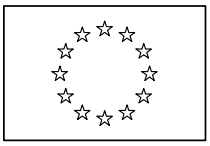

EUROPEAN COMMISSION

Brussels, 25.7.2011
SEC(2011) 937 final

COMMISSION STAFF WORKING PAPER

IMPACT ASSESSMENT

Accompanying the document

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

Creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters

{COM(2011) 445 final}
{SEC(2011) 938 final}

DISCLAIMER: This report commits only the Commission's services involved in its preparation and does not prejudge the final form of any decision to be taken by the Commission

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1. INTRODUCTION

The Internal Market offers citizens and companies unique opportunities to do business or shop in other Member States. In addition, more and more European citizens decide to move to another Member State and found a family there. When business or family relations turn sour and the other party does not pay voluntarily the sums due - e.g. the purchase price, damages for breach of contract or family maintenance – citizens and businesses are faced with the problem of having to recover their debt in another Member State with the help of the judicial system.

At present, a creditor seeking to recover his debt in another Member State faces significant difficulties. In particular, it is more cumbersome, lengthy and costly for him to obtain provisional measures*[1] to preserve assets of his debtor located abroad. The quick and easy access to such provisional measures is often crucial to ensure that the debtor has not removed or dissipated his assets by the time the creditor has obtained and enforced a judgment on the merits*. This is particularly important with regard to assets in bank accounts. Currently, debtors can easily escape enforcement measures* by swiftly moving their monies from a bank account in one Member State to another. A creditor, however, has little chance of blocking a debtor's bank accounts abroad to secure the payment of his claim. As a result, many creditors are either unable to successfully recover their claims abroad or do not consider it worthwhile pursuing them and write them off.

This initiative aims to facilitate cross-border debt recovery by improving access to and the efficiency of the preservation of bank accounts in the European Union. It will contribute to strengthen the confidence of businesses – particularly SMEs (small and medium enterprises), consumers and families to make full use of the possibilities offered by the Single Market and to engage in cross-border trade and relationships within the EU. This is consistent with the Commission's integrated approach to strengthen the recovery of the European economy as set out in the Europe 2020 Strategy for Growth[2].

2. POLITICAL MANDATE AND CONSULTATION OF INTERESTED PARTIES

2.1. Political mandate and existing instruments

The Stockholm Programme to deliver justice, freedom and security to citizens, adopted by the European Council in December 2009, states that "the European judicial area should serve to support economic activity in the Single Market". It therefore "invites the Commission to put forward appropriate proposals for improving the efficiency of enforcement of judgments in the EU regarding bank accounts and debtors' assets". The

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1 Terms marked with an asterix are defined in the Glossary of legal terms in Annex I.

2 At the European Council meeting on 26 March 2010, European Union leaders set out their plan for "Europe 2020", a strategy to enhance the competitiveness of the EU and to create more growth and jobs. http://ec.europa.eu/europe2020/index_en.htm

Commission Action Plan Implementing the Stockholm Programme[3] confirms this political mandate by referring to an initiative for a "Regulation on improving the efficiency of the enforcment of judgements in the European Union: the attachment of bank accounts" under the section on supporting economic activity.

The Commission already noted the difficulties of cross-border debt recovery in its 1998 Communication 'Towards Greater Efficiency in Obtaining and Enforcing Judgments in the European Union'[4]. In view of the diversity of Member States' legislation and the complexity of the subject, the Commission proposed to confine reflection initially to the problem of bank attachments. The Council endorsed this approach in its 2000 Programme of Mutual Recognition by calling upon the Commission to establish protective measures against the debtor's assets at European level and to improve the efficiency of enforcement of decisions in another Member State, i.a. by facilitating access to information about the debtor's assets[5].

Although much progress has been made towards the creation of a genuine European Area of Civil Justice since then, none of the existing legislative instruments creates a European provisional measure or covers the enforcement proper of decisions. Existing instruments in the area of civil justice, e.g. Regulation Brussels I[6], solely ensure that a judgment given in one Member State is recognised and *enforceable* in another Member State but they do not contain any provision on how the judgments are actually enforced. To date, the enforcement of a judgment or other enforceable title is exclusively governed by national law. This approach does not change with the proposed revision of Regulation Brussels I[7].

Existing European procedures - the European Small Claims Procedure[8] and the European order for payment procedure[9] – facilitate the task of the creditor to obtain a decision on the substance in a cross-border situation. They do not create a European procedure for obtaining a protective measure.

A previous attempt by the Commission to follow up on this political mandate by proposing several provisions on enforcement, including the creation of a preservation

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3 COM(2010) 171 final of 20.4.2010

4 OJ C 033, 31.1.1998, p. 3.

5 OJ. C 12, 15.1.2001, p. 1, 5 at point 2 (a) (iii),(iv) and p. 6 at point 2.

6 Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12 of 16.1.2001, p. 1.

7 Proposal for a Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), COM (2010) 748 final of 14.12.2010.

8 Regulation (EC) No 861/2007 establishing a European Small Claims Procedure, OJ L 199 of 31.7.2007.

9 Regulation (EC) No 1896/2006 creating a European order for payment procedure, OJ L 399 of 30.12.2006.

order, in the specific context of family maintenance was rejected by the Council on the grounds that these issues should be dealt with in a separate, horizontal legal instrument.[10]

2.2. Organisation and timing

The Commission's Work Programme for 2011 includes the adoption of a legislative proposal on improving the efficiency of the enforcement of judgments in the EU: cross-border debt recovery. It is a strategic initiative for which a road map was prepared (adoption foreseen in July 2011).

The Commission launched an external study to support the preparation of the Impact Assessment (hereinafter "the external study)[11]. The problems, objectives and policy options assessed in that study are based on the outcome of the consultation and the expertise brought together by the Commission to prepare the present initiative as well as contributions from the contractor.

