 a).

⁵⁶⁵ During the adaptation of the Brussels Regulation in 1999-2001, article 47 Reg. has been amended, while articles 31-32 Reg. remained unchanged. As the ECJ rendered its judgment *Van Uden* when the Working Party discussed an amendment of (former) Article 24 Brussel's Convention (now article 31 Reg. 44/01), the majority opined that due to this case law any amendment would not be necessary, cf. Stadler, *Erlass und Freizügigkeit einstweiliger Maßnahmen im Anwendungsbereich des EuGVÜ*, Juristenzeitung 1999, 1089, 1098; Kohler, *Die Revision des Brüsseler und des Luganer Übereinkommens*, in Gottwald (ed.), *Revision des EuGVÜ* (1999), p. 2, 29 et seq.

⁵⁶⁶ By a better coordination of the national rules on provisional and protective measures and by proposing a genuine European Protective Measure.

⁵⁶⁷ Kerameus, IECL 10-26 with further references.

presupposes the exhaustion of all methods of appeal.⁵⁶⁸ In the Member States, provisional enforceability is systematically dealt with in different contexts. While some systems address the issue as a prerequisite to enforcement proceedings⁵⁶⁹, others integrate provisional enforceability within the context of the making of a judgment⁵⁷⁰ or provisional enforceability is dealt with in the context of appeal proceedings⁵⁷¹. However, there are some Member States in which provisional enforceability does not exist at all. In the common law world, all judgments are final and become enforceable from the day on which they are delivered⁵⁷². Nevertheless, the legal results in regard to provisional enforceability in these systems are similar to those in other Member States, because the latter also allow the immediate enforcement of a judgment after it is handed down.

The policy underpinnings of provisional enforcement are as follows. First, it operates mainly in the interest of the creditor. As the creditor obtained a judgment confirming his claim against the debtor, his entitlement (and the binding force of the judgment) must be regarded as superior to any objection by the debtor which might be dealt with in appellate proceedings. Therefore, provisional enforceability is expected to ensure that the creditor's victory is not frustrated, and induces the debtor to present his defence in the first instance court and to refrain from taking unmeritorious appeals merely in contemplation of a stay of enforcement⁵⁷³. However, there is also a compelling need to protect the debtor in case the judgment should be reversed on appeal. In this situation, the debtor must be compensated by the creditor for any loss incurred as a result of the enforcement measures. As a consequence, most of the Member States impose an obligation on the creditor to compensate the debtor in this situation. Consequently, the creditor enforces a provisionally enforceable judgment

⁵⁶⁸ Thus, the duration of provisional enforcement is closely interconnected with appeal periods: while in Member States a three-months period is provided within which an appeal may be lodged, others only provide for a two or four-week period, Kennett, *Enforcement*, p. 72-73.

⁵⁶⁹ Examples: France, Germany, Greece.

⁵⁷⁰ Example: Luxemburg, cf. National Report Provisional Enforcement, Preliminary Remarks, p. 1.

⁵⁷¹ This is the case in England, where provisional enforcement (as an institution) does not exist, because all judgments are immediately (fully) enforceable. The appellate court may, however, stay the proceedings, see article 37 (2) Brussels' Regulation and English Report Provisional Enforcement, p. 1.

⁵⁷² This rule is today expressed in England in part 40.7 of the CPR 1998, English Report Provisional Enforcement, p. 1; Irish Report, Provisional Enforcement, C 1-7.

⁵⁷³ This is a predominant opinion in the German legal literature, see Wieczorek/Hess, *Commentary, Preliminary Remarks on sec. 708-720a ZPO* (1999), nos 1-3, German Report on Provisional Enforcement, p. 1-2.

at his own risk⁵⁷⁴. In addition to this, the creditor must, before starting enforcement proceedings, provide security, which is aimed at protecting the (possible) claim of the debtor for compensation in the case of a reversal of the judgment⁵⁷⁵.

In principle, a broad consensus exists in the Member States about these socio-political underpinnings of provisional enforceability (i.e. the need to protect the creditor). However, there is some discussion relating to the question of whether provisional enforceability should operate (as a rule) by law or should be subject to some discretionary consideration by the judge, especially on the prospects of a (pending) appeal. This discussion is currently taking place in France, where the government recently proposed to amend article 539 of the *Nouveau Code de Procédure Civile* and to extend provisional enforceability by law to all first-instance judgments. The majority of the legal literature strongly opposed this proposal and argued that there were often circumstances in which a first instance judgment might be erroneous and the debtor (as any party) should be entitled to a full review hearing⁵⁷⁶. This is the reason why some Member States provide for a specific verification procedure by a judge (or by the enforcement court) on the question of whether the judgment is well-founded and whether there are sufficient prospects for an appeal⁵⁷⁷. In other systems, this examination takes place in the appellate court, after an appeal has been lodged⁵⁷⁸. The appellate court may order a stay of provisional enforcement. Finally, some national systems include damage resulting from delay (of enforcement) as an additional prerequisite of provisional enforceability.⁵⁷⁹

b) Different approaches in the Member States

⁵⁷⁴ The principle is explicitly stated in art. 1398 (2) Belgian Code Judiciaire: "l'exécution du jugement n'a lien qu'aux risques et périls de la partie qui la poursuit", Belgian Report on Provisional Enforcement, n°6.

⁵⁷⁵ Cf. answers in the National Reports on Provisional Enforcement, 4.1.

⁵⁷⁶ Cf. The discussion between Guinchard; Pour une exécution provisoire à visage humain et le droit de libre critique des choses de la justice, *Petite Affiche* 2002, 7 et. seq. ; Cadiet, Feu à l'exécution immédiate des jugements ? Regretst de la France du milieu, *JCP, Semaine juridique*, 2002, 1489 et. seq ; Le Bars, Vers une suppression de l'effet suspensif de l'appel ?, *Dalloz* 2002, 1987 ; Moury, De la règle de l'effet suspensif de l'appel en matière civile, *Mél. J. Normand* (2003), p. 353 et seq.

⁵⁷⁷ See infra at fn. 588 et seq.

⁵⁷⁸ Ex. Germany, sec. 718 ZPO, German Report Provisional Enforcement, 5.1. and 5.2. This solution seems to be preferable, because only in this situation is there a likelihood that the judgment might be reserved.

⁵⁷⁹ Ex.: Austria, sec. 370 EO, Austrian Report on Provisional Enforcement, 2.1.3. and 2.5.2.; Belgian Report on Provisional Enforcement, 2.3.3.

The national systems of the Member States provide for three different systems of provisional enforcement. Most of the Member States⁵⁸⁰ provide for provisional enforcement (at least) in relation to all first-instance judgments⁵⁸¹. Provisional enforceability operates by law or is ordered by the judge, it operates up to the point that all prospects of appeal have been exhausted. As a rule⁵⁸², the creditor must provide a security in case the judgment is set aside on appeal. In this circumstance, the judgment creditor is required to compensate all damages incurred by the debtor which result from enforcement of the judgment. In most Member States, this liability is a no-fault liability⁵⁸³.

The second type of provisional enforceability is found in Austria, Finland and Sweden. These Member States only allow for the seizure of the debtor's assets, any realization of the claim (compulsory sale or similar measure) is strictly forbidden. From its legal consequences, this type of provisional enforcement is aimed at ensuring enforcement when the litigation will be terminated; it resembles provisional and protective measures. However, in some exceptional cases, the creditor may apply for an immediate transfer of funds by way of provisional measures for his personal needs (this exception applies mainly to maintenance proceedings)⁵⁸⁴. In these Member States, the granting of provisional enforcement is normally combined with a security which must be given by the creditor before starting enforcement proceedings. In addition, the creditor must provide compensation for any damage incurred by the debtor if the judgment is reversed. In Austria and Finland, the debtor's claim is based on strict liability⁵⁸⁵.

The third type of "provisional enforcement" is found in England and Ireland. In these Member States, final judgments become effective from the day on which they are

⁵⁸⁰ Belgium, Denmark, France, Germany, Greece, Italy, Luxembourg, Netherlands, Portugal and Spain.

⁵⁸¹ With the exception of judgments in matrimonial and family matters, ex.: Germany, sec. 704 (2) ZPO; Belgian Report, Provisional Enforcement, 2.4.

⁵⁸² In Italy, posting of security is only required in special cases; e.g. in case of final appeal and in case of provisional measures.

⁵⁸³ Belgium, Article 1398 C.J.; Denmark, Article 505 Rpl. ; Germany, Section 717 (2) ZPO ; the legal situation is the same in the Netherlands, Luxembourg, Portugal and Spain. In Greece the liability is restricted to cases of gross-negligence of the creditor, while in Italy the liability depends on the fault of the creditor, article 96 (2) CPC.

⁵⁸⁴ Austrian Reports on Provisional Enforcement, 4.2.4.1. and on Provisional measures, 4.2.1.

⁵⁸⁵ Sec. 376 (2) EO (with the exception of the reversal of default judgments) Austrian Report, 6.2.; Finish Report, 6.2.

handed down regardless of the availability of any appeal possibilities⁵⁸⁶. According to part 40.7 CPR (1998) a judgment or an order of the court takes effect from the day when it is given, or such later date as the court may indicate. As a consequence, there is no room for provisional enforceability, but under CPR 40.11, enforcement measures are not allowed within a period of two weeks.⁵⁸⁷

However, in these jurisdictions, the concept of *res judicata* is different from that in other national jurisdictions. The period during which judgments in England and Ireland may be appealed is longer than on the Continent. Additionally, the appellate court will grant, as a rule, a temporary stay of enforcement if a security is given⁵⁸⁸. As a result, from a functional perspective, the gap between the common law system and the continental law system does not seem huge. The main difference relates to the requirement that the creditor posts a security before starting enforcement proceedings.⁵⁸⁹ In England and Ireland, this precondition does not exist⁵⁹⁰. However, in all national systems the creditor must compensate (or at least provide restitution to⁵⁹¹) the debtor if the judgment is reversed on appeal.⁵⁹² Additionally, both systems provide for a stay of enforcement if the higher court considers that there are prospects of success or a specific need to protect the debtor against enforcement.

c) Particular issues relating to provisional enforcement

aa) Scope of application. As a rule, provisional enforcement applies to first instance judgments. In many Member States, it is expressly ordered by the first instance court⁵⁹³, while in others provisional enforceability operates by law and is not addressed in the wording of the judgment⁵⁹⁴. In some Member States, where provisional enforcement is expressly ordered, the successful party must apply for a

⁵⁸⁶ English Report, Provisional Enforcement, p. 1; Irish Report, Provisional Enforcement C 1-7, p. 39.

⁵⁸⁷ Hess/Hub, IPRax 2003, 93, 96.

⁵⁸⁸ Irish Report, C. 1-7, p. 39.

⁵⁸⁹ Same opinion: Kerameus, IECL 10-35.

⁵⁹⁰ However, in Finland, the Netherlands, Spain and Sweden, the creditor is also not required to give any security.

⁵⁹¹ A similar function is served by the obligation of the creditor to relinquish any enforcement measure and to pay the costs if the appeal is successful; Irish Report, C 1-7, p. 39. This claim is based on unjust enrichment.

⁵⁹² C.f. the National Reports on Provisional Enforcement, n° 6.

⁵⁹³ Belgium, France, Germany (with the exception of judgments given by the labor courts); Greece, Luxembourg, the Netherlands and Spain.

⁵⁹⁴ Austria, Denmark, England, Finland, Ireland, Italy, Portugal and Sweden.

decision of the court⁵⁹⁵. This application can also be lodged in the court of appeal at a later time. In other Member States, provisional enforcement is expressly ordered by the court, but does not require an application by the party⁵⁹⁶. Other differences relate to the issue of whether provisional enforcement includes costs. While in Austria, Belgium, Denmark, England, Finland, Germany, Ireland, Italy, the Netherlands and Sweden costs are included⁵⁹⁷, France, Greece and Luxembourg expressly exclude costs. In Spain, the winning party may even apply for an additional award (up to 30% of the judgment amount) to cover the costs of enforcement⁵⁹⁸, whereas in Portugal the costs of a first-instance judgment are generally not reimbursed and therefore not included in the provisional enforcement⁵⁹⁹. The different solutions reflect the different cost-allocation rules in the Member States.

Differences also relate to the provisional enforceability of a judgment which is given by an appellate court. This issue is closely related to the suspensive effect of a second (or final) appeal. There are Member States (France, Belgium, Greece, Italy, Luxembourg, the Netherlands and Sweden) where the second appeal (“cassation”) does not suspend the finality of a judgment and does not affect its enforceability. Accordingly, in these jurisdictions provisional enforcement is restricted to the decisions of the first instance court. In other Member States (Austria, Germany, Ireland, England and Spain) provisional enforcement also applies to the decisions of the appellate courts. In these Member States, the temporal scope of provisional enforcement is considerably broader.

bb) Compensation of the debtor after reversal of the judgment. As the creditor executes the provisionally enforceable judgment at his own risk, he must reimburse the debtor for any damage incurred as a result of the execution⁶⁰⁰. However, there are considerable differences in the national systems relating to the question of whether the creditor must post a security to guarantee the debtor’s claim for

⁵⁹⁵ This is the case in Belgium, France (see Articles 515 and 526 NCPC), Greece, Luxembourg and Spain.

⁵⁹⁶ This is the case in Germany, whereas the legal framework of provisional enforcement seems over-complicated, see Wiczorek/Hess, Commentary, *Preliminary Remarks to sec. 708-720a ZPO*, nos 5.

⁵⁹⁷ See the answers to question 1.7 in the National Reports on Provisional Enforcement.

⁵⁹⁸ Cf. Spanish Report on Provisional Enforcement, 1.5.

⁵⁹⁹ Portuguese Report on Provisional Enforcement, 1.7.

⁶⁰⁰ See the answers to question 6 in the National Reports on Provisional Enforcement. With the exception of Italy and Greece, all Member States hold the creditor strictly liable.

(eventual) compensation. In Austria, Belgium, Denmark, France, Germany, Greece, Luxembourg and Portugal the creditor must post such a security before starting enforcement proceedings. The amount of the security is fixed by the court in its discretion⁶⁰¹. Nevertheless, in Finland, Ireland, the Netherlands, Spain, Sweden and England there is no obligation on the creditor to provide security. In Italy, the creditor must only post a security in some special cases⁶⁰².

cc) Stays of provisional enforcement. Finally, most of the national systems provide for a stay of provisional enforcement when an appeal has been lodged and there is a good prospect of success. In Denmark, Germany, Greece, Ireland, Italy, the Netherlands, Luxembourg and Sweden, the appellate court will order the stay of enforcement when there are sufficient prospects of success. However, the stay might depend on the debtor lodging a security⁶⁰³. Other Member States generally allow the debtor to avoid provisional enforcement by posting a security⁶⁰⁴, while in Italy and Spain the debtor must show the risk of irreparable damage⁶⁰⁵. The same system applies in those jurisdictions where the second appeal does not entail a suspensive effect. However, in these Member States, the Supreme Court may order the stay of provisional enforcement⁶⁰⁶.