This report also incorporates contributions submitted during two meetings of the inter-service steering group on 29 June 2010 and on 1 March 2011 in which representatives of Directorates-General Enterprise and Industry, Health and Consumer Affairs, Internal Market, Taxation and Customs, the Secretariat General and the Legal Service participated.

2.3. Impact Assessment Board

This Impact Assessment was reviewed by the Impact Assessment Board (IAB). The recommendations issued in the IAB's opinion have been accommodated in this revised version of the report. In particular, the following changes have been made: (i) the analysis of the problem has been strengthened by explaining better the stages of cross-border debt recovery and the problems remaining in this area after the revision of Regulation Brussels I, in particular the assumptions underlying the estimates of the economic effects of the measure have been clarified, (ii) the assessment of the baseline scenario has been expanded and the added value of the preferred option highlighted; (iii) the assessment of the impacts has been improved, in particular assessing further sub-options reflecting important elements of the legislative proposal, with specific focus on time-limits as proposed in the new initiative. (iv) Finally the legal concepts have been clarified and a glossary was added in Annex. The size of the document has been controlled as much as possible.

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[10] COM proposal for a Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, COM (2005) 649 final of 15 December 2005.

[11] CSES Centre for Strategy & Evaluation Services, Study for an Impact Assessment on a Draft Legislative Proposal on the Attachment of bank Accounts, Final Report of 5 January 2011.

2.4. Consultation and expertise

To better understand the *status quo*, the Commission commissioned a study on "Improving the enforcement of judicial decisions in the European Union: transparency of the debtor's assets, attachment of bank accounts; provisional enforcement and protective measures" submitted by Prof Burkhard Hess of the University of Heidelberg in February 2004 (and covering the then 15 Member States)[12].

On 24 October 2006, the Commission adopted a Green Paper on improving the efficiency of the enforcement of judgments in the EU: the attachment of bank accounts[13]. A total of 68 responses to the public consultation were received, the large majority of which supported the Commission's suggestion to create a European provisional measure for the preservation of bank accounts (for a summary of the replies to the Green Paper see Annex II).

Empirical data supporting the preparation of this impact assessment was collected by the external study finalised in January 2011. In the context of the external study, a meeting with 15 major financial institutions and the contractor took place in London on 15 June 2010. In addition, a survey of European companies on commercial disputes and cross-border debt recovery was launched via the European Business Test Panel (EBTP)[14], the results of which were published in August 2010.

A public hearing on facilitating cross-border debt recovery took place on 1 June 2010 and was attended by 84 participants representing ministries of justice, judicial authorities, law firms, bailiffs, academics, banks, businesses and citizens' groups. The hearing confirmed the results of the 2006 consultation that there was general support for the creation of a European procedure for the preservation of bank accounts (for a summary of the hearing see Annex IIIA).

In December 2010, the Commission set up a group of private experts from a variety of legal professions (judges, lawyers, bailiffs, banking in-house lawyers, academics) and representing the different legal traditions of the European Union to assist the Commission in its work on a legislative proposal in this area. The group met four times between February and April 2011.

Finally, the Commission held a meeting with national experts on a preliminary draft proposal for a regulation on facilitating cross-border debt recovery on 31 March 2011. While some details of the draft remained controversial, no delegation contested the need for and added value of the envisaged instrument (for a summary of the meeting see Annex IIIB).

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12 http://ec.europa.eu/civiljustice/publications/docs/enforcement_judicial_decisions_180204_en.pdf

13 SEC(2006) 618.

14 422 replies were received in total out of which 281 companies filled in the questionnaire completely. For the others, the topic was not relevant. For a summary, see Annex V.

2.5. Respect of Fundamental Rights

With the entry into force of the Treaty of Lisbon on 1 December 2009, the Charter of Fundamental Rights of the European Union ('the Charter')[15] has become legally binding[16]. This means that the EU's institutions as well as the Member States when implementing Union law have to respect the rights, observe the principles and promote the application of the Charter in accordance with their respective powers[17]. Any EU legislation must fully comply with the provisions of the Charter. For this reason, all legislative proposals proposed by the Commission are subject to a systematic and rigorous monitoring to ensure their compliance with the Charter[18]. When assessing the impact of the envisaged initiative to improve cross-border debt recovery, this report will pay particular attention to fundamental rights in order to ensure that the proposed schemes fully respect the rights and principles set out in the Charter. The main provisions affected by this initiative are the following: the right to an effective remedy (Article 47 subparagraph 1), the right to a fair trial (Article 47 subparagraph 2), the right to human dignity (Article 1), the right to property (Article 17), the right for family life (Article 7) and the right to data protection (Article 8).

Right to an effective remedy, Article 47 subparagraph 1 of the Charter

According to Article 47 subparagraph 1 of the Charter – which corresponds with Article 13 of the ECHR, everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal. In line with the case law of the European Court of Human Rights, the right to an effective remedy also includes the right of the creditor to recover his claim within a reasonable period of time and on the basis of efficient procedures[19].

Right to a fair trial, Article 47 subparagraph 2 of the Charter

The envisaged initiative must respect the fundamental rights of the debtor/defendant. Article 47 subparagraph 2 stipulates that everyone is entitled to a fair and public hearing. Inherent in this provision is the right of defence which includes – in the area of civil law -

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15 OJ 2010 C 83/02, 389ss.

16 Cf. Article 6 TEU.

17 Cf. Article 51 (1) of the Charter.

18 Communication from the Commission "Compliance with the Charter of Fundamental Rights in Commission legislative proposals. Methodology for systematic and rigorous monitoring" COM (2005) 172; Report on the practical operation of the methodology for a systematic and rigorous monitoring of compliance with the Charter of fundamental rights". COM(2009) 205.