2. The cross-border context: The impact of Art. 47 Brussels' Regulation

a) The regulatory framework of Regulation 44/01

Provisionally enforceable judgments are *titre exécutoires* and, therefore, recognized under the third chapter of the Brussels' Regulation (Art. 38 et. seq.). As a consequence, the Regulation also addresses the situation where a provisionally enforceable judgment is appealed in the Member State of origin. Under Article 46, the competent court in the Member State addressed may stay the exequatur proceedings (on application of the debtor) or order security from the creditor (Art. 46

⁶⁰¹ This is the case in Austria, Belgium, Denmark, France, Greece, Luxembourg, Portugal; while in Germany the discretion of the court is strictly limited.

⁶⁰² Italian Report on Provisional Enforcement, 4.1.

⁶⁰³ This is the case in England, Ireland and Germany.

⁶⁰⁴ Austria, Belgium, Finland, France and Portugal and in some circumstances in Germany.

⁶⁰⁵ Spanish and Italian Reports on Provisional Enforcement, 5.2.

⁶⁰⁶ Example: Italy, Sweden, Greece, and to some extent France and Belgium, *Kerameus* IECL 10-38 with further references, answers to the National Reports, 5.2.

(3) Reg. 44/01) when enforcement proceedings were instituted without security⁶⁰⁷. The Brussels' Regulation refers, as far as enforcement is concerned, largely to the national laws. Accordingly, an Austrian judgment which is provisionally enforceable will be fully enforced in Germany (even if Austrian law only allows protective measures, cf. sec. 370 ss. EO), whereas a completely enforceable German judgment which has not yet become *res judicata*⁶⁰⁸, is only secured in Austria (sec. 370 et. seq. EO)⁶⁰⁹.

At present, enforcement of foreign judgments in the European Judicial Area requires their prior recognition⁶¹⁰. Therefore, Articles 38-56 Reg. 44/01 lay down rules for exequatur proceedings and provide for an autonomous and genuine appeal system (Art. 43-45 Reg.). In this context, the Regulation also contains a genuine system of provisional enforcement. According to Articles 47 (2) and (3), a creditor may seek all protective measures which are provided by the enforcement law of the Member State addressed. These measures apply until the appellate court decides on the granting of exequatur. After the decision of the appellate court, full enforcement of the foreign judgment is available – but the court deciding on the second appeal (cf. art. 44) may order a stay of enforcement.⁶¹¹ The reference of Art. 47 (2) to the national laws is not unlimited. As the ECJ ruled in *Cappeloni/Pelkmann*, provisional measures must be granted without any additional requirements that are normally provided for by the national systems⁶¹². Consequently, article 47 (2) Reg. 44/01 contains a borderline for provisional relief under the law of the Member States.

As a consequence, in most of the national systems the rules on provisional and protective measures (and not provisional enforceability) apply⁶¹³. This practice is

⁶⁰⁷ According to the French Report, Article 46 (3) Regulation is very seldom applied, French Report on Provisional Enforceability, 7.5.

⁶⁰⁸ In Germany, this judgment is fully enforceable, sec. 704 (1) ZPO.

⁶⁰⁹ Czernich/Tiefenthaler/Kodek, *Kurzkommentar Europäisches Gerichtsstands- und Vollstreckungsrecht* (2nd ed 2003), article 47 Reg. 44/01, n° 11 et seq. (according to a predominant opinion, the creditor may even apply for a complete execution (Exekution zur Befriedigung). However, any transfer of the claim or any payment to the creditor are excluded, unless the foreign judgment becomes *res judicata*. Austrian Report on Provisional Enforceability, 7.1.1.

⁶¹⁰ The situation will change when the European Enforcement Order for Uncontested Claims will be adopted.

⁶¹¹ German Supreme Civil Court, IPRax 1985, 157.

⁶¹² ECJ, Case C-119/84 [1985] ECR 3147, Kennett, *Enforcement*, 95-97; Schlosser, RIW 2002, 809, 813.

⁶¹³ See the answers to question 7.2 in the National Reports on Provisional Enforcement.

explained by the fact that Art. 47 (2) and (3) Reg. 44/01 contain an autonomous concept of “provisional enforceability” in the context of exequatur proceedings. It is mainly aimed at securing the creditor’s position in a (future) execution. According to the clear wording of article 47 (3), realisation of the assets seized is excluded until the declaration of enforceability can be appealed⁶¹⁴. If the creditor initiates garnishment proceedings, only the first step of the procedure (the blocking of the account) is permitted⁶¹⁵. However, it does not seem to be the case that the (limited) reference in Art. 47 (2) to the national systems has proved excessively complicated in practice⁶¹⁶.

b) Practical impacts of Art. 47 (1) Brussels’ Regulation

Art. 47 (1) Reg 44/01 extends provisional enforceability of foreign judgments to the time period before their recognition in a Member State addressed. According to this provision, the creditor may request provisional measures in the Member State addressed before a foreign judgment has been recognized according to Art. 41 Reg 44/01. This provision, which was originally proposed by the Commission in its Communication of November 27th 1997,⁶¹⁷ is modelled on Belgian law⁶¹⁸. According to Article 1445 *Code Judiciaire*, a creditor may, on the basis of a foreign *titre exécutoire*, approach a plaintiff directly and seek provisional measures (without any intervention of the court)⁶¹⁹. Therefore, the foreign judgment is similar to a *titre conservatoire* without any exequatur procedure⁶²⁰. Art. 47 (1) Brussels’ Regulation transfers the Belgian model to the European level. The creditor can therefore seek all provisional and protective measures available in the Member State addressed.

⁶¹⁴ However, according to the autonomous concept of article 47 Reg, a second appeal (art. 44) does not prevent a full enforcement of the judgment which was declared enforceable on appeal, Hub, NJW 2001, 3147, with further references.

⁶¹⁵ See supra at .

⁶¹⁶ A different opinion is expressed in Kennett, *Enforcement*, p. 98. It should be noted, however, that the intervention of a court in enforcement proceedings does not always entail a formal investigation of (additional) prerequisites of enforcement. In several Member States courts are acting in garnishment proceedings as (simple) enforcement organs (comparable to plaintiffs), see supra B at fn . Consequently, these courts are directly addressed by the (foreign) creditors and must apply the criteria of *Cappeloni/Pelkmann*.

⁶¹⁷ COM (97) 609 final, n° 28, OJ C 33/3 of January 31st, 1998.

⁶¹⁸ Similar provisions are found in Luxembourg (see Luxembourg Report on Provisional Enforcement 7.1.3); the Netherlands, (National Report 7.1.3) and in France, (Art. 68 law of July 9th 1991, French Report on Provisional Enforceability, 7.1).

⁶¹⁹ Belgian Report, Provisional Enforcement, 7.2.

⁶²⁰ Leroy, *Les mesures conservatoires en droit belge*, in: Verbeke/Caupain (ed), *La transparence patrimoniale* (2001), p. 449, 528 et seq.

The existence of the claim is established by the foreign enforceable judgment. However, whether additional pre-conditions which apply to provisional measures must be met (such as urgency of the creditor's need⁶²¹ or the risk of dissipation of assets) depends on the law of the Member State addressed⁶²².

Art. 47 (1) can be regarded as an application of the community principle of mutual recognition of provisional measures. The foreign judgment produces – *per se* – judicial effects in the other Member States without any prior verification in exequatur proceedings⁶²³. Nevertheless, the effects of mutual recognition are strictly limited to the measures available in the Member States addressed⁶²⁴. As a consequence, a foreign judgment may be more effective abroad than it would be in the Member State where it was given. There are Member States where enforcement proceedings can only be initiated after a period of two weeks (commencing with the handing down of the judgment)⁶²⁵. However, in the European context, the same judgment will be enforced abroad before this period has elapsed⁶²⁶.

To date, little practice from the Member States relating to Art. 47 (1) has been reported. The opinions of the national reporters about the improvements of the new provisions are divided. Six reporters consider the provision improved the position of the creditor, by allowing faster and simpler protective measures⁶²⁷ while seven reporters do not see any amelioration⁶²⁸. According to the Spanish report, article 47 (1) “makes no sense” because it does not correspond to the Spanish system of

⁶²¹ This requirement is applied in Belgium, Belgian Report 7.2.; in Finland, Finish Report 7.1.1.; Greece, Greek Report 7b; Italy, Italian Report 7.2.; Portugal, Portuguese Report 7.2.1.

⁶²² Kennett, *Enforcement*, p. 141; there are considerable differences in the Member States relating to the pre-conditions to provisional measures, see the answers in the national reports to questions 7.1 and 7.2.

⁶²³ Contrary view is expressed in Thomas/Putzo, *Commentary on the ZPO* (25th ed. 2003), Art. 47 Reg. 44/01, n° 2: (asserting that the enforcement organ must investigate whether the non-recognition of the judgment is required according to article 34 Reg. 44/01); the same misunderstanding of the legislative intention is found in Rauscher/Mankowski *Commentary on European Procedural Law* (2003), Art. 47 Reg. 44/01, n°7.

⁶²⁴ The German legal literature describes this effect as *Tatbestandswirkung* or *Substitution* (assimilation of the foreign element with a corresponding element of the procedural provision in the Member State addressed).

⁶²⁵ For a comparative survey see Schlosser, *Der Überraschungseffekt der Zwangsvollstreckung – national und international*, [2002] 48 RIW, 809, 813.

⁶²⁶ Schlosser, RIW 2002, 809-811.

⁶²⁷ Belgium, France, Germany, Greece, Italy, Portugal.

⁶²⁸ Austria, Finland, Luxemburg, Netherlands, Scotland, Sweden and Spain

provisional and protective measures⁶²⁹. However, recent German case law shows that the practical improvements of the provision may be quite considerable. In March 2003, the Local Court (*Amtsgericht*) Bonn allowed the seizure of a claim with a value of € 33 million based on the presentation of an Italian judgment⁶³⁰. When the third party debtor opposed the garnishment, the District Court Bonn confirmed the seizure of the claim, stating that according to the clear wording of Art. 47 Brussels' Regulation no judicial review of the foreign judgment was required⁶³¹. As the judgment had been meanwhile recognised the court based its judgment on article 47 (2) Reg. 44/01. Though, this example shows how a foreign creditor can freeze considerable sums of money before obtaining the exequatur of the foreign judgment.

In addition, German law provides an effective way to freeze the assets of the debtor immediately. Under sec. 845 ZPO, the creditor may serve a so-called "announcement of a seizure" on the third debtor. This instrument (which normally consists of a simple letter of the creditor) contains the statement that the creditor will seize the debtor's claim against the third debtor in the near future. If the creditor garnishes the debtor's claim within a period of one month, the creditor gets a lien (and priority) on the assets seized. During this period, the creditor may request the recognition of the judgment under article 41 Reg. 44/01. The practical advantage of this procedure is the fact that the creditor may institute enforcement proceedings without any recourse to a court or other enforcement organ⁶³².

3. *Proposals for further activities by the European Union*

a) *The context of Art. 47 (2) and (3) Reg.44/01*

At present, article 47 is aimed at securing the future enforcement of a foreign judgment before initiating exequatur proceedings. The concept of the Regulation (which resembles to the model of provisional enforcement in Austria, Finland and

⁶²⁹ Spanish report, Provisional Enforcement, 7.2.

⁶³⁰ The Italian creditor obtained a judgment against a Cuban debtor, the (alleged) third debtor was Deutsche Telekom AG in Bonn, jurisdiction was derived from secs. 828 (2), 23 ZPO (location of the assets to be seized). The court based its decision on art. 47 (2) Reg. 44/01, after the recognition of the Italian judgment. However, the same consideration applies to the "pre-exequatur" situation (i.e. art. 47 (1) Reg. 44/01).

⁶³¹ District court Bonn, Judgment of 4th March 2003, RIW 2003, 388 (note Kumscheid).

⁶³² He may, however, request that the plaintiff serve the document on the third debtor, see German Report Garnishment, 1.1., Hess/Hub, IPRax 2003, 93, 98.

Sweden) is more restricted than the concept of provisional enforceability in most of the Member States. Twelve of the fifteen Member States also allow full enforcement (which includes the realisation of the assets) of provisionally enforceable judgments⁶³³. The present situation might appear unbalanced to some extent. Normally, provisionally enforceable judgments are considered more “reliable” than default judgments because they have been rendered based on a hearing in which the parties presented their arguments. However, default judgments will be more easily enforced under the new Instrument on the European Order for Uncontested Claims, which does not require exequatur⁶³⁴. Consequently, non-default judgments which are still subject to exequatur should at least be fully enforceable after their recognition. Seen from this perspective, it seems advisable to enlarge the provisional enforceability provided for in Art. 47 to full enforcement.

The present situation is explained by the fact that under article 41 Reg. 44/01, the decision on exequatur is given in an ex-parte proceeding on the application of the creditor without any review of the grounds for non-recognition in article 34 of the Regulation. As a consequence, full enforcement of the foreign judgment is only permitted after the period for appealing the exequatur decision expires or after the appellate court has made a decision⁶³⁵. However, from the perspective of mutual trust in the judicial systems of the Member States and of mutual recognition of judgments within the European judicial area, this argument seems unconvincing. Within the system of the Brussels’ Regulation, the grounds for refusing recognition in art. 34 of the Regulation are exceptions, and should not prevent the creditor from obtaining full relief in enforcement proceedings. Accordingly, it seems advisable that, at least, provisionally enforceable judgments for monetary claims should be fully enforceable in all Member States during the exequatur proceedings, with the condition that the creditor lodges a security⁶³⁶.

⁶³³ See infra at [fn XX](#).

⁶³⁴ COM (2003) 341 final, cf. Coester-Waltjen, *Einige Überlegungen zum künftigen europäischen Vollstreckungstitel*, *Festschrift Beys* (2003), p. 183 et seq; Jeuland, *Le titre exécutoire européen, un jalon perfectible*, *Gaz. Pal.* 2003n° 320, 10, 13; Stadler, *Das Europäische Zivilprozessrecht – Wie viel Beschleunigung verträgt Europa? – Kritisches zur Verordnung über den Europäischen Vollstreckungstitel und ihre Grundidee*, *IPRax* 2004, 2 et seq.

⁶³⁵ German Supreme Civil Court, *IPRax* 1985, 157.

⁶³⁶ This security will usually comprehensively cover any damage incurred by the debtor; this proposal corresponds to the practice of German courts which allow (full) enforcement measures during appellate proceeding if the creditor lodges security, cf. Schlosser, *Commentary* on Art. 46 of the Brussels’ Regulation (2nd ed. 2002), n°4.

In addition, there is an urgent need to enlarge the provisional enforceability of judgments in relation to maintenance claims. In this context, the creditor must be able to fully enforce the provisionally enforceable title, because of the nature of the claim⁶³⁷. Full enforcement of maintenance claims is provided in article 4 (2) of the Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance⁶³⁸. A similar provision should be added (as a fourth paragraph) to article 47 Reg. 44/01.

Finally, there remain practical difficulties. As demonstrated above, provisional enforceability operates in some Member States by law, whereas in other Member States it is ordered by the courts and forms part of the wording of the judgment⁶³⁹. In those jurisdictions, where the provisional enforceability is derived from legal provisions, the wording of the judgment does not contain any information about its enforceability. When such an instrument is enforced in another Member State, the competent organs of that Member States must enquire as to whether the instrument is provisionally enforceable or not. Information on this issue (especially in a mutually-understood language) is not always readily available⁶⁴⁰. It would be useful to extend the claim form provided in Annex V to the Brussels' Regulation to include information about whether the judgment is provisionally enforceable.

b) Improvements in the context of Art. 47 (1) Reg. 44/01

At present, it seems too early for an evaluation of the new provision. According to the national reports it is still unclear whether the position of foreign creditors in the Member States have been improved. Though, there are some practical problems related to the application of Art. 47 (1) Reg. 44/01⁶⁴¹. These problems relate to the issue of which national remedies apply in the context of Art. 47 (1) and what formal requirements must be met, before the competent organs are entitled to order

⁶³⁷ Schlosser, *Commentary on Art. 47 of the Brussels' Regulation* (2nd edition 2002), n° 1.

⁶³⁸ This provision reads as follows: „Provisionally enforceable decisions and provisional measures shall, although subject to ordinary forms of review, be recognised or enforced in the State addressed if similar decisions may be rendered and enforced in that State“.

⁶³⁹ See *infra* at footnote 582.

⁶⁴⁰ Accordingly, it would be advisable to include this information to the European Network for Civil and Commercial Matters.

⁶⁴¹ Hess/Hub, *IPRax* 2003, 93, 96 et seq.

protective measures⁶⁴². Therefore, an additional claim form which indicates the type and the enforceability of a foreign judgment should be annexed to the Brussels' Regulation⁶⁴³. It should contain information as to whether or not the foreign instrument is (provisionally) enforceable and whether enforcement depends on security or on a particular copy of the judgment being presented (as it is the case with the "*vollstreckbare Ausfertigung*" in Germany)⁶⁴⁴. In addition, the claim form in Annex V of the Brussels' Regulation should provide additional information for the enforcement organs of other Member States. The form should also summarise whether the foreign judgment includes additional claims which are not expressed in the wording of the judgment (such as interests, costs) and whether some additional time periods must be respected before enforcement proceedings can be initiated. As a result, a (costly and time-consuming) translation of the foreign judgment⁶⁴⁵ would no longer be needed⁶⁴⁶.

c) Provisional Enforceability and European cross-border Garnishment

For the efficient protection of creditors, the proposed European instrument on cross-border garnishment should be applied to provisionally enforceable judgments. This would correspond to the guiding principle of provisional enforceability, which ensures that the creditor's success (in the first instance court) is not frustrated. At present, article 47 of Reg. 44/01 guarantees the creditor provisional protection during appellate proceedings⁶⁴⁷. However, including provisionally enforceable judgments in the proposed instrument would improve the legal position of creditors considerably. The reason for this is that article 47 of Reg. 44/01 refers to the relevant national legal systems⁶⁴⁸. The proposed instrument, by contrast, will harmonize the pre-conditions for applications for the seizure of bank accounts in another Member State and

⁶⁴² The interpretation of article 47 Reg. 44/01 is largely controversial in the German literature, see Schlosser, RIW 2002, 809, 811; different opinion Rauscher/Mankowski; *Commentary* on article 47 Reg. 44/01, n°7.

⁶⁴³ Hess/Hub, IPRax 2003, 93, 98.

⁶⁴⁴ Cf. sec. 724 German Code of Civil Procedure.

⁶⁴⁵ Under article 55 (2) Reg. 44/01 a translation of documents is only necessary when the court orders that a translation be presented.

⁶⁴⁶ Apart from these – rather technical – improvements of Art. 47, it seems advisable to observe first the practice of the national courts and enforcement organs in relation to this new provision.

⁶⁴⁷ See above at footnote 617.

⁶⁴⁸ In some Member States, the application of article 47 (1) Reg. is largely disputed, Austrian Report 7.2.; German Report 7.2.

require third-party debtors to disclose the financial and legal particulars of an affected account on the basis of a standard form. This will improve the position of creditors who will not have to investigate the legal system of the relevant Member State to determine what provisional and protective remedies are available and appropriate under the particular legal system. In addition, linguistic barriers will be surmounted.

Notwithstanding this, legal protection of the debtor requires that the creditor will be obliged to provide security before commencing an action for cross-border garnishment. This security provides a guarantee for the debtor's claim for damages (reimbursement) to be realised in the event that the judgment is reversed on appeal⁶⁴⁹. The creditor's obligation to pay compensation for damages incurred by the debtor, as a result of the action, should also be expressly included in the proposed instrument⁶⁵⁰.

III. Provisional and Protective Measures

1. *Different types of provisional relief*

All Member States provide for provisional and protective measures to secure creditor's claims in cases of urgency⁶⁵¹. There is a consensus in the Member States that provisional measures are aimed at protecting the future enforcement of a judgment. These measures are seen as instruments to prevent the evasion of legal responsibilities of a debtor and to avoid a situation where the debtor would be unable to pay the judgment⁶⁵². Provisional remedies, characterized by speed and efficiency, are normally ordered in instances of extreme urgency, to maintain the status quo or to safeguard certain rights, so that the parties may proceed to argue their claims on the merits⁶⁵³. The fundamental structure of provisional remedies is similar in all

⁶⁴⁹ The provision of security corresponds to the legal situation in most of the Member States, *supra* at fn. 575.

⁶⁵⁰ This proposal corresponds to the legal situation in most of the Member States, *supra* fn. 583.

⁶⁵¹ There is a trend in some Member States to interpret the urgency factor loosely, see *infra* at footnote 734.

⁶⁵² On the political underpinnings see Kennett, *Enforcement*, p. 151, distinguishing different approaches in the Common Law and Continental Law jurisdictions. These differences are, however, rather limited: German law, for example, adopts the same rationales as the English system.

⁶⁵³ According to the European Court of Justice, the purpose of provisional measures is to safeguard rights which the court dealing with the merits of a case is, in any event, requested to recognize while

jurisdictions. A creditor seeking provisional relief must establish the existence of the claim (*fumus boni juris*) and prove that an infringement of that claim is imminent (*pericula in mora*)⁶⁵⁴. If the court is satisfied that these conditions are met, it will (often at its discretion) grant an interim order to preserve the status quo of the parties (especially freezing (specific) assets of the defendant), provide for the interim satisfaction of the claim, or order any other anticipatory enforcement of the judgment⁶⁵⁵. Provisional measures are limited in a twofold way: they do not become *res judicata* and their legal effects are strictly limited up to the effects of the relief sought in the main proceedings.

While the provisional remedies available in each of the Member States are mostly similar, significant differences exist between the national systems⁶⁵⁶. One reason for the present semi-patchwork approach, is the position occupied by provisional measures between judicial proceedings and enforcement⁶⁵⁷. The procedure for obtaining provisional relief can be characterized as akin to summary proceedings. The execution of provisional measures forms part of enforcement proceedings (even if the execution of the measure is effected and supervised by the decision-making court⁶⁵⁸).

During the last 25 years, national courts⁶⁵⁹ (and to some degree national legislators⁶⁶⁰) have developed various types of provisional measures and thereby

preserving the status quo both in fact and in law, see ECJ, 26.3.1992, case c-261/90, *Reichert II*, ECJ Reports 1992 I 2149.

⁶⁵⁴ On these similarities cf. Commission's Communication of 27th November 1998, COM (1997) 609 final, n° 23-24.

⁶⁵⁵ See article 10.1.2. of the Draft Recommendation on the Approximation of Judiciary Laws in Europe presented by M. Storme and G. Tarzia (1984).

⁶⁵⁶ These differences are stressed by several authors, see Schlosser, 284 RdC 157-182 [2001]; Kessedjian, *Note on Provisional and Protective Measures in Private International Law and Comparative Law*, Hague Conference on Private International Law, Enforcement of Judgments, Prel. Doc. No. 10, October 1998, at www.hcch.net; Stürmer, *Einstweiliger Rechtsschutz: Generalbericht*, in Storme (ed.) *Procedural Laws in Europe* (2003), 143, 161 et seq.; see also Commission Communication of 27th November 1997, COM (1997) 609 final, n°24.

⁶⁵⁷ The problem is discussed (in relation to French law) by Cuniberti, *Les mesures provisoires portant sur les biens situés à l'étranger* (2000), nos. 42-49.

⁶⁵⁸ This is the case in Austria, France and Germany, as well as in England and Ireland.

⁶⁵⁹ The most prominent evolution took place in England, see infra at fn. 669 where provisional relief is available when the High Court in London, under *Lord Denning M.R.*, granted a Mareva Injunction for the first time, a decision in the case of *Nippon Yusen Kaisha v. Kara Georgis* [1975] 1 WLR 1093. A similar decision was afterwards made in another case, the case of *Mareva Companiera S.A. v. International Bulk Carriers Ltd.* [1975] 2 Lloyd's Rep. 509, on the evolution of the English law see Cuniberti, *Les mesures provisoires* (2000) nos 67 et seq.

improved the position of creditors. At the same time, the impact of cross-border provisional relief (which also includes cooperation between the courts of different Member States) has been enhanced considerably.⁶⁶¹ Within the European Union, cooperation between different courts, within the context of cross-border actions is supported by articles 31 and 32 of the Brussels' Regulation. Provisional and protective remedies have been the subject of considerable review and examination in legal literature.⁶⁶² The present study adopts a classification of different types of provisional remedies based largely on their legal effects. According to this classification, the following types of provisional remedies can be distinguished:

- (i) those aimed at reserving a future enforcement (preliminary attachments or freezing orders);
- (ii) provisional measures designed to regulate the status quo of the parties; and
- (iii) measures that protect future specific performance (especially interim payments).⁶⁶³

Most of the national reporters agree that this classification, which is not used consistently in all Member States, nevertheless provides a workable basis for the purpose of comparative research.⁶⁶⁴

a) Preliminary attachments and freezing orders

All Member States provide for provisional remedies aimed at securing the future enforcement of monetary claims.⁶⁶⁵ Two types of provisional measures exist. In

⁶⁶⁰ Especially the French legislation of 1991 introduced the „juge de référé” with a large empowerment for provisional and protective measures, see *infra* at fn.

⁶⁶¹ This improvement of cross-border provisional relief is largely influenced by the European instruments which provide for the recognition of provisional remedies, cf. Schlosser, RdC 284 (2000), 190 et seq.

⁶⁶² Recent literature: Cuniberti, *Les mesures conservatoires* (Paris 2000); Igenhoven, *Grenzüberschreitender Rechtsschutz durch englische Gerichte* (2001),

⁶⁶³ Baur, *Studien zum einstweiligen Rechtsschutz* (1967), p. 23-34; Stürner, *Generalbericht*, in Storme (ed.), *Procedural laws in Europe* (2003), p. 161 ff. This classification was also used by Storme/Tarzia, *Rapprochement*, p. 105 ff; article 10.1.2., p. 203, it is also found in the Commission Communication of 27th November 1997, COM (1997) 609 final, n°23.

⁶⁶⁴ See the answers of the national reports to question 1.2.5 of the questionnaire on provisional and protective measures.

⁶⁶⁵ See the answers to the questions 1.2.1 – 1.2.3 of the questionnaire on provisional measures. The classification is not used in Italy, where provisional and anticipatory measures are distinguished, Italian Report on Provisional Measures, 1.1.

Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, Luxembourg, Portugal, Spain, Scotland and Sweden, creditors can apply for an order attaching to the defendant's assets. Nevertheless, differences concerning the operation of the seizure do exist, such that it operates in a general way⁶⁶⁶ in certain of these Member States, while in others it will affect specific assets.⁶⁶⁷ Either the court orders a specific seizure (e.g. of a bank account) or grants general permission to the creditor to seize whatever assets of the defendant may be detected. As a rule, the seizure operates *in rem*. Accordingly, the account or targeted asset is directly frozen and any operation of the account/asset is deemed to be invalid against the creditor.⁶⁶⁸

However, in England and Ireland, provisional and protective measures do not operate *in rem* but *in personam*.⁶⁶⁹ In these jurisdictions, the defendant may be ordered to do or to refrain from doing something, e.g. from dealing with or disposing of money deposited in a bank. Yet, the operation of the account remains legally possible.⁶⁷⁰ If the defendant (or any third party) does not comply with the court order, they will be indirectly sanctioned by the court which may impose penalties for contempt. The Common Law approach, viewed from a comparative perspective, is not unique. Continental jurisdictions also combine *in rem* and *in personam* remedies: In France, provisional measures under articles 808 and 812 n.c.p.c. operate *in rem*, but are often combined with an *astreinte* (penalty)⁶⁷¹. Scottish law provides for provisional remedies which operate *in rem* (arrestment) and for others operating *in personam* (interim interdict). Both are used for the blocking off assets; *in personam* relief entails extraterritorial effects⁶⁷².

⁶⁶⁶ In France, by operation of law (art. 47 law of July 1991), the seizure has a blocking effect with respect to all accounts kept by the bank (in any of its branches) for the debtor.

⁶⁶⁷ Cf. the answers in the National Reports to question 2.5.3. Some Member States (ex.: Belgium, Luxembourg) empower the creditor to seize the accounts of the debtor with the help of the plaintiff, while other entrust the enforcement courts (ex. Scotland, where the competence of the court clerk has been challenged due to article 6 ECHR. Since 2002, only a judge can grant the arrestment, Scottish Report on Provisional Measures, 2.5.2.

⁶⁶⁸ Example: Secs. 135, 136 German Civil Code, German Report on Provisional Measures, 2.5.3. The same situation exists in Scotland, Scottish Report on Provisional Measures, 2.5.3. and 2.5.3.2.

⁶⁶⁹ English Report on Provisional and Protective Measures, 2.5, Briggs, [2003] LMCLQ 418, 425.

⁶⁷⁰ The addressee of the injunction may therefore continue to contract with third parties and the validity of these transactions depends on the bad faith of the third party.

⁶⁷¹ French Report on Provisional Measures, 5.3.3.3.