19 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 Huissiers 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.

the right to be heard and the right to make known its views on the truth and relevance of the facts, objections and circumstances put forward by the other party[20].

Right to respect of human dignity, as enshrined in the Preamble and Article 1 of the Charter

Article 1 states that human dignity is inviolable. The envisaged initiative must respect the debtor and his/her family's dignity at all levels of the debt collection and enforcement procedures. This requires notably that the part of debtor's assets, which is necessary to cover the basic living expenses of him and his family are exempt from enforcement.[21]

Right to property, as enshrined in Article 17 of the Charter

Article 17 provides that everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. This includes claims which the creditor lawfully pursues against a debtor.

Protection of personal data, Article 8 of the Charter

Article 8(1) states that everyone has the right to the protection of personal data concerning him or her. The consequences flowing from this right are specified in Directive 95/46/EC on the protection of personal data in the European Union. The envisaged initiative will need to ensure that the requirements of the Directive on the processing and retention of personal data are complied with.

3. PROBLEM DEFINITION

3.1. The problem of cross-border debt recovery

3.1.1. Introduction

At present, a creditor seeking to recover his debt in another Member State faces significant difficulties. The causes of this problem are complex. They relate to the differences in national procedural law, diverging levels of efficiency of the organisation of justice, additional costs triggered by cross-border proceedings and linguistic barriers.

These difficulties arise both, in the context of a) proceedings on the merits* in which a court issues a final judgment on the basis of a full analysis of all factual and legal issues involved in the case, and b) proceedings for provisional measures* in which a court issues an interim decision such as an order preserving a bank account on the basis of a summary analysis of the case.

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[20] Commentary to the Charter of Fundamental Rights, p. 368.

[21] Council of Europe recommendation CM/Rec(2007)8 of the Committee of Ministers to member states on legal solutions to debt problems.

In line with the political mandate, this initiative focuses on facilitating to obtain provisional measures for preserving a debtor's assets and on improving the efficiency of enforcement of decisions in the European Union. It is limited to assets of the debtor located in bank accounts because these assets are generally the most efficient target of enforcement measures. In comparison to moveable or immoveable property, the value of assets in bank accounts can be easily determined and can be realised without a cumbersome sales procedure like a public auction.

3.1.2. The problem of obtaining provisional measures in cross-border cases

Provisional measures such as preservation orders can be of crucial importance in debt recovery proceedings because they enable a creditor to prevent the debtor from removing or dissipating his assets during the time it takes to obtain and enforce a judgment on the merits. While proceedings on the merits may take several years, provisional measures are usually issued within a matter of days or weeks.

However, a creditor seeking to obtain provisional measures to preserve assets of his debtor in a cross-border situation currently faces additional costs and delays compared to preserving assets in his own Member State. The creditor is also confronted with the fact that the conditions for issuing a provisional measure differ considerably throughout the EU. As a consequence, the question whether he is able to obtain a provisional measure in his case at all depends on the law of the Member State where the competent court is located. As a result, the creditor is often either not able to obtain a protective order or does not consider it worthwhile to try.

The problems of obtaining provisional measures preserving a debtor's assets in cross-border cases are particularly important with regard to assets in bank accounts. Currently, the internal market enables a debtor to move his funds from one bank account to another almost instantly, thereby making it easy for him to escape enforcement. A creditor, on the other hand, has little chance of blocking a debtor's bank accounts abroad to secure the payment of his claim with the same swiftness. Moreover, the creditor will often have difficulties to find out the whereabouts of his debtor's account; these difficulties are aggravated in cross-border situations. As a result, many creditors are either unable to successfully recover their claims abroad or do not consider it worthwhile pursuing them and write them off. The existing possibilities to obtain preservation orders under national law are currently comparatively little used by creditors for the reasons set out in Section 3.3. below.

3.2. Stages of cross-border debt recovery and current legal framework

The different stages of cross-border debt recovery can be described as follows.

3.2.1. *Provisional measures for the preservation of debtor's assets*

In many Member States, the creditor can apply for a provisional measure preserving his debtor's assets (or specific parts thereof) already prior to launching proceedings on the

merits. In all Member States, an application can be made in parallel with the initiation of such proceedings.

In most Member States, the creditor has a choice to go to the court which is competent for deciding the case on the merits or to the court at the place of enforcement, e.g. where the account is located. The jurisdiction of the court competent on the merits of the case is determined by European law, notably Regulation Brussels I and the Maintenance Regulation. Depending on the specific case in question, the competent court may be situated in the creditor's own Member State or in another Member State[22]. The two basic cross-border scenarios resulting from the jurisdiction rules are illustrated in Figure A1 and A2. It should be noted that a case can also involve three or four different Member States. Thus, the creditor, competent court, debtor and the account to be preserved could all be located in different Member States.