⁶⁷² Maher/Rodger, *Provisional and Protective Remedies, The British Experience of the Brussels' Convention*, [1999] 48 ICLQ 302, 330 et seq; Scottish Report on Provisional Measures, 2.5.3.2.

b) Provisional protection of non-pecuniary claims

All Member States provide provisional remedies designed to regulate the status quo of the parties or to safeguard future performance⁶⁷³. In practice, injunctions enjoining a person from doing a certain act are of utmost importance. As a rule, they include an “astreinte” (penalty) which is recognised in the other Member States under article 49 of the Reg. 44/01⁶⁷⁴. These injunctions are closely related to the substantive rights that they protect. Accordingly, considerable differences exist between the Member States. In many jurisdictions, the courts have significant discretion concerning the means used to protect affected parties. In some Member States, the ordinary courts are also entrusted with the enforcement of their orders, while in other Member States provisional protection may also be obtained from enforcement organs.⁶⁷⁵ Due to the significant differences between the national systems, it does not seem advisable to propose any Community action for harmonisation of these injunctions.⁶⁷⁶

c) Interim payments

The third type of provisional measures are interim payments. Interim payments are similar to provisional remedies in non-pecuniary matters. They are designed to regulate the status quo of the parties or to order interim performance. In many Member States, courts are empowered, on the presentation of sufficient evidence refuting the creditor’s alleged claim, to order interim payments from the debtor. This kind of provisional protection is of particular importance in France and the Benelux Countries, where *juges de référé* are specifically empowered to order these kinds of

⁶⁷³ Cf. the answers to questions 1.2.2. and 3 of the Questionnaire on Provisional and Protective Measures.

⁶⁷⁴ As an alternative to article 49, the courts of another Member State may order a penalty (in favor of a foreign judgment which is recognized under article 32 of the Reg. 44/01) if the debtor does not comply with the foreign judgment, German Supreme Civil Court, Wertpapiermitteilungen 2000, 635, 637.

⁶⁷⁵ As the present study mainly deals with the enforcement of monetary claims, the general report refers for further details to the 3rd synopsis on provisional measures and to the answers of the national reporters.

⁶⁷⁶ Stürner, Einstweiliger Rechtsschutz: Generalbericht, in: Storme (ed.), Procedural Laws in Europe (2003), 143, 175 et seq.

payments.⁶⁷⁷ As a result, these Member States adopted a two-tier system of provisional measures: on the one hand provisional attachments (*saisie conservatoire*), on the other hand provisional injunctions (*référé*)⁶⁷⁸. Interim payments are available in Austria,⁶⁷⁹ Belgium,⁶⁸⁰ France,⁶⁸¹ Greece,⁶⁸² Luxembourg,⁶⁸³ the Netherlands,⁶⁸⁴ Sweden⁶⁸⁵ and England.⁶⁸⁶ However, considerable variations exist between the national systems, especially with regard to the conditions and scope of application. While in some Member States interim payments are regarded as a general remedy that requires only proof of the (mere) existence of the secured claim,⁶⁸⁷ other Member States require proof of a particular need by the creditor (urgency).⁶⁸⁸ In France, interim payments are based on both the existence of the claim or of the creditor's specific need for protection.⁶⁸⁹ However, creditors in Denmark, Finland, Germany,⁶⁹⁰ Ireland⁶⁹¹, Italy⁶⁹², Scotland⁶⁹³ and

⁶⁷⁷ See generally van Compernelle, *Introduction générale*, in: van Compernelle/Tarzia, *Les mesures provisoires en droit belge, français et italien – Étude de droit comparé* (1998), p. 5 ss.

⁶⁷⁸ It should be noted that *référé* proceedings mainly relate to non-pecuniary claims, enjoining persons from doing an act.

⁶⁷⁹ Secs 381, n° 2, 382 *Exekutionsordnung*, Austrian Report on Provisional Measures, 1.2.3.

⁶⁸⁰ *Référé*–provision, However, none of the provision of the Belgium Code Judiciaire empowers explicitly the president of the instance court to order interim payments. The present situation is largely influenced by French developments see van Compernelle, in: id/Tarzia (ed.), *Les mesures provisoires*, p. 14-15.

⁶⁸¹ Article 809 (2) *ncpc*, French Report on Provisional Measures, 1.2.3.

⁶⁸² Article 728 CCP, Greek Report on Provisional Measures, 4.1.-4.2. This provisional remedy is, however, limited to certain categories of pecuniary claims, especially maintenance claims, tortious liability (especially interim payments for medical expenses,) and workers compensation.

⁶⁸³ *Ordonnance de référé*–provision, article 933 (2) c.p.c. of Greek Report on Provisional Measures 1.2.3.

⁶⁸⁴ Dutch Report on Provisional Measures, 1.2.3. and 4, the proceedings vary in the 19 district courts, much depends on local custom.

⁶⁸⁵ Chapter 15, sec. 4 CJPr (providing for summary proceedings), Swedish Report on Provisional and Protective Measures, Preliminary Remarks, D.

⁶⁸⁶ Order for payment, CPR 25 r. 1(k), English Report on Provisional Measures, 4.1.- 4.9.

⁶⁸⁷ Belgium, France, Luxemburg and the Netherlands.

⁶⁸⁸ Especially Austria, Greece.

⁶⁸⁹ Cf. articles 809 (1) and 809 (2) n.c.p.c., French Report on Provisional Measures, 1.1.

⁶⁹⁰ With the exception of maintenance claims, see sec. s. 935, 940 ZPO, German Report on Provisional Measures, 1.2.3.

⁶⁹¹ In Ireland, no provisional measures for the enforcement of claims for payment exist in Irish law. In actions where the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, the summary summons procedure is used, Irish Report, part. D, 2.1.

⁶⁹² Comparable protection can be obtained by the summary proceedings for uncontested debts, Italian Report on Provisional Measures, 1.2.3.

Spain⁶⁹⁴ generally do not grant this type of interim relief. Nonetheless, alternate accelerated proceedings may be applied to offer similar protection.⁶⁹⁵ In addition, the well performing judicial systems in some of these jurisdictions (where a judgment of a first instance court is obtained in an average of 6 months⁶⁹⁶) do not require any additional provisional protection.

In many Member States, provisional remedies are considered an efficient alternative to costly and time-consuming main proceedings. Therefore, interim payments are largely replacing main proceedings. This is acceptable if the debtor is given a fair chance to contest the claim by way of an oral hearing⁶⁹⁷. However, in the cross-border context the substitution of main proceedings with provisional remedies is much more problematic. If interim payments are considered as provisional measures, they can be based on exorbitant grounds of jurisdiction. The main reason for this is that Article 31 of the Brussels Regulation⁶⁹⁸ does not address the international jurisdiction of provisional measures but simply refers to the procedural laws of the Member States. Consequently, the courts in the Member States assume jurisdiction on the basis of national laws, especially on the exorbitant grounds of jurisdiction (which are excluded in Annex II of the Regulation). As provisional measures are recognised and may be enforced under Chapter III of the Regulation without review of the foreign court's jurisdiction, there is a real danger that the foreign debtor could be sued in an exorbitant forum, thereby effectively denying him or her an efficient legal defence⁶⁹⁹. As a result, the balance of the Brussels' Convention, built upon a comprehensive system of jurisdictional grounds which are not reviewed in the exequatur proceedings, was impaired.

⁶⁹³ Scottish Report on Provisional Measures, 1.2.3.

⁶⁹⁴ Spanish Report on Provisional and Protective Measures, 1.2.3.

⁶⁹⁵ In Germany, a maintenance creditor may apply for a preliminary injunction if the payment of the debt is urgently needed. In Italy, articles 186 bis c.p.c. and 186 quater provide for summary proceedings which replace largely proceedings on the merits, Stürner, in Storme (ed.), *Procedural Law*, p. 173, Italian Report on Provisional Measures, 1.1. (in fine).

⁶⁹⁶ This is the case in Germany and in Belgium, see Stürner in: Storme (ed.), *Procedural Law*, p. 142, 174.

⁶⁹⁷ In France, about 11% of all cases dealt by the tribunaux de grande instance are decided as référé; about 35% of these judgments are not followed by ordinary proceedings, French Report on Provisional and Protective Measures, 5.1. In the Netherlands, in 95% of all kort geding proceedings, no procedure on the merits will follow, Dutch Report on Provisional and Protective Measures, 3.8.

⁶⁹⁸ The text of this article corresponds to former article 24 of the Brussels' Convention.

⁶⁹⁹ Cuniberti, *Les mesures conservatoires* nos. 250 et seq. on the practice in the Member States before *Van Uden*.

Accordingly, the European Court of Justice held in the *van Uden* case that a Dutch kort geding order can only be recognised under Article 24 and 25 Brussels' Convention (Art 31 and 32 Brussels' Regulation) if the provisional character of the measure is secured.⁷⁰⁰ The court found that „a court ordering measures on the basis of article 24 must take into consideration the need to impose conditions or stipulation such as to guarantee their provisional or protective character. Therefore interim payment of a contractual consideration does not constitute a provisional measure within the meaning of article 24 unless, first, re-payment to the defendant of the sum awarded is guaranteed if the plaintiff is unsuccessful as regard the substance of his claim and, secondly, the measures sought relate only to specific assets of the defendant located or to be located within the confines of the territorial jurisdiction of the court to which application is made.”⁷⁰¹

As a consequence of this judgment, many provisional payment claims can no longer be considered to fall within article 24 because the relevant national law does not provide for any guarantee of re-payment to the defendant⁷⁰². In addition, the possibility to get an interim order for payment which may be obtained by a court basing its competence on exorbitant ground of jurisdiction is not longer possible because a real-connecting link between the competent court and the place of enforcement will not exist⁷⁰³. This pre-condition of the ECJ must be read as a limitation of competence of the court ordering ancillary protective measures to the Member State where the ancillary measure is enforced⁷⁰⁴. As a result the Van Uden decision of the European Court clearly stopped the expanding practice of the 1990s to force cross-border interim payments under the Brussels' Convention. Therefore, the working party which prepared the revision of the Brussels' Convention left the text of article 24 (re-numbered as article 31) unchanged⁷⁰⁵.

⁷⁰⁰ Dutch Report 3.3.

⁷⁰¹ ECJ Case C-391/95 *Van Uden* [1998] ECR I-7091, para 48.

⁷⁰² In some Member States, the courts changed their practice: Interim payments are conditioned by a security of the creditor, Dutch Report on Provisional Measures, 6.1.1.3. Recently, the French Court of Appeal in Chambéry refused to grant an order for interim payment for damages, as the application did not meet the criteria of *Van Uden*, French Report, 6.2.3.

⁷⁰³ See *infra* at fn. 769 et seq.

⁷⁰⁴ Gaudemet-Tallon, *Compétence et exécution*, n°312; C. Cass., 3.12.2001, Rev. Critique 2002, 371.

⁷⁰⁵ This decision is largely criticized in the legal literature, see Gaudemet-Tallon, *Compétence et exécution des jugements en Europe* (3rd ed. 2003), n° 312.

A few months later, the German Bundesgerichtshof asked the court in an additional preliminary ruling explicitly, whether kort geding proceedings are covered by article 24 of the Brussels' Convention. The European Court of Justice held⁷⁰⁶ that interim payments as the kort geding are covered by article 24, but only when the conditions elaborated in the *Van Uden* ruling are met. In addition, the court elaborated a general presumption that a preliminary order which is not accompanied by a security of the creditor and was given in a different Member State under article 24 does not meet the territorial connection criteria of the *Van Uden* decision⁷⁰⁷. As a result it must be stated, that since the *Mietz* decision of the European Court, the free movement of provisional measures within the European judicial area is considerably restricted⁷⁰⁸. This restriction is mainly caused by the fact that article 24 Brussels' Convention / 31 of the Reg. 44/01 are still applied to interim payments⁷⁰⁹.

d) "Interim" disclosure of information

In some Member States, provisional measures are used to obtain or preserve evidence. In England, a freezing order is regularly made in combination with an ancillary order for disclosure⁷¹⁰. This requires the defendant, but also third party debtors to disclose the whereabouts of the debtor's assets. The defendant must disclose particulars of their assets by way of a sworn affidavit accompanied by documentary proof⁷¹¹. In addition, English law provides for a so-called Search Order which permits authorised individuals to enter and search the defendant's premises.⁷¹² The preservation of evidence is considered a preliminary measure in

⁷⁰⁶ ECJ Case C-99/96 *Mietz*, [1999] ECR-I 3637.

⁷⁰⁷ ECJ Case C-99/96 *Mietz*, ECR-I 3637, paras 53-55.

⁷⁰⁸ Hess, IPRax 2000, 270, 372 et seq. Recently, in *Comet Group plc v. Unika Computers*, the London High Court (Mc Gonical J.) held that a French interim order ordering (simply) the payment of the amounts due to several invoices to the French plaintiff could not be recognised and enforced in England, because the English defendant had no assets in France (therefore: no real connection existed) and the order did not contain any guarantee for the repayment, [2004] ILPr. 10, 20 (Gonical J.).

⁷⁰⁹ Accordingly, it seems advisable to exempt interim payments from article 31 of the Reg. 44/01, see infra at fn. 801.

⁷¹⁰ Andrews, *Towards a European Protective Order*, in: Storme (ed.) *Procedural Laws in Europe* (2003), 267, 290; Praxis Direction to CPR 25; annexes 122.

⁷¹¹ English Report on Provisional Measures, 1.5.

⁷¹² Formerly called „Anton Piller Order“, 25.1. (1)(a) CPR, cf. English Report on Provisional and Protective Measures, 3.6.2.; Andrews, in: Storme (ed.), *Procedural Laws in Europe*, 267, 301 et seq.

Belgium, Denmark,⁷¹³ France,⁷¹⁴ Greece,⁷¹⁵ Ireland,⁷¹⁶ Italy,⁷¹⁷ Luxemburg⁷¹⁸ and Sweden. To the contrary, in Finland, Germany, the Netherlands, Portugal, Scotland and Spain the preservation of evidence is not considered as a protective measure, but as a distinct procedure⁷¹⁹ or as a part of the evidence gathering process.⁷²⁰ A mid-position is found in Austria where protective measures for the preservation of evidence are only available if the ordinary procedure for the conservation of evidence does not adequately safeguard the interests of the parties.⁷²¹

In a cross-border context, the classification of an order for the disclosure of information as a protective measure entails the application of articles 31 and 32 of Reg. 44/01⁷²². At present, the ECJ is considering the legal nature of these proceedings following a reference⁷²³. As a matter of principle, proceedings for the preservation of evidence should be regarded as provisional measures⁷²⁴. As they are aimed at the preparation of the main proceedings and securing the interests of the parties, the European Court's definition on the nature of protective measures is met⁷²⁵. This result, which corresponds to the legal situation in most of the Member States, also reinforces the legal protection of the parties within the European Judicial Area. However, the effect of an order for the preservation of evidence should be

⁷¹³ Art. 635 ss. Rpl., Danish Report, 1.5.; Belgium Report, 1.5.

⁷¹⁴ Cour de Cassation, 10.3.1992, JDI 1993, 156, French Report, 1.5. In addition, art. 145 n.c.p.c. provides for a specific procedure.

⁷¹⁵ The preservation of evidence is addressed in article 725 (2) CPR, but not often sought in practice, Greek Report, 1.5.

⁷¹⁶ Irish Report, 1.5. The legal situation (regarding the preservation of proofs) corresponds largely to the situation in England.

⁷¹⁷ Art. 669 *quaterdecies*, Italian Report, 1.5.

⁷¹⁸ Art. 933 (1) CPC.

⁷¹⁹ Example: Germany, secs. 485 ss. ZPO ("Beweissicherungsverfahren").

⁷²⁰ Spanish Report on Provisional Measures, 1.4.

⁷²¹ Austrian Report, 1.5.; proposes a similar solution in Germany (application of secs. 938, 940 ZPO) see Schlosser, RdC 284 (2000), 166.

⁷²² A majority of the German literature favours the application of article 31 Reg. 44/01, cf. Nagel/Gottwald, *Internationales Zivilprozessrecht* (5th ed. 2002), 821 with further references; the contrary opinion is found in the Dutch legal literature, National Report Netherlands, 1.5.

⁷²³ Case C-104/03, *St. Paul Dairy Industries/Unibel Exser*, OJ C 130/30 (26 april 2003).

⁷²⁴ Different opinion: Stürner, in Storme (ed.), *Procedural Law*, p. 142, 183 et seq.

⁷²⁵ ECJ, Case C-261/90, *Reichert and Kockler v. Dresdner Bank AG* [1990] ECR I- 2149, at para. 34.

limited to protection of means of evidence⁷²⁶. Any failure of the defendant to cooperate in the preservation proceedings should not be sanctioned by contempt fines, but by court (deciding on the merits) in the context of the free evaluation of the evidence. However, the Evidence Regulation covers, according to its article 1 (2) also the preservation of evidence. After its entry into force on Jan. 1st, 2004, the issue will be mainly dealt by the new instrument⁷²⁷. Nevertheless, it seems advisable to adopt the legal position of Austria and to allow provisional measures for the preservation of proof, if the protection by Reg. 1248/01 should not be sufficient enough for the protection of the applicant.

2. *The procedure for obtaining provisional or protective measures*⁷²⁸

In many Member States, provisional measures are granted in summary proceedings on applications of the creditor and without any hearing of the defendant⁷²⁹, so that the “surprise effect” of the protective order is maintained and the application can be disposed of efficiently⁷³⁰. The debtor is protected by security which the creditor must provide to the court to reimburse any damages incurred by the debtor as a result of the provisional attachment, if the order is reversed in the main proceedings or on appeal. In addition, the debtor may challenge the provisional measure in the main proceedings or in a hearing concerning the basis for the measure, before the court which granted the provisional measure *ex parte*. However, many national jurisdictions also provide the possibility of an adversarial hearing. According to the case law of the European Court of Justice, provisional measures given *ex parte* are not recognized under articles 32 et seq. of the Regulation EC 44/01⁷³¹.

a) *Pre-conditions for obtaining provisional measures*

⁷²⁶ Ex.: Inspection of a building or a chattel by a requested judge or the plaintiff, ex. *Cook Industries v. Galbicher* [1997] Ch. 439.

⁷²⁷ Stürmer, in Storme (ed.), *Procedural Laws in Europe*, p. 142, 183 et seq.

⁷²⁸ The following part of the study only addresses the procedure for obtaining a preliminary attachment order or a freezing injunction. Additional information on the preconditions of other provisional remedies is found in the answers of the national reports to questions 3 and 4 of the questionnaire on provisional measures.

⁷²⁹ There are some variations in the practice of the Member States: In Greece, provisional measures are regularly granted on the basis of a contradictory procedure, Greek Report on Provisional and Protective Measures, 6.2.4.

⁷³⁰ On the „surprise effect“ see Schlosser, RIW 2002, 809, 812 ss.

⁷³¹ ECJ, Case 125/79, *Denilauler/Couchet Frères*, [1980] ECR 1553.

In all Member States, the creditor must, when applying for provisional and protective measures, prove the existence of a claim on the merits and a danger that the enforcement of the claim may be frustrated. Nonetheless, all national systems lower the standard of proof somewhat in relation to the claim on the merits⁷³². In Belgium, the applicant must only provide sufficient evidence to establish that the claim exists, in Denmark, Portugal and Spain a *prima facie* standard applies, while in England the claimant must present a “good arguable case”⁷³³. In Austria and Germany, the courts may order an “*arrest*” even if the applicant fails to establish the existence of a claim, although in this case the creditor must provide a security as a condition of the provisional measure.

The second condition is urgency, which is interpreted in different ways. Most of the jurisdictions require that the applicant shows there is a risk (whether imminent or not) that an eventual judgment will remain unsatisfied⁷³⁴. In most of the Member States, especially in Austria, Denmark, Finland, Germany, Greece, Italy, the Netherlands and Portugal the creditor is not able to rely on showing the need for protection based on the existence of competing creditors and the risk of the debtor becoming insolvent. In France and Belgium and Luxembourg, urgency is not always a pre-requisite for provisional relief. In these jurisdictions, provisional measures are granted in a “two-tier” system. Creditors can seek an arrest of the defendants’ assets (*saisie conservatoire*) or directly address the president of the competent (or local) court for protective relief in *référé* - proceedings⁷³⁵. In these processes, urgency is not a pre-requisite for provisional relief, as long as the claim on the merits appears to be well-founded⁷³⁶. In addition, in many Member States urgency is loosely interpreted, because, the claim on the merits does not have to be due, so future and conditional claims may be secured⁷³⁷.

b) The examination of the court

⁷³² See the answers in the national reports on question 2.4.4.

⁷³³ The practical differences of these divergent formulations do not seem to be great.

⁷³⁴ See the answers in the national reports on question 2.3.2.

⁷³⁵ Article 808 (2) n.c.p.c.; the French model has been adopted by the other jurisdictions under consideration, French report, Dutch report, Belgium report, Luxembourg report.

⁷³⁶ However, it should be noted that in these Member States *référé* – proceedings (for interim payments of a debt) to some extent replace summary procedures, Kennett, *Enforcement*, p. 171.

⁷³⁷ Austria, sec 378 (2) EO; Germany, sec 916 (2) ZPO; Belgium, article 1415 (2) Code Judiciaire ; Luxembourg and England, *Zucker v. Tyndall Holdings plc* [1992] 1 WLR 1127; Scotland: *Gillanders v. Gillanders* (1966) S.C.54.

Provisional measures are granted in an accelerated, often informal procedure. There are differences in the Member States relating to the requirement for an adversarial hearing. Although in Austria, France (Article 67 Act of 1991), Luxemburg and the Netherlands provisional measures are regularly granted *ex parte*, other Member States require the debtor to be heard (especially Spain). Nevertheless, in these Member States provisional measures are also granted *ex parte* if the creditor asserts particular urgency or the danger of frustration⁷³⁸. If provisional measures are granted *ex parte*, the debtor must be immediately informed about enforcement measures and has a right to oppose to the measures in a contested hearing⁷³⁹.

c) *The need for a security*

In most of the Member States there is an obligation on the applicant to compensate the defendant for any loss or damage if the provisional measure should be set aside in the main proceedings⁷⁴⁰. On the Continent, the courts often require a security from the creditor which is usually provided in the form of a bank guarantee. In some jurisdictions, the court has discretion when ordering the security⁷⁴¹; much depends on the creditor's prospects of success in the main proceedings or on the latter's financial ability to provide a security⁷⁴².

In England and Ireland, the applicant is required to give an undertaking as to damages⁷⁴³. This undertaking is made to the court, not to the other party⁷⁴⁴. Under such an undertaking the applicant will compensate the affected party for any losses they would suffer by reason of the injunction being granted if the applicant's case ultimately fails at trial. The undertaking is called on at the end of the trial if the substantive action fails; the defendant does not have to commence fresh

⁷³⁸ See the answers in the national reports to question 2.4.3.1.

⁷³⁹ For example, in Spain the debtor is customarily heard, in accordance with Article 733 LEC Scotland: *Gillanders v. Gillanders* (1966) S.C.54. If provisional measures are granted *ex parte*, the debtor must oppose these measures within 20 days.

⁷⁴⁰ Cf. the answers of the national reports on provisional measures to question nos 2.6 and 3.6.

⁷⁴¹ This is the case in Germany, where according to sec. 921 ZPO, the court may order an arrest even if the existence of the claim has not been sufficiently established.

⁷⁴² See the answers of the national reports on provisional measures to question 2.6.3.

⁷⁴³ Cf. the English and Irish Reports on Provisional Measures, 3.6. In Scotland, the creditor must not give a security, Scottish Report on Provisional Measures, 2.6.1.

⁷⁴⁴ In the case of a freezing order which is granted *ex parte*, the applicant must notify the defendant forthwith of the order and serve on the defendant a copy of the affidavit used in support of the application, together with the claim form and the order, English Report on Provisional Measures, 3.6.2.

proceedings for damages to cover his or her loss. In addition, the applicant is also required to indemnify the reasonable costs of any non-party complying with the order and to indemnify any loss caused by the order⁷⁴⁵. If a court is satisfied that an undertaking would be without value, it can either require that some form of security be given to support the undertaking (usually in the form of a bond) or it can refuse the application for an injunction.

3. “Enforcing” provisional measures

As a matter of principle, provisional measures are immediately enforceable⁷⁴⁶. However, there exist considerable differences in the details of the order (especially as to whether specific assets must be identified or whether the order may be drafted in a general form)⁷⁴⁷. These differences relate to the way in which provisional measures are enforced. Most of the legal systems refer to the general rules on the enforcement of judgments for the enforcement of provisional measures. However, when provisional measures are enforced, these rules are only applied insofar as they provide for the freezing of the debtor’s assets. Satisfaction of the claim is effected unless the creditor obtains a judgment on the merits.

There are considerable differences to the position of a debtor in this situation. While in Germany and Portugal, the creditor is entitled to a lien, according to him or her priority even over competing creditors⁷⁴⁸, the position in English law is quite different: the debtor is entitled only to a security, a freezing injunction does not create any rights *in rem* and leaves issues of priority among creditors unaffected⁷⁴⁹. In order to provide for efficient protection of the secured claim, some Member States have modified the competencies of enforcement organs. Under German law, the garnishment of a bank account is not ordered by the judicial officer (*Rechtspfleger*)

⁷⁴⁵ Andrews, in: Storme (ed.), *Procedural Laws in Europe* (2003), 267, 292. A similar obligation does not exist on the Continent.

⁷⁴⁶ French Report on Provisional and Protective Measures, 2.7.2. (*mesures référées des articles 808/809/812 n.c.p.c. exécutoires de plein droit*).

⁷⁴⁷ Cf. Schlosser RdC 284 (2000), 167-168.

⁷⁴⁸ Secs. 930, 804 ZPO, German Report on Provisional and Protective Measures, 2.5.3.1.; article 622 n° 2 Código Civil, Portuguese Report on Provisional and Protective Measures, 2.5.3.4.

⁷⁴⁹ English Report on Provisional and Protective Measures, 2.5.3.4.

of the enforcement court, but by the court ordering the provisional measure (*Arrest*)⁷⁵⁰. Similar modifications are found in other Member States⁷⁵¹.

By contrast, in England there exists a clear separation between the asset freezing measures (which are derived from recent case law) and the enforcement mechanisms relating to judgments. While provisional measures are mainly enforced by injunctions against the debtor and the third debtor from disposing of their assets (injunction *in personam*), and sanctioned by contempt orders, the garnishment of bank accounts in enforcement proceedings operates *in rem*⁷⁵². In the Netherlands and Luxemburg, the general laws of enforcement are applied, but the differences are nevertheless so considerable that the procedures for the enforcement of provisional measures are virtually separate⁷⁵³.

The national systems also diverge in regard to the enforcement structures. Some legal systems require, as a pre-requisite to the making of asset-freezing orders, that the applicants specify the assets targeted for seizure⁷⁵⁴, while others do not consider this necessary and grant wide-ranging orders for seizure. This is the case in France, where the creditor may obtain and enforce an order freezing the balance of all the accounts the debtor may have in the bank, even if the bank operates on a nationwide business⁷⁵⁵. The same situation is encountered in the Netherlands, where no identification of the targeted account is required⁷⁵⁶. In most Member States, the ambit of a provisional measure is not limited to specific assets and, therefore, all assets of the debtor can be targeted. This position is protected by the immunities (relating to salaries etc.) which are provided by the general laws on enforcement. The same considerations apply to the position of third debtors and other third parties: they are protected by the procedural safeguards, which are found in the general laws of enforcement.

⁷⁵⁰ German Report on Provisional and Protective Measures, 2.4.1.2.

⁷⁵¹ Ex. The large discretionary power of a Greek court, Greek Report on Provisional and Protective Measures, 2.5.2.

⁷⁵² Kennett, *Enforcement*, p. 164; Goldstein, *Commercial Litigation – Pre-emptive Remedies*, A2-013; Briggs, [2003] *Lloyds' MCLQ* 418, 425.

⁷⁵³ National Reports on Provisional Measures, 2.2.

⁷⁵⁴ Especially Austria and Germany, National Reports on Provisional Measures, 2.5.3.1.

⁷⁵⁵ Schlosser, RdC 284 (2000), 168.

⁷⁵⁶ National Report Netherlands on Garnishment, 2.2.2.: as a rule, the three largest banks are regularly the subject of applications by creditors seeking to enforce provisional measures. A similar situation exists in Scotland, Scottish Report on Garnishment, 2.2.1.1.

4. Provisional measures and main proceedings

If provisional relief is granted before the main proceedings are commenced, the applicant is obliged to initiate these proceedings within a definite period. There are some variations in the national systems, as some Member States have a specific period of time set in legislation⁷⁵⁷, in other Member States, the court fixes the period according to the circumstances⁷⁵⁸. In other Member States, the debtor may apply for the revocation of the provisional measure if the creditor fails to comply with the formal conditions regulating the granting of that measure⁷⁵⁹. As a rule, the provisional measure will be set aside if the debtor should succeed in the main proceedings or if able to prove a change of the circumstances. Under these circumstances, the creditor must compensate the debtor's loss. As a result, it can be said that there are considerable differences in the details of the relationship between provisional measures and substantive proceedings in the Member States. Nevertheless, a common denominator can be found in the fact that the court hearing the substantive matter always has competence in relation to the supervision of the provisional measures which had been granted in ancillary proceedings⁷⁶⁰.