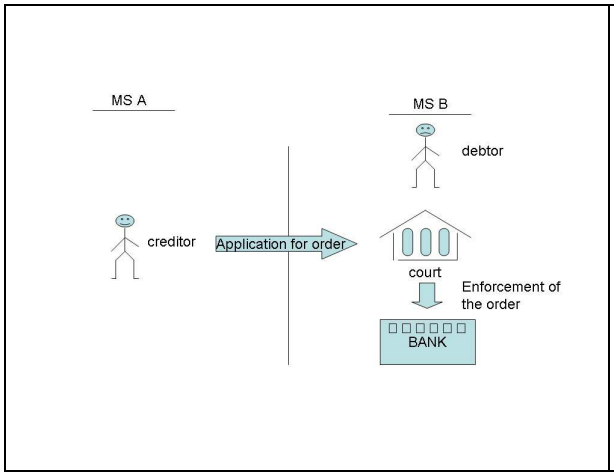

Figure A1

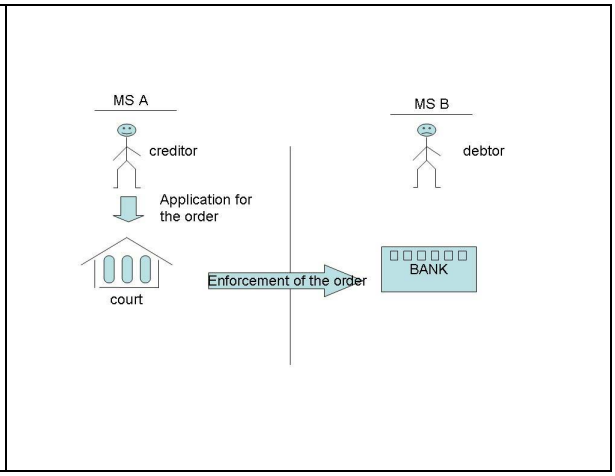

Figure A2

Once a provisional measure has been issued by the court, it will need to be enforced to actually produce the desired effect. If the provisional measure has to be enforced in another Member State than the one where it was issued (i.e. in the scenario set out in Figure A2), the creditor needs to have the decision declared enforceable there (in the so-called *exequatur* procedure). Under the current Regulation Brussels I, *exequatur* can be obtained for provisional measures issued in another Member State, except if they have been issued without a hearing of the debtor (so called *ex parte* orders). This means that at present, a preservation order which has been issued without notifying (and thereby warning) the debtor that his account will be blocked is not recognized and enforced in another Member State under the existing EU instruments.

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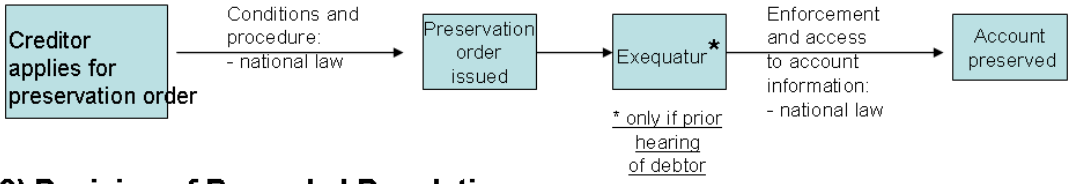
22 As a general rule, the court at the defendant's domicile has jurisdiction* although in many situations, the claimant can alternatively go to another court, e.g. at the place where the goods have been delivered or at the place where the damage occurred. If parties have concluded a choice of court agreement – which is frequent in commercial cases – the chosen court will have jurisdiction. Special rules apply for consumers and maintenance creditors which are generally entitled to sue in their own Member State.

With the revision of the Brussels I Regulation, if adopted as proposed, the current situation will improve in two respects: First, the requirement of exequatur will be abolished, i.e. decisions given in one Member State will be automatically enforceable in another Member State without the need for any intermediate procedure. Second, this regime will also apply to *ex parte* orders which were issued by the court competent on the merits.

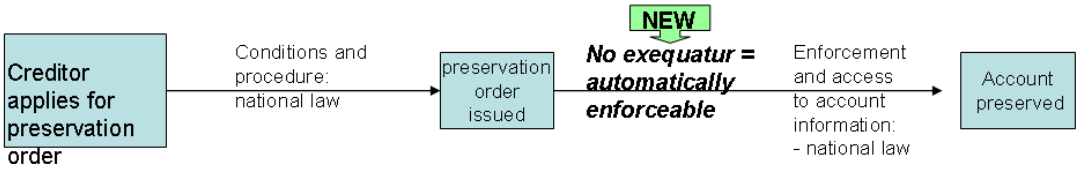
While the *enforceability* of preservation orders will therefore be fully ensured under the revised Brussels I Regulation, their enforcement will remain governed exclusively by national law. In practice, the creditor has to apply to the competent authority of the Member State where the assets are located to take the specific steps necessary under national law for the enforcement of the provisional measure. A provisional order preserving a debtor's bank account is enforced by serving it on the bank in accordance with national law. Differences in national law exist in respect of the details of procedure (see below Section 3.3.4.). National law also diverges as to whether and from whom the creditor can obtain information about the whereabouts of his debtor's bank account (see below section 3.3.2.).

The different stages of obtaining and enforcing a preservation order and the impact of the revision of Regulation Brussels I and the proposed initiative on that process are illustrated in Figure B:

1) Current legal situation:



2) Revision of Brussels I Regulation:



3) Proposed initiative:

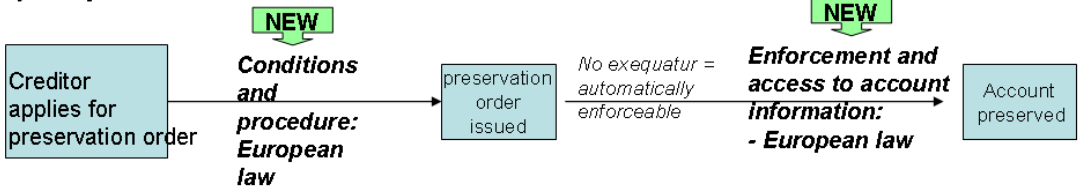


Figure B

Even when the exequatur will be abolished, there still remains the request of hearing the debtor under Regulation Brussels I if the national law or the judge so requires. So the surprise effect will not always be achieved. According to the current initiative it will possible to proceed to the enforcement without hearing the debtor. It is in many cases vitally important to have this surprise element to prevent the debtor from hiding the assets. This makes the current initiative an effective tool for the claimant in difficult cases. At the same time there has to be legal protection for the debtor, too. The balance between efficiency and legal protection will be safequarded in the current initiative by 1) security provided by the claimant, 2) the responsibility of the claimant to initiate the proceedings on the substance in timelimit, 3) right of the debtor to provide alternative security and 4) the liability of the claimant to provide the defendant appropriate compensation for any injury caused by the order.

Another essential difference between the revised Regulation Brussels I and the initiative on preservation order is, that the latter would enable minimum access to information of the bank account. The Member States should ensure that certain minimum methods of disclosure will available under their national law.

Third main difference between revised Regulation Brussels I and the current initiative is that the latter provides an uniform and self standing European court and enforcement procedure. There would be provisions e.g. concerning the application, taking of evidence, the preservation of several or joint accounts, immunities on bank account attachment, amounts exempt from enforcement and serving the documents. This would be the first time to have common Union provisions on enforcement.

In addition the current initiative would be "target specific": In practice bank accounts are priority targets for preservation orders because of their high net value (no need for a realisation of assets). The problem is the easy transferability of funds on bank account. At the same time, legal protection of the debtor is important because the monies on bank accounts are often essential to ensure the livelihood of private persons and are of vital importance for businesses. Therefore a general regulation on precautionary measures that would be applicable to all kinds of assets would not operate in best possible way when preserving bank accounts, and there is need for an instrument which takes into account the special nature of bank accounts as an object for preservation orders.

3.2.2. Proceedings on the merits

A preservation order will have only the effect of blocking the money in the account pending the outcome of proceedings on the merits. The creditor will be able to actually get the money only by obtaining a judgment on the merits or other enforceable title. The stages of proceedings on the merits largely correspond to those outlined above for provisional measures with the notable difference that proceedings on the merits can only

be started in the court with jurisdiction on the merits and not, in principle, at the place of enforcement[23].

It should be noted that if the claimant seeks to recover a small[24] or potentially uncontested claim, he can make use of existing self-standing European procedures on the merits which allow him to recover these types of claims in a swift, simple and comparatively low cost procedure. The existence of these procedures might reduce the need for protective measures like preservation orders because a judgment on the merits can be obtained relatively quickly. This is particularly true in those Member States where the European payment order is issued in an automated procedure. In general, however, it will be quicker to obtain a provisional measure than a decision on the merits. The claimant would also be able to apply jointly for a Small Claims or Payment order procedure and a preservation order.

3.3. The causes of the current problem

3.3.1. Problem 1: Conditions for issuing preservation orders vary throughout the EU

The conditions required under national law for obtaining provisional measures vary considerably under national law.[25] This makes it more difficult for creditors to obtain a preservation order in some Member States than in others.

Differences relate for example to the level of proof required by the court to issue the order. For example, in the Netherlands, a preservation order can be obtained within a matter of hours on the basis of an application filed by a lawyer, accompanied by an invoice, stating that the creditor has a claim and that there is a risk of dissipation of assets. On the other hand, in the United Kingdom, a preservation order is only issued if the creditor submits sufficient evidence, e.g. an affidavit by a witness, satisfying the court that his case has a good, although not necessarily certain prospect of success.

Differences also relate to the specific conditions in which a preservation order is granted. In most Member States, the creditor must demonstrate that there is a serious risk that if the preservation order is not issued, the ultimate enforcement of the judgment will be rendered impossible. However, this criterion is applied differently in the Member States. In some countries, e.g. Spain, it is handled very restrictively meaning that the creditor generally has to show that the debtor is on the verge of insolvency and to explain why the proposed preservation order is indispensible at that specific stage. Even more restrictively, in Germany and Austria, the existence of competing creditors and the risk of the debtor becoming insolvent do not suffice to justify a preservation order[26]. In contrast,

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23 However, in certain cases jurisdiction on the merits lies with the courts in the Member State of enforcement, cf Article 22 (5) Regulation Brussels I.

24 Up to €2.000.

25 Hess study on improving the efficiency of the enforcement of judgments in the European Union, p. 128ss.

26 Hess study, precit, p. 129.

in France, Belgium and Luxembourg, it is generally sufficient to show that the debtor is somehow in financial difficulties.[27]

Finally, differences exist with respect to the possibility to obtain a preservation order without a prior hearing of the debtor. This can be essential to safeguard the surprise effect of the measure since a recalcitrant or fraudulent debtor which has been warned that a preservation of his bank accounts is imminent is likely to move his money elsewhere. In some Member States (such as Spain, Portugal, Greece) the conditions for issuing the order are particularly restrictive with respect to the possibility to obtain a preservation order *ex parte* and it is generally very difficult to convince the judge to waive notice to the debtor. In contrast, in Austria, France, Luxemburg and the Netherlands provisional measures are regularly granted ex parte[28].

Annex IV provides an overview of the differences relating to the conditions for issuing a preservation order in the Member States.

As a result, the possibility to obtain a preservation order in a given case or to obtain it without prior notice to the debtor varies considerably throughout the EU. This problem is illustrated in case studies No 1a and 1b (see section 3.5., commercial case, paragraph on Spain) but is equally relevant for consumers and maintenance creditors. This problem is not addressed by any of the existing Union instruments.

3.3.2. Problem 2: Difficulties to obtain information on debtor's bank account in some Member States

A second problem relates to the fact that the rules on the transparency of a debtor's assets vary considerably throughout the European Union[29] and that in many Member States (such as Belgium, Germany, France, United Kingdom, Italy, the Netherlands) it is difficult, if not impossible, for a creditor to obtain information about the whereabouts of his debtor's bank account if he does not have that information. However, in most jurisdictions[30] the creditor needs to have this information in order to be able to apply for a preservation order. The reason for this lack of transparency is that in many Member States, there is no central register of bank accounts or other register containing the relevant information (e.g. a tax register) which would be accessible to either the creditor or the enforcement authorities[31]. It is also not possible to obtain an order obliging the banks domiciled in these Member State to disclose whether the debtor holds an account

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27 Hess study, precit., p. 129.

28 Hess study, precit, p. 130.

29 See Hess study on making more efficient the enforcement of judgments in the European Union, p. 20 ss.

30 With the exception of the common law countries (UK, IRL, CY) where the preservation order is directed against the person of the debtor himself and not against specific bank accounts.

31 This is the case in the Scandinavian countries where the enforcement authorities have access to the tax registers, thus being almost in all cases able to trace a debtor's bank account if the creditor does not have that information.

with them[32]. Furthermore costs of banks and bailiffs are not sufficiently transparent in a cross-border context. This has a deterrent effect on creditors seeking to secure their claim abroad.

Consequently, the creditor has to turn to private investigation agencies in order to find out about debtor's bank account. These services are not only costly without offering a guarantee of success because the agencies depend themselves on the information that they have previously collected or which is publicly available. This problem is particularly relevant for citizens trying to recover a maintenance claim abroad and consumers having encountered problems in e-commerce because account information is usually not exchanged in these transactions. In a commercial context, the letterhead of the other party will usually indicate at least one bank account. However, the need to trace the bank account of a business partner will arise in situations where such information was not contained in previous correspondence or the "official" bank accounts turn out to be empty. This problem is demonstrated in case studies No 1a, 1b and No 2 (see section 3.5.).

In the area of family maintenance, the problem of access to information is already to some extent addressed by the Maintenance Regulation which establishes a system of administrative assistance to creditors by central authorities which are granted access to information held by public authorities[33]. Outside the scope of family maintenance, however, this issue is not addressed by any existing Union instrument.

3.3.3. Problem 3: Costs of obtaining a preservation order are higher in cross-border cases

Finally, the costs of obtaining and enforcing a preservation order in a cross-border situation are generally higher than in domestic cases. The revision of Regulation Brussels I, if adopted, will reduce the fees of cross-border litigation by abolishing the need to obtain a declaration of enforceability for a court decision issued in another Member State. This reform will save creditors about €2.000 in legal fees (court fees, lawyers' fees and fees for service of documents) on an EU average[34]. However, cross-border cases currently trigger additional legal costs above and beyond the costs of the exequatur procedure. This concerns in the first place costs of lawyers but concerns also costs of the translation of documents or the costs for serving documents across borders.

- The need to involve an additional lawyer

If proceedings take place in a Member State other than the creditor's domicile, the creditor will need a lawyer licensed to practice in the foreign jurisdiction to represent him

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32 This is the case e.g. in Spain.

33 Cf Article 61 of Regulation (EC) No 4/2009 on jurisdiction, applicable law and the recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L 7, 10.1.2009, p. 1.

34 Cf Impact Assessment accompanying the proposal for a regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast) of 14.12.2010.

before the court. In most Member States, it is not obligatory to be represented by a lawyer in proceedings for provisional or protective measures. Neverthelesss, the creditor will usually seek legal advice in order to determine whether his case has sufficient prospect of success and which pieces of evidence he would need to provide to the court to obtain a preservation order.

At present, it will generally be advisable for a creditor to be represented by a lawyer licensed to practice in the country where proceedings take place because the differences in the conditions and procedure for issuing preservation orders under national law are so significant that a foreign lawyer would not be sufficiently familiar with them. The creditor will usually not contact the foreign lawyer directly himself but charge his local lawyer or in house legal counsel with the task to identify a competent colleague abroad and to supervise and liaise with him on this particular case. Consequently, cross-border litigation increases the bill of lawyers' fees in comparison to domestic cases because of the need to involve one lawyer per jurisdiction. Even if the competent court is situated in the creditor's own Member State, he will still need to engage foreign lawyers in order to deal with the enforcement of the subsequent judgment abroad.

The problem of lawyers' fees is illustrated in case studies 1a and 1b and 3 (see section 3.5.). The situation is aggravated in situations (as illustrated in case study 1b) where a creditor seeks to obtain preservation orders simultaneously against several defaulting debtors located in different Member States.

- Translation costs

Costs of translation and the costs of service of documents abroad add to the bill. Currently, all documents have to be translated into the official language of the Member State where the court proceedings take place; often large amounts of supporting documents need to be translated. The same is true for the preservation order and any accompanying documents (such as a transcript of a hearing) which have to be served on the bank and the defendant in a language which they understand. The envisaged initiative does not purport to eliminate these costs but can contribute to reducing them (see below section 7.2. b).

3.3.4. Problem 4: Differences in national enforcement systems and length of enforcement procedures in Member States

Finally, in practice, delays in enforcement procedures and divergences in national enforcement systems constitute a serious problem for creditors seeking to enforce a judicial decision like a preservation order.

The speed of enforcement is particularly relevant for provisional and protective measures the effectiveness of which by definition depends on a swift implementation. There is no specific data on the time it takes to enforce provisional measures. The Council of Europe collected data on the time for enforcement of final judgments and part of this data may

give indications as regards the enforcement of provisional measures[35]. This concerns in particular the data on the time for service of documents which varies considerably within the Member States. The table below shows that even on a domestic level it can take significant time to serve a document. In cross-border situations, delays will generally be even longer:

Timeframe for notification of a court decision on debt recovery to a person living in the city where the court is sitting[36]

Between 1 and 5 days: Austria**,** Estonia, Luxembourg
Between 6 and 10 days: Finland, France, Hungary, Latvia, Lithuania
Between 11 and 30 days: Bulgaria, Ireland, Netherlands, Poland, Slovakia, Spain, Sweden
More than 30 days: Czech Republic, Greece

Differences in national enforcement systems also cause problems for creditors in cross-border situations which result in additional delays for enforcement or even inexecution of judicial decisions. One key difference relates to the authorities which are competent for enforcement in the Member States[37]. In some Member States, enforcement is carried out by bailiffs acting outside the court system[38], in others this is done by the court[39] or by a central administrative agency[40]. A creditor coming from a country with one system of enforcement, will have difficulties to find out who he has to address if wanting to enforce in a Member State with another system. In cross-border situations, frictions between systems frequently occur in practice with the result that e.g. service of a preservation order on a bank in a different Member State is delayed or that a foreign order is not implemented because the recipient bank considers that it has not been properly served[41].

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35 Existing data from the Council of Europe relating to national enforcement procedures relate to the definitive enforcement of a judgment. The figures cannot be transposed fully to the enforcement of a provisional measure like the preservation of a bank account because the procedural steps necessary to enforce such a measure are considerably reduced compared, e.g. to the enforcement against immoveable property which has to be sold in a public auction. It is also not clear from the data to what extent the delays are caused by enforcement against debtors in insolvency proceedings where funds can only be distributed to the creditors once the insolvency administrator has determined all claims against the debtor, if necessary by conducting court proceedings.

36 Council of Europe, European Commission for the efficiency of Justice (CEPEJ), European Judicial Systems, edition 2010, Table 13.17.

37 See the comparative analysis of national reports by B. Hess in Andenas/Hess/Oberhammer, Enforcement agency practice in Europe, 2005, p. 31ss.

38 This is the case in France, Belgium, Luxemburg, the Netherlands, Portugal, Scotland and many Eastern European countries.

39 This is the case e.g. in Austria, Spain and Denmark.

40 Sweden and Finland.

41 Examples given by the members of the expert group in oral discussion.

Differences also exist as to who is responsible for serving the order on the bank (the creditor or the issuing court), how much time the bank has to implement the order, how and when the creditor is informed that the order has actually caught funds and how long the order remains in force.

3.3.5. Reasons for suboptimal use of preservation orders in cross-border disputes

To date creditors are less enclined to seek a preservation order in another country than in their own country. The following factors contributing to the smaller number of preservation orders used in cross-border disputes vs. domesting disputes have been identified as follows, as well as their relative contribution to the problem.

Table: Reasons for suboptimal number of preservation orders in cross-border disputes

Factors	Contribution to the problem (order of magnitude)
1. Barriers/costs/delays addressed by the revision of Regulation Brussels I such as those related to exequatur	+ (only part of the problem since the general revision of Regulation Brussels I cannot address the specific issue of a cross-border preservation order)
2. Problems/costs/delays being addressed by this initiative (varying conditions, lacking information on debtor's assets, length etc, including the problem of poor awareness to be addressed by information campaigns)	+++ (major contribution as remaining obstacles can only be addressed efficently by a specific instrument)

This table shows that the revised Regulation Brussels I will improve the current situation only to a limited extent, since as a general measurethe Regulation Brussels is not designed to address this specific issue) and that this initiative will add a noteworthy benefit on top of the effects of the revised Regulation Brussels I. Even with the current initiative, there may remain certain factors still making the use of preservation orders in cross-border disputes somewhat more burdensome than domestic ones, such as costs related to actual recovery, but these are only marginal.

3.4. Scale of the problem

3.4.1. Who is affected?

Problems of cross-border debt recovery affect in the first place businesses which are trading or providing services in other Member States. It is particularly relevant for SMEs which generally have limited financial resources and are less likely to have recourse to the available commercial options for reducing the risk of non-payment like credit

insurance or factoring. The problem is also relevant for companies currently not engaged in cross-border trade to the extent they are put off from doing so by the difficulties of debt recovery abroad.

The problem concerns also, albeit to a lesser extent, consumers ordering goods or services from abroad if payment was made in advance but the goods were not delivered or services were not supplied according to the contract.

Finally, the problem affects individuals having to pursue claims for family maintenance from a debtor, e.g. a parent or former spouse, domiciled in another Member State.

3.4.2. Companies

According to the 2010 Intrum Justitia European Payment Index (EPI)[42] there has been an increasing tendency for businesses to write-off bad debts in Europe. It is estimated that on average, 2.6% of the annual turnover of European companies is written off[43]. Applied to the volume of intra EU trade, this means that more than €55bn of cross-border debt is annually written off by European companies[44].

The major part of the written-off this debt is not recoverable at all – e.g. because the debtor is bankrupt, the debt has not a good ranking as compared to other creditors or the creditor loses his case on the merits. A further part of it can be recovered by execution against moveable or immoveable goods rather than against bank accounts – e.g. in case of machinery sold under retention of title. From the amount of bad debt that is in principle recoverable from bank accounts, only part can be secured by preservation orders because the conditions for obtaining a preservation order will not be fulfilled in all circumstances. Finally, only part of the amount secured by a preservation order will be recovered in the end, e.g. because the creditor may lose the case on the merits or because the debtor successfully managed to contest the measure. Figure C illustrates the interrelation between these different categories of debt but does not purport to reflect the actual size of these categories. The amount of cross-border bad debt that can potentially be secured can be estimated at between €1.12 and €2bn, as it will be presented below in more detail.

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42 *2010 Intrum Justitia European Payment Index* (page 6). Intrum Justitia is a credit management services company with 3.400 employees serving over 90.000 clients in 22 European countries. The 2010 survey obtained responses from 6.000 businesses in 25 European countries. The percentages relating to written-off amounts are calculated as a percentage of turnover. According to the 2010 report, the average level of write-offs is generally above 3% in the newer EU Member States and below this in the older Member States.

43 CSES study, p.25. It should be noted, that the figure of 2,6% covers both domestic and cross-border bad debt. There seems to be no data available relating only to the recovery of cross-border debt. There is qualitative evidence that the ratio of bad debt is higher in cross-border than in domestic cases because of the difficulties causing problems for recovering debts in another Member State (outlined above at point 3.3). However, on the basis of the existing data it is not possible to quantify this difference.

44 For details see Annex VII.

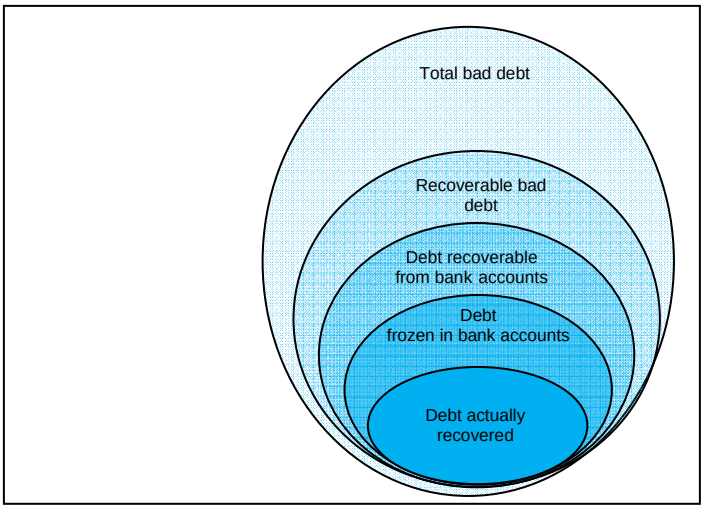

Figure C

At present based on the EBTP survey, it can be estimated that around 20% of the 5 Mio companies engaged in the Single Market have been involved in a commercial disputes of cross-border nature[45]. This creates a potential of 1 million businesses appearing thus to have problems in cross-border payments and debts. Relatively few make use of the possibility to apply for a provisional measure preservation their debtor's bank accounts in cross-border situations. According to the EBTP survey, only 11,6% of companies engaged in cross-border trade have applied for a preservation order to secure payment of a cross-border claim as opposed to 19,2% which have made use of this possibility in a domestic context[46]. In about half of the cross-border applications (53.3%), the order was actually granted[47]. This success rate is significantly lower than for applications in domestic cases (almost 65%). Evidence from the European Business Test Panel suggest that if the procedure for obtaining a preservation order was made easier, this type of procedure would be used much more often[48].

According to sample data from 13 European financial institutions, the average amount of a cross-border preservation order is about €20.000[49].

On the basis of the figures set out above, the amount of debt which can be secured per year can be estimated at just over € 1,2 bn[50]. As a result of the revision of Regulation Brussels I, it is estimated that the number of companies taking advantage of preservation

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45 EBTP survey question 10a.

46 EBTP survey question 17.

47 EBTP survey, question 19b.

48 EBTP survey question 23

49 CSES study, Chapter 4.2.2 page 54, 55 on the basis of sample data from 13 European financial institutions.

50 11.6% x 1 Mio companies experiencing cross-border dispute, i.e. 116.000 companies having applied bank attachment; 61.828 companies obtained a bank attachment covering a total of € 1,236 bn.

orders in a cross border situation would increase to some extent, leading to the increase of the debt preserved in the order of magnitude of 10%. If the current legal framework for obtaining and enforcing preservation orders in a cross-border situation were significantly improved, the proportion of companies resorting to this remedy in cross-border situations (initially 11,6 %) could further increase and potentially over time reach the one using it in domestic situations (i.e. 19,2%). This would represent additional 65,5 % of recoverable debt. For the purposes of scale-up estimates, this figure was narrowed at 60% from which further 10% have been deducted as the already positive impact expected from the revision of Regulation Brussels I. On this basis, the maximum probable amount of cross-border debt not being currently recovered due to the problems being addressed could be estimated to be around 50% higher - in addition to the 10% gain from the revised Regulation Brussels I - at almost €2bn – i.e. €1,2 bn + €0,12 bn (10% in relation to Regulation Brussels I) + €0,6 bn (50% in relation to the current initiative).

A calculation based on an upscale of the sample data from 13 European banks leads to a result of similar scale. However, when analysing these figures it has to be borne in mind that the banks were not able to provide exact data on the number and value of cross-border bank attachments but merely estimated that the proportion of these attachments would amount to about 1% of all attachments. On this basis, it has been estimated that there are about 34.000 cross-border bank attachments per year amounting to a total of €679 Mio [51]. As a result of the revised Regulation Brussels I this number will increase to some extent, leading to the increase of the debt preserved by about 10%. Following the same reasoning as above, on the basis of these figures, the maximum probable amount of cross-border debt not being recovered due to the problems being addressed can be estimated at about €1.12 bn[52]- i.e. €679 Mio + €68 Mio (10% in relation to Regulation Brussels I) + €373 Mio (50% in relation to the current initiative)

3.4.3. Consumers

According to recent Eurobarometer surveys, consumers are still reluctant to shop cross-border. Today only 20% of European citizens order goods or services from abroad; only 8% undertake cross-border e-commerce. 14% of consumers shopping at a distance encountered problems with the transaction[53]. About three-quarters of those complained to the seller or service provider, but only half of those whose request was not satisfied, took further action. A major concern of consumers is that their rights will not be sufficiently protected if a problem arises. Over half of them consider that it is difficult to access civil

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51 CSES study, p. 57.

52 It is difficult to determine which estimate is more accurate. In the EBTP survey, certain questions were only answered by relatively few companies which means that one or two companies can create disproportionate variation. At the same time, the estimate of 1% cross