5. The cross-border context

a) Jurisdictional issues

All Member States grant competence to order provisional measures to the courts deciding the main proceedings.⁷⁶¹ In the European context, the competence of the court deciding the main proceedings is determined by Articles 2 – 24 of Reg. 44/01. This competence may also be exercised before the main proceedings are initiated.

⁷⁵⁷ Examples: Denmark: 40 days, Greece and Italy: 30 days.

⁷⁵⁸ Examples: Austria, Finland.

⁷⁵⁹ Example: Germany.

⁷⁶⁰ Recently, the Swiss Federal Tribunal, referring to this principle, held that the exequatur decision for a foreign provisional measure becomes void if that measure should be set aside by the competent court for the main proceedings, BGE 129 III 626 (*Motorola*), judgment of 30 July 2003.

⁷⁶¹ Cf. the answers to question 6.1. in the national reports on provisional and protective measures. In France and the Low Countries, the competence for ordering *référé*-measures lies with the president of the court which decides the main proceeding.

According to the procedural laws of most of the Member States, the applicant must then initiate the main proceedings within a period of time fixed by the court (often 2 weeks or 1 month). If the proceedings are not initiated within this time, the provisional measure will automatically become ineffective or will - following an application of the defendant – be set aside by the court⁷⁶².

In addition to the competence of the court deciding on the merits of the case, all Member States – with the exception of Spain⁷⁶³ – confer additional jurisdiction on the court where enforcement takes place⁷⁶⁴ (i.e. the place where the defendant's assets are located or the court at the defendant's domicile)⁷⁶⁵. This competence is derived from practical necessity. Often the evidence, assets or the occurrences forming the basis of the case are located where the enforcement of the provisional measure is sought⁷⁶⁶. The allocation of competences between the court hearing the main proceedings and the court at the place of enforcement has a long tradition in the Member States. However, it presumes preliminary and main proceedings can be coordinated and, therefore, that there will be close cooperation between the courts involved⁷⁶⁷.

The domestic heads of competence are also applied if provisional measures are sought in the European cross-border context. These rules which were originally designed for the allocation of local cases are largely applied in the international context. Accordingly, a creditor may apply for the seizure (or freezing) of local assets even when the main proceedings are pending abroad. The European instruments on civil procedure do not directly address these jurisdictional issues. As the national

⁷⁶² This is the legal position in Germany, sec. 926 ZPO.

⁷⁶³ In Spain, the courts of justice are responsible for the enforcement of their judgments, Spanish Report on Provisional Measures, 6.1. and 6.2.

⁷⁶⁴ In England, Ireland and Scotland the competence of the domestic courts to support main proceedings abroad was explicitly stated when the Brussels' Convention was ratified. The Civil Jurisdiction and Judgments Act 1982 (CJJA '82), s. 25(1), confers on the High Court in England power to grant interim relief in the absence of substantive proceedings, provided proceedings have been or will be commenced in another State. With effect from 1st April 1997, the power to grant interim relief was extended to any proceedings in any State, regardless of whether it is a Brussels or Lugano contracting State or whether the proceedings fall within the scope of the Conventions (Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997 (SI 1997/302)), cf. English Report on Provisional Measures, 6.1.1.3. The legal situation in Ireland is similar, see Sec. 13 (1) of the Jurisdiction of Courts and Enforcement Act of 1998, Irish Report on Provisional Measures, 6.1.

⁷⁶⁵ This criteria corresponds to article 39 (2) of Reg. 44/01.

⁷⁶⁶ Kennett, *Enforcement*, p. 134.

⁷⁶⁷ Kennett, *Enforcement*, p. 155; Schlosser, RdC 284 (2000), 174-182.

reports show, all Member States provide for support of main proceedings in other Member States and considerable case law has been reported⁷⁶⁸. As a result, it can be stated that collaboration between the courts of different Member States in provisional and main proceedings has become a reality in the European Judicial Area.

Nevertheless, in practice, the coordination of provisional and main proceedings at the European level has proved to be difficult. A key reason is that Article 31 of the Reg. 44/01 does not address the jurisdictional issues but simply refers to the domestic rules of the Member States. These rules often include exorbitant heads of jurisdiction⁷⁶⁹. Additionally, in some Member States creditors may even seek extraterritorial protective measures. This is especially the case in England and Ireland where the worldwide “Mareva injunction” (now: freezing order, C.P.R. 25) is aimed at freezing all assets of a debtor wherever they are located⁷⁷⁰. Accordingly, creditors who have conducted main proceedings in other European countries, have often applied to the English High Court for a freezing order/Mareva injunction with the aim of blocking the defendant’s assets abroad⁷⁷¹. In *Crédit Suisse Fides v. Cuoghi*, the Court of Appeal explicitly rejected the argument that jurisdiction to grant asset-freezing measures (as ancillary measures) should be restricted to the courts where the assets are located⁷⁷². This position is shared by Ireland, but it is not found in the other Member States⁷⁷³.

Finally, serious problems arose in the context of interim payments in the 1990s. As explained above, these orders were often sought on the basis of exorbitant heads of

⁷⁶⁸ Cf. the answers to question 6.2.2. in the Dutch, English, French, German, Greek, Irish, Italian, Scottish and Swedish Reports on Provisional Measures.

⁷⁶⁹ Example: In France, the juge de référé may base his competence on the exorbitant competences of articles 14 and 15 Code Civil; in the *van Uden* case, the competence of the president of the Dutch first instant court in kort geding proceedings was derived from (former) art. 126 (3) bv, cf. Hess/Vollkommer, IPRax 1999, 220, 222 et seq.

⁷⁷⁰ English Report on Provisional Measures, 6.2.5; Heinze, *Internationaler einstweiliger Rechtsschutz*, *Recht der internationalen Wirtschaft* 2003, 923, 924. Scottish law does not permit a cross-border freezing of assets abroad, Scottish Report on Provisional Measures, 6.2.5., *Steward v. The Royal Bank of Scotland* (1994) SLT (Sh.Ct.) 27.

⁷⁷¹ *Republic of Haiti v Duvalier* [1990] 1 QB 202, [1989] 1 All ER 456; *Credit Suisse Fides Trust S.A. v. Cuoghi* [1998] Q.B. 818; *Refco Inc v Eastern Trading Co* [1999] 1 Lloyds Rep 159.

⁷⁷² *Credit Suisse Fides Trust S.A. v. Cuoghi* [1998] Q.B. 818.

⁷⁷³ Schlosser, RdC 284 (2000), 181, cf. the answers of the national reports to question 6.2.5. of the questionnaire on provisional and protective measures.

jurisdiction and had to be recognized and enforced by the other Member States⁷⁷⁴. As a result, forum shopping for provisional measures has become a common practice within the European Internal Market and the balance between establishing uniform heads of jurisdiction and mutual recognition of judgments as provided for by the Brussels' Convention was endangered.

However, in the decisions *van Uden* and *Mietz*, the ECJ imposed far-reaching jurisdictional limits on provisional measures at the European level⁷⁷⁵. According to the Court: "the granting of provisional or protective measures on the basis of article 24 of the Convention of 27 September is conditional on, inter alia, the existence of a real connecting link between the subject-matter of the measure sought and the territorial jurisdiction of the Contracting State the court before which those measures are sought."⁷⁷⁶ According to this decision any ancillary protective measure aimed at supporting main proceedings in another Member State presumes the existence of assets within the jurisdiction of the court which determines the matter⁷⁷⁷. However, this limitation does not rule out the possibility that the ancillary measure might be enforced in another Member State, if there are additional assets which can be seized. Yet, the principal effects of ancillary protective measures which are given on the basis of domestic competences, remain strictly territorial⁷⁷⁸.

The ECJ largely relied on the traditional approach⁷⁷⁹ according to which the parties are protected mainly by provisional measures which must be sought from the court determining the merits of the case. The effects of ancillary measures remain limited to the assets located in the district of the assisting court. As a consequence, within the scope of Article 24 of the Reg. 44/01, a worldwide freezing order can only be sought when the English court is competent for the decision on the merits or when

⁷⁷⁴ Cf. supra at fn.700.

⁷⁷⁵ ECJ Case C-391/95 *Van Uden* [1998] ECR I-7091; Case C-99/96 *Mietz* [1999] ECR I-3637.

⁷⁷⁶ ECJ Case C-391/95 *Van Uden* [1998] ECR I-7091, 7122, para 48.

⁷⁷⁷ According to the ECJ, article 24 presumes that "...the measure sought relates to specific assets of the defendant located or to be located within the confines of the territorial jurisdiction of the court to which application is made".

⁷⁷⁸ Stadler, Erlaß und Freizügigkeit einstweiliger Maßnahmen im Anwendungsbereich des EuGVÜ, JZ 1999, 1089, 1093; Schulz, Einstweilige Maßnahmen nach dem Brüsseler Gerichtsstands- und Vollstreckungsübereinkommen in der Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften, ZEuP 2001, 805, 815 ss. Gaudemet-Tallon, Compétence et Exécution, n° 311 s.

⁷⁷⁹ As described above at fn. 763.

(considerable) assets are located within England⁷⁸⁰. Under Article 31 of the Reg. 44/01, a far-reaching freezing order as given in the *Duvalier*⁷⁸¹ and the *Cuoghi*⁷⁸² cases seems to be excluded⁷⁸³. However, in the legal literature, the interpretation of the “territorial connection criteria” remains largely disputed⁷⁸⁴.

b) The recognition of provisional measures

Under the traditional doctrine, the recognition of a foreign judgment presumes its finality. Therefore, interim measures for protection could not be recognised and enforced abroad. Art. 25 of the Brussels’ Convention (now article 32 of the Reg. 44/01) adopted an innovative approach and allowed the recognition of provisionally enforceable judgments and provisional measures⁷⁸⁵. However, the ECJ restricted the application of Article 25 of the Brussels’ Convention in the famous case *Denilauler v. Couchet Frères*⁷⁸⁶ and excluded the recognition of protective orders under the Convention which had been obtained *ex parte*. The main arguments for the exclusion of these orders (which were set out in the concluding passages of the judgment of AG Mayras) were the drastic effects of those measures, the protection of the defendant (who did not know that proceedings had been instituted against him abroad) and the effect on third parties resulting from the blocking of an account in respect of counter-action cannot immediately be taken⁷⁸⁷. Therefore, in order to protect those persons, the ECJ concluded that affected parties should be afforded an opportunity to object to such a measure in a forum which is geographically close, is

⁷⁸⁰ However, the question remains open as to whether ancillary provisional measures can be sought from a court which is competent according to articles 2 – 25 of the Reg. 44/01, cf. Hess/Vollkommer, IPRax 1999, 220, 222; Rauscher/Leible, *Commentary on Art. 31 Brussels’ Regulation* (2003), n° 20; Swiss Federal Tribunal, 30 July 2003, BGE 129 III 626 (*Motorola*); contrary opinion Wolf, *Europäisches Wirtschafts- und Steuerrecht* 2000, 11, 16-17.

⁷⁸¹ Republic of Haiti v Duvalier [1990] 1 QB 202, [1989] 1 All ER 456; Credit Suisse Fides Trust S.A. v. Cuoghi [1998] Q.B. 818; Refco Inc v Eastern Trading Co [1999] 1 Lloyd’s Rep 159.

⁷⁸² Credit Suisse Fides Trust S.A. v. Cuoghi [1998] Q.B. 818.

⁷⁸³ Same opinion is expressed by Stadler, JZ 1999, 1089, 1093. Different opinion Schlosser, RdC 284 (2000), 188, stressing that the rulings of the ECJ in *van Uden* and *Mietz* should be limited to interim payments.

⁷⁸⁴ Cf. The answers of the national reports to question 6.3.5.

⁷⁸⁵ Schlosser, RdC 284 (2000), 190 et seq.

⁷⁸⁶ ECJ, Case 125/79, *Denilauler/Couchet Frères*, [1980] ECR 1553, the case is discussed by Kennett, *Enforcement*, p. 146 et seq.

⁷⁸⁷ ECJ, Case 125/79, *Denilauler/Couchet Frères*, [1980] ECR 1553,

based on a legal system which is familiar to the affected parties and which does not pose any linguistic barriers⁷⁸⁸.

Since *Denilauler*, *ex parte* decisions have not been recognised and enforced in the European Judicial Area⁷⁸⁹. This restrictive position undermines the efficient protection of creditors, because the cross-border “surprise effect” of provisional measures is not guaranteed. As an alternative, creditors must apply directly at the place of enforcement for ancillary protective orders⁷⁹⁰ or relinquish any surprise effect and apply for a contested hearing when seeking provisional relief. Now that 25 years have passed since *Denilauler*, the decision should be reappraised⁷⁹¹. Today, allowing the cross-border recognition of *ex parte* orders securing the enforcement of pecuniary claims would be a clear step towards the principle of mutual trust in the judicial systems of other Member states. However, there are considerable differences in the national legal systems in regard to the conditions for obtaining, and the legal effects of, provisional measures⁷⁹². Therefore, in the absence of prior harmonisation of minimum standards that provide efficient protection of the affected persons, the application of the principle of mutual recognition of provisional measures seems to be excluded. Nevertheless, as most of the Member states provide for measures designated to secure the (future) enforcement of a claim in the case of urgency, Community action in this field seems to be advisable. This action should reinforce and restructure the existing cooperation between national courts granting provisional relief in support of main proceedings in other Member States.

Finally, it should be noted that the different structure of provisional measures (operating in personam/in rem; affecting specific assets or all assets of the debtor) has not been an obstacle for their recognition and enforcement within the European Judicial Area. Accordingly, the English “freezing order” (formerly Mareva injunction) has been recognised in France⁷⁹³, Germany⁷⁹⁴ and in Switzerland⁷⁹⁵ (although these

⁷⁸⁸ The main arguments are summarized by Kennett, *Enforcement*, p. 147.

⁷⁸⁹ See the answers to question 6.4. in the national reports on provisional and protective measures.

⁷⁹⁰ Recourse to several jurisdictions entails additional costs and (often) delay. In addition, the debtor might be alerted when the creditor seeks to obtain provisional measures in several jurisdictions and might be able to transfer his assets out of the reach of the creditor.

⁷⁹¹ Same opinion Kennett, *Enforcement*, p. 148 et seq.; Swedish Report on Garnishments, preliminary remarks in fine; Scottish Report on Provisional Measures, 7.2.1. and 7.2.2.1.

⁷⁹² Cf. supra at fn.783.

⁷⁹³ C.A Paris, Oct. 5 2000, Gaz. Pal. 2002 n° 204 (Niboyet).

Member States do not provide for comparable provisional relief). This example shows that in practice, “mutual trust” (or the willingness to accept a different but functional similar solutions of a foreign jurisdiction) has become a reality in case law of the different European courts.

6. Policy recommendations

a) Clarifications of Article 31 of the Brussels’ Regulation

There is a general consensus amongst the Member States (also reflected in the answers of the national reporters to question 7.1) that Article 31 of the Regulation 44/01 should be clarified. The decision of the Working Party on the revision of the Brussels and Lugano Conventions, not to change these provisions, was unfortunate⁷⁹⁶. Despite the clarifications of the European Court of Justice in *Van Uden* and *Mietz*, many uncertainties still exist in regard to the limitations of the judicial competences for (ancillary) provisional measures.

First, it would be useful to address the question of whether interim payments are “provisional measures” in the sense of Article 31 Reg. 44/01. Despite the case law of the ECJ⁷⁹⁷, there are compelling reasons to exclude interim payments from Article 31⁷⁹⁸. The main reason is that the function of these remedies is not only to protect the creditor efficiently for the future realisation of the judgment (in the main proceedings), but to replace the lengthy and time consuming main proceedings

⁷⁹⁴ OLG Karlsruhe, ZZP Int. 1996, 91, 93 ; OLG Frankfurt, OLG Report 1998, 213, 214 ; OLG Frankfurt, OLG Report 1999, 74, 75.

⁷⁹⁵ BGE 129 III 626, judgment of 30 July 2003.

⁷⁹⁶ Same opinion Stadler, JZ 1999, 1089, 1099; Kennett, *Enforcement*, p. 140; Gaudemet-Tallon, *Compétence et reconnaissance*, n° 312.

⁷⁹⁷ Case C-99/96 *Mietz* [1999] ECR I-3637.

⁷⁹⁸ It should be added that the safeguards which the European Court of Justice established in the *Mietz* case, largely hinder the free movement of such measures within the European Union. For example: the European Court requires that the creditor must provide security before obtaining an interim payment. However, according to article 46 of the Regulation, the party against whom enforcement is sought may seek a stay of the proceedings or the provision of a security when the decision which is being enforced is appealed or opposed in its state of origin. Therefore, according to the structure of the Regulation, the provisional enforceable judgment may be recognized without any prior security of a creditor. Thus, the position of the ECJ relating to provisional measures is more restricted than the position of the Regulation itself, cf. Stadler, JZ 1999, 1089, 1099.

themselves⁷⁹⁹. In many Member States, these remedies are not considered to be “provisional measures”, but a form of summary proceedings⁸⁰⁰. Therefore, interim payments should be linked to other summary proceedings⁸⁰¹. This proposal does not lead to an exclusion of those remedies from the Regulation 44/01. Hence, interim payments can be obtained from a court which is competent according to Article 2-24 of Regulation 44/01. They are therefore recognized under Articles 32 et seq. of the Regulation⁸⁰². If the jurisdictional limits of the Regulation are respected, it would even be conceivable to remove the additional requirement (as stated in *Van Uden*) that the repayment of the sum must be guaranteed by a security.

Second, it seems advisable to clarify and improve. Article 31 of Reg. 44/01. A second paragraph should contain the following definition of provisional measures⁸⁰³:

“For the purposes of the first paragraph, provisional, including protective measures are measures to maintain the status quo pending determination of the issues at trial; or measures to secure assets out of which an ultimate judgment may be satisfied”⁸⁰⁴.

In addition, the jurisdiction of a court to grant provisional and protective measures should be clarified: this jurisdiction should be in line with the case law of the ECJ and provide that the principal responsibility lies with the court that is competent according to the Regulation to determine the main proceedings in the case under article 2-25 [and that, additionally, ancillary protective measures may be obtained from a court in

⁷⁹⁹ In 1991, the Luxembourg Court of Appeal held that a „référé-provision” (interim payment) could not be considered as a provisional measure in the sum of article 24 Brussels’ Convention, Judgment of Nov. 26th, 1991, n°12898, Luxembourg Report on Provisional Measures, response n° 6.

⁸⁰⁰ See supra at footnote.

⁸⁰¹ Cf. the Green Paper on a European order for payment procedure and on measures to simplify and speed up small claims litigation, p. 18-19, COM/2002/0746/final.

⁸⁰² This proposal corresponds to the exclusion of interim payments in n° 22 of the International Law Associations, Principles on Protective Measures in International Litigation (Helsinki, Principles of 1996), which reads as follows: “The procedure in domestic law under which a court may order an interim payment (i.e. an outright payment to the plaintiff which may be subsequently revised on final judgment) is not a provisional and protective measures in the context of international litigation”, ILA Reports 1996, 185-196; Kennett, *Enforcement*, p. 373-375.

⁸⁰³ It is advised to rely on article 1 of the ILA Principles on provisional and protective measures, which reads as follows: „Provisional and protective measures perform two principal purposes in civil and commercial litigation: (a) to maintain the status quo pending determination of the issues at trial; or (b) to secure assets out of which an ultimate judgment may be satisfied”. According to this definition, a paradigm case under category (b) are measures to freeze the assets of a defendant held in the form of sums on deposit in a bank account with a third-party bank (n° 2 of the Helsinki Principles).

⁸⁰⁴ It seems to be advisable to include in the Preamble of Reg. 44/01 the indication that interim payments are subject to the legal regime of the Regulation (but not on article 31) and that provisional measures securing proofs fall within the scope of article 31, see supra at fn 710. This proposal also closely follows the wording of the ILA principles, infra fn. 789.

whose jurisdiction assets of the debtor are located or the protective measure is enforced⁸⁰⁵. Therefore, the definition under Article 31 of the Regulation should continue to apply to any provisional measure (with the exception of an interim payment) which is sought in order to block the defendant's assets or to preserve the status quo pending a final decision on the merits. As a result, it should be stated that the actual legal provision of the Brussels' 1 Regulation on provisional measures should be clarified.

b) A European Protective Order for Cross-Border Garnishment

aa) Outline. It seems advisable to set up a Community instrument on a European Protective Order for the Cross-border Garnishment of Bank Accounts. This instrument should supplement the legal protection of creditors provided for by the Brussels' Regulation. This instrument should be part of a larger Community measure dealing with enforcement matters⁸⁰⁶.

The European protective order should be based on the principle of mutual trust in the judicial systems of the Member States⁸⁰⁷; it should provide for comprehensive responsibility of the court exercising jurisdiction over the substance of the matter. This court should be empowered to grant provisional and protective measures which are automatically enforced in all other Member States (on the basis of a form)⁸⁰⁸. Under exceptional circumstances (urgency) these measures may be ordered *ex parte*⁸⁰⁹. They would always be ordered on the condition that the applicant gives a security which covers any eventual loss or damage suffered by the defendant if the action should fail on the merits. The legal effects of the cross-border garnishment would be the blocking of (specific) bank accounts of the debtor in other Member

⁸⁰⁵ A similar opinion is expressed by Andrews, in: Storme (ed.), *Procedural Laws in Europe* (2003), 263, 270 et seq.

⁸⁰⁶ Cf. supra C at fn. and infra D at fn.

⁸⁰⁷ Cf. n° 36 of the final Conclusion of the Finish Presidency at the Tampere Council, 14th/15th December 1999.

⁸⁰⁸ Same opinion Andrews, in: Storme (ed.), *Procedural Laws in Europe*, p. 267, 272.

⁸⁰⁹ These circumstances must be established by the plaintiff; the plaintiff must ensure that the defendant is promptly informed of the order, cf. ILA Helsinki principle n° 7. This proposal corresponds (at least from its effects) to the proposal of Prof. Perrot and Prof. de Leval at the seminaire held in Lisbonne (1999) on the "inversion of the proceedings" (L'inversion du contentieux), cf. Caupain/de Leval (ed.) *L'efficacité de la justice civile en Europe*, p. 200-204 and 433-435.

States⁸¹⁰. The European Protective Order should be served on the debtor and the debtor should be obliged to disclose the whereabouts of his assets on the basis of the European Assets Declaration⁸¹¹. The bank where the account of the debtor is held shall also be obliged to provide information on the status of the account on the basis of a claim form (European Third Debtors' Assets Declaration)⁸¹². These cross-border proceedings would be supported by the competent organ/court of the Member State where the account is located. These courts or organs may order ancillary protective measures which are strictly confined to the assets located in that Member State. In addition, these organs may adjudicate upon any objection of the debtor or the third-party debtor against the seizure which may be based on the enforcement laws of the Member State addressed. Hence, close cooperation between the courts involved would be needed. Any ancillary measure would have to be immediately communicated to the court hearing the main proceedings⁸¹³. This cooperation may be supported by the European judicial network.

bb) Guiding principles. Cooperation between the courts of the Member States should be based on the following principles:

- 1) The main responsibility for ordering provisional and protective measures should fall on the court which is to determine the merits of the case. This responsibility does not depend on the commencement of main proceedings⁸¹⁴. However, any provisional measure which is granted prior to the commencement of main proceedings should be conditional upon those proceedings being instituted.
- 2) Therefore, the court deciding on the merits may order the freezing (blocking) of the debtor's assets in several Member States. This order should regularly be obtained after the debtor is heard; only in cases of urgency would it be possible

⁸¹⁰ The legal effect of the order should be determined by the procedural laws of the Member State where the account is located, cf. *supra* C, text at fn. 733-736.

⁸¹¹ See *supra* B at fn. 276 et seq.

⁸¹² See *supra* at fn. 728 – the third debtor's declaration should be given on a standard form.

⁸¹³ Recently, the Swiss Supreme Federal Court held that the *exequatur*-decision under articles 25 et seq. Lugano Convention would automatically become void if a provisional measure should be set aside by the court addressing the main proceedings, BGE 129 III 626 (judgment of 30 July 2003). According to this case law, there exists a clear "priority" of the court addressing the main proceedings.

⁸¹⁴ However, if a party applies for protective orders to a specific court which is competent under Articles 2-24 of the Regulation 44/01, the application to that court should be considered as a choice of the court for the main proceedings.

to make an order *ex parte*⁸¹⁵. The order would be automatically recognized and enforced in the other Member States, according to the principles of the European garnishment order⁸¹⁶. Accordingly, the competent court may itself freeze bank accounts which are located in other Member States. The legal effects of that order, however, would be determined by the enforcement law of the Member State where the account is located.

- 3) The grant of such relief should be discretionary. It should be available on (a) a showing of a case on the merits to a standard of proof which is less than that required for the merits under the applicable law; and (b) on showing that the potential injury to the plaintiff outweighs the potential injury to the defendant⁸¹⁷
- 4) Provisional measures should be issued as an interim order on the basis of a claim form which informs the third-party debtor about the effects of the seizure and which requires the third-party debtor to provide any information on the account seized. This information shall be given on the form of the European Third Debtor Assets Declaration⁸¹⁸. In addition, the court may order that the debtor gives a European Assets Declaration on the whereabouts of his or her assets⁸¹⁹.
- 5) As a rule, the defendant should be heard before the order is issued. If the order is (for reasons of urgency) obtained *ex parte*, the defendant should be heard within a reasonable time and should be granted the opportunity to object to the order⁸²⁰.
- 6) The court should have authority to require a security from the plaintiff or to impose other conditions to ensure the compensation of any loss or damage suffered by the defendant or third parties which may result from the granting of the order.

⁸¹⁵ A similar proposal is found in Article 10.3.1. of the Storme/Tarzia Draft, Storme (ed.), *Approximation of Judiciary Law*, p. 204.

⁸¹⁶ See *infra* C at fn. 497 et seq.

⁸¹⁷ This precondition corresponds to n° 4 of the ILA Helsinki Principles on Provisional and Protective Measures and to article 10.2. of the Storme/Tarzia Draft, Storme (ed.), *Approximation of Judiciary Law*, p. 204.

⁸¹⁸ Cf. *supra* C at fn. 503 et seq.

⁸¹⁹ The court may directly request the competent organ at the domicile/seat of the debtor to take the assets declaration, cf. *supra* B at fn. 276 et seq.

⁸²⁰ Cf. article 10.3.1. (2nd phrase) of the Storme/Tarzia Draft, Storme (ed.), *Approximation of Judiciary Law*, p. 204.

- 7) If the provisional measure is obtained before the main proceedings are commenced, the court granting the measure should make orders to the effect that the main proceedings be commenced within a short period of time. Otherwise, the provisional measure will be set aside *ex officio*.
- 8) In addition, the location of a bank account in a Member State would be a sufficient basis for granting additional provisional measures in respect of these assets. As a rule, the assets should be blocked in order to secure any future enforcement of the secured claim. These measures should be issued on the basis of a standard form, informing the third party debtor of their legal effects (which are determined by the procedural law of the Member State where the account is located). The third-party debtor would be obliged to give all necessary information on the status of the bank account to the applicant.
- 9) If ancillary measures are sought before the commencement of the main proceedings, the court should impose a condition that the main action must be filed within a reasonable period of time. Otherwise, the provisional measures would be set aside. Any ancillary measures shall be subject to a security given by the applicant.
- 10) The court with jurisdiction in the main proceedings and the competent court for the ancillary provisional measures should cooperate closely: the court of the ancillary proceedings shall (with the support of the European judicial network) inform (on its own motion) the court of the main proceedings about the protective measure⁸²¹. The court of the main proceedings shall exercise a supervisory function and shall be empowered to suspend or to amend the ancillary order^{821a}.
- 11) The court (or enforcement organs) at the place of enforcement shall be competent to decide on any objection to the seizure which may be derived from the *lex loci executionis* (the enforcement laws of that Member State which

⁸²¹ This corresponds to the cooperation in insolvency proceedings, see article 31 of Reg 1346/00/EC. Cf. also Schlosser, RdC 284 (2000), 396-397 on "joint transborder case management".

^{821a} See also Swiss Federal Court, 30/7/2003, BGE 129 III 626, at 5.2.3. According to article 20 (2) of Regulation Brussels II a, ancillary provisional measures "cease to apply when the court of the Member State having jurisdiction as to the substance of the matter has taken the measures it considers appropriate", Reg. EC 2201/2003 of 27th November 2003, OJ L 338/1 of 23rd December 2003.

includes any release of parts of the sum seized) which might be based on immunities of the debtor or on a priority of concurrent creditors or of the bank.

The proposed instrument would allow the close cooperation between civil courts and enforcement organs in the European Judicial Area, which is based on mutual trust in the well functioning of national jurisdictions. Furthermore, it would considerably improve the provision of creditors who would not only get a provisional protection of their claims within the European Union, but would also be able to trace the debtor's assets with the help of enforcement organs and third-party debtors. As a result, the three different strands of the present study: transparency, garnishment and provisional and protective measures, are simultaneously applied for an improvement of the judicial protection of the citizens within the European Judicial Area. Accordingly, it seems advisable to complement the Reg. 44/01 by a rRgulation on European Enforcement.

E. Conclusions

I. The present state of affaires

The right of a creditor to enforce a claim efficiently within the European Judicial Area is currently guaranteed by Article 6 of the European Convention for Human Rights and Article 47 of the Charta of Fundamental Rights of the European Union. In everyday practice, the exercise of this constitutional right is often impaired in the cross-border context. As the enforcement laws of the Member states are not harmonised, creditors seeking the enforcement of their claims in other Member States are confronted with practical and legal obstacles. Practical obstacles include a lack of information on foreign enforcement systems, the necessity to engage an (additional) attorney, the different organisation and practice of the enforcement organs in the Member States. In addition, sufficient or even merely reliable information on the address or the whereabouts of the debtor's assets is difficult and often expensive to obtain. Creditors face considerable uncertainty about whether enforcement in an unknown legal environment will be successful. Legal obstacles are created by the current legal situation which may be likened to a patch work. At present, 16 different enforcement systems exist in the Member States, creditors must apply in each Member state for enforcement measures (garnishment) under the conditions of the respective legal system. Similar difficulties exist in the context of

provisional measures. While these remedies are (partly) addressed in the existing European instruments on civil procedure⁸²², important issues still remain unsettled: the definition of provisional measures, the jurisdiction for granting provisional relief and the recognition of such orders. However, the legal situation regarding provisionally enforceable judgments has been improved by the Brussels' Regulation. Nevertheless, there exist considerable uncertainties on the interpretation of article 47 of the Regulation.

In the Internal Market, the differences between the national enforcement systems hinder the free movement of goods, persons and services. Cross-border transactions must be secured by well-functioning procedural laws, including enforcement. Without sufficient knowledge of their prospects of recovering debts, creditors will not seek enforcement abroad. Further, bad faith debtors may be encouraged to channel their funds into Member States where they might easily be concealed. As a result, the free movement of judgments within Europe is severely impaired; creditors don't enforce their claims in other Member States, but write them off. At the same time, the unsettled legal situation favours a tendency in some Member State to allow cross-border seizures⁸²³. But, there exists great uncertainty regarding the applicable law, the legal effects and the efficient protection of the debtors and third parties affected by cross-border enforcement orders⁸²⁴.

II. The need for Community action

Without any alignment of national enforcement systems, the efficient protection of creditors within the Internal Market is not guaranteed. However, due to the divergences between the national enforcement systems, all-encompassing unification or harmonisation seems to be unattainable. Accordingly, a more restricted and sectoral approach is appropriate. It seems advisable to address specific fields

⁸²² Especially by Articles 31 and 32 of the Brussels' Regulation.

⁸²³ Recently the English House of Lords stopped the tendency of English courts to allow cross-border garnishments. The House of Lords held that garnishment operates in rem and, therefore, the third party debtor and the assets seized must be located within the jurisdiction, *Société Eram v. HSBC*, [2003] 3 W.L.R.21 (H.L.), *KOTCO v. UBS*, [2003] 3 W.L.R. 14 (H.L.), annotation of Briggs, [2003] LMCLQ 418-425. But there exists still some inconsistency between a provisional freezing order (operating in personam) and a garnishment order (operating in rem).

⁸²⁴ Supra at fn. 520 ss.

which are closely related to the cross-border enforcement of claims⁸²⁵. These issues are the transparency of the debtor's assets, cross-border garnishment and cross-border provisional relief.⁸²⁶ Comparative research in these fields which was undertaken in this study shows that the divergences between the national systems should not be overstated. All Member States provide similar devices in these fields which should be aligned by a community instrument.

The European instrument should be based on the following guiding principles. It should replace the former guiding principle of territoriality of enforcement measures by the principles of universality and (to some extent) the mutual recognition of enforcement measures. Additional principles are the equal treatment of all parties (creditors, debtors and third party debtors) and proportionality. Proportionality refers to the "balancing" of the competing rights and interests of the parties. According to this principle, enforcement measures should not unnecessarily impinge upon the debtor and third parties; disproportionate or vexatious measures are not to be admitted.

The proposed legislative activities of the Community should be based on article 65 lit c) of the EC Treaty, all proposed legislative measures should relate to cross-border situations in relation to enforcement of judgments. It seems advisable to establish a European Regulation on the Enforcement of Judgments which should complement the Brussels' Regulation 44/01.

III. Recommendations

The present study revealed several alternatives for legislative activities by the Community which seem to be conceivable. These proposals are found in the respective parts of the study. As a result of the study, it seems advisable to supplement Regulation 44/01 with an additional Regulation on European Enforcement. It should provide for the following instruments:

- a European Assets Declaration of the debtor

⁸²⁵ The subjects of the comparative research were prescribed by the structure of the tender (JAI A3 02/2002). As a result, the convergence between the different strands of the study is found in the "combination" of the proposals in an legislative instrument on the European Protective Order.

⁸²⁶ Activities of the European Union in these fields were first proposed in the Commission's Communication of 26 Nov. 1997, (COM (97) 609 final, OJ C 33, January 31st, 1998.

- a European Garnishment Order
- a European Garnishee's Declaration
- a European Protective Order

These instruments should only supplement the existing remedies in the national enforcement systems, not harmonise the national laws. Accordingly, they are aimed at supporting the principle of mutual recognition of judicial transactions within the European Union. However, they are not likely to replace the existing national enforcement laws, they would simply help the creditor to access the foreign enforcement organ in a smooth and efficient way.

1. *"European Assets Declaration"*

After obtaining an enforceable title, creditors in most Member States can trace the debtor's assets with the support of enforcement organs. The main sources of information are the debtor's declaration of his assets and the garnishee's declaration. It is recommended that both types of declarations be harmonised by Community legislation. The introduction of a European Assets Declaration would be an innovation in some Member States (Belgium, France, Italy, Luxembourg, Netherlands and Scotland). However, these Member States also require the debtor, under specific circumstances, to disclose his financial situation. In principle, the declaration does not impose a heavy burden on the debtor, who can fulfil the obligation simply by filling out a statutory form.

It is recommended that a *"European Assets Declaration"* be established. Such an instrument would achieve the following:

- debtors would be obliged to disclose their assets throughout the European Judicial area ("cross-border" disclosure);
- the declaration would be made on a standard form available in all Community languages which would be answered (mainly) by crossing relevant boxes.
- minimum standards would be set for the Declaration's conditions, content and related sanctions. This would tend to encourage uniformity across Member States;
- as a result, creditors would have equal access to information about assets within the European Judicial Area, while debtors within the Internal Market would receive

equal protection. In addition, the present practice of information shopping within the European Judicial Area would be reduced.

2. *The European Garnishment Order for Bank Accounts*

The second proposal is to set up a European system for the cross-border garnishment of bank accounts. The proposed legislative instrument should apply if the seizure of an account located in another Member State is sought⁸²⁷. Jurisdiction should be exercised at the domicile/seat of the debtor and/or in the Member State (of origin) where the judgment against the debtor was given. As a prerequisite, the creditor must present an enforceable instrument (as per Article 32 Regulation 44/01/EC). The debt to which the enforceable instrument relates must be due and the creditor must be entitled to recover it by the enforceable instrument. These preconditions should be checked by the national enforcement authorities of the Member State of origin which are competent for issuing the European Garnishment Order⁸²⁸. The Garnishment Order would be issued based on a harmonised form drafted in all Community languages. The copy of the garnishment order which is served on the third-party debtor should be issued in the languages of the Member State of origin and of the Member State addressed. The order should be served on the garnishee directly under Regulation 1348/00/EC.⁸²⁹ The claim form should contain additional information for the garnishee about the nature and the effects of the instrument, the options for opposing it (including information about the competent court/enforcement organ in the Member State addressed). In addition, the enforcement order should also be served on the judgment debtor. The judgment debtor should also be informed about the nature and the effect of the instrument and the opportunities to oppose to it.

The legal effects of the garnishment order are mainly determined by the law of the Member State where it is enforced (*lex loci executionis*). Its main effect relates to the

⁸²⁷ The location should be defined primarily by the location of the branch where the account is held (and operated).

⁸²⁸ Even in Member States (Italy, Greece, Luxembourg) where the enforcement organs do not investigate the prerequisites for garnishment, the imposition of a formal investigation (based on documents) by a Community instrument does not seem too burdensome.

⁸²⁹ In practice, article 14 of that Regulation, which allows direct service by post, may often apply. However, it should be noted that postal service is not undisputed in the Member States, see Jeuland, Gaz. Pal. 2003 n° 320, 10, 14-15.

seizure of the bank account which is effected according to the law of the Member State addressed. The account in its current state (i.e. the balance at the moment of the seizure) should be frozen⁸³⁰. If a national system provides for the seizure of additional accounts held in the same branch of the bank or the seizure of future balances, these rules should apply. The application of that law (*lex loci executionis*) means that in Member States where the creditor obtains a lien, the creditor has a preferential right. However, in Member States where the group principle applies, the creditor is treated equally with all other competing creditors in that State.

In addition, the instrument should address the legal capacity of the creditor to collect the money from the garnishee (according to the garnishment proceedings of the Member State addressed). A formal recognition procedure (*exequatur*) would not be required.⁸³¹ The creditor should be in a position to prove his or her entitlement for the collection of the claim by simply presenting a standard form⁸³².

In order to protect the debtor, the instrument should provide for the following safeguards: There might be a danger that creditors seeking garnishments abroad, seize several accounts of the debtor at the same time in different Member States and thereby receive more protection than needed. For the sake of protecting the debtor against such an event, the instrument should provide that a creditor, who seeks to attach⁸³³ several accounts of the debtor (in different Member States) should provide a security before obtaining multiple enforceable copies⁸³⁴. In addition, the instrument should create an obligation on the creditor to compensate any damage the debtor suffers for “overseizure”.

⁸³⁰ Same opinion: *Tarzia, Exigences et garanties de l'exécution transfrontalière en Europe*, in : Mél. Normand (2003), 449, 459 : « cette mesure devrait être conçue comme une mesure conservatoire (...) ; autrement dit, une mesure de gel. »

⁸³¹ This corresponds to Article 18 (1), 19 Reg. 1346/00 on Insolvency proceedings. For a contrary opinion, see Kennett, *Enforcement*, p. 283 (formal recognition would be necessary).

⁸³² A similar provision is found in Article 19 Insolvency Regulation 1346/00/EC.

⁸³³ A similar provision is contained in sec. 733 German Code of Civil Procedure: According to this provision, the delivery of an additional enforceable copy of the judgment is an exception, the creditor must motivate why he needs the additional copy. The copy is expressly designated as “additional” and the *Rechtspfleger* (judicial officer) may even hear the debtor before issuing a second copy.

⁸³⁴ It does not seem to be necessary to prescribe how the security must be provided. It should depend on the national legal system whether the provision of a security should be prescribed by express legal provision or whether the court should impose an undertaking of the creditor. As a rule, the imposition of a security should be regulated in the same ways as the provision of a security for the enforcement of a provisionally enforceable judgment. Therefore, the creditor must produce the security before applying for an European Enforcement Order.

Above all, the instrument should clearly state that the protection of the maintenance needs of the debtor and his family, the collection of the claim and all additional questions are subject to the enforcement law of the Member State addressed. However, before the garnishee is formally served on the third debtor, any payment to the judgment's debtor would be considered valid.⁸³⁵

3. European Garnishee's Declaration

The third proposal relates to the establishment of a European Garnishee's Declaration. Third-party debtors should be obliged to give information on the assets seized on the basis the European instrument. Accordingly, the European Garnishment Order, which is served on the garnishee should contain a second standard form relating to the obligation of the garnishee to give information about the account seized (amount of the balance, existence of preferential creditors) and about his willingness to pay.⁸³⁶ This declaration should be given within a defined period of time (between two to four weeks). It should be published in a standardised form such that it can be completed by simply crossing relevant boxes (or inserting names and numbers).

In addition, the proposed instrument should address the legal nature of the garnishee's declaration. A balanced solution would be an obligation on the garnishee to compensate the debtor for any damage which results from his obligation to inform the creditor sufficiently about the factual and legal situation of the account. Finally, the European instrument should provide for (modest) compensation of the garnishee's costs incurred in obtaining and providing that information.

4. A European Protective Order for Cross-Border Garnishment

Finally it seems advisable to establish a Community instrument on a European protective order for the cross-border garnishment of bank accounts. This instrument should supplement the legal protection of creditors provided for by the Brussels' Regulation.

⁸³⁵ This corresponds to the protection of a garnishee according to article 24 of the Insolvency Regulation.

⁸³⁶ A model form for this type of declaration is annexed to the Austrian Report Garnishment. The form is mostly filled out by simple crossing of boxes.

The European Protective Order should be based on the principle of mutual trust in the judicial systems of the Member States⁸³⁷; it should provide for co-operation between the courts in the Member States and for comprehensive responsibility of the court exercising jurisdiction over the substance of the matter. This court should be empowered to grant provisional and protective measures which are automatically enforced in all other Member States (on the basis of a form). Under exceptional circumstances (urgency) these measures may be ordered *ex parte*. They would always be ordered on the condition that the applicant gives a security which covers any eventual loss or damage suffered by the defendant if the action should fail on the merits. The legal effects of the cross-border garnishment would be the blocking of (specific) bank accounts of the debtor in other Member States. The European Protective Order should be served on the debtor and the debtor should be obliged to disclose the whereabouts of his assets on the basis of the European Assets Declaration. The bank where the account of the debtor is held shall also be obliged to provide information on the status of the account on the basis of a standard form (European Garnishee's Declaration).

These cross-border proceedings would be supported by the competent organ/court of the Member State where the account is located. These courts or organs may order ancillary protective measures which are strictly confined to the assets located in that Member State. In addition, these organs may adjudicate upon any objection of the debtor or the third-party debtor against the seizure which may be based on the enforcement laws of the Member State addressed. Hence, close cooperation between the courts involved would be needed. Any ancillary measure would have to be immediately communicated to the court hearing the main proceedings. This cooperation may be supported by the European Judicial Network.

The proposed instrument would allow the close cooperation between civil courts and enforcement organs in the European Judicial Area, which is based on mutual trust in the proper functioning of national jurisdictions. Furthermore, it would considerably improve the position of creditors who would not only get a provisional protection of their claims within the European Union, but would be able to trace the debtor's assets with the help of enforcement organs and third-party debtors.

⁸³⁷ Cf. n° 36 of the final Conclusion of the Finish Presidency at the Tampere Council, 14th/15th December 1999.

As a result, the three different areas emphasised in the present study (transparency, garnishment and provisional and protective measures) would simultaneously be addressed with a consequential improvement of the judicial protection of the citizens within the European Judicial Area. Accordingly, it seems advisable to complement the Reg. 44/01 by a Regulation on European Enforcement.

Heidelberg, December 5th, 2003

(Prof. Dr. Burkhard Hess)

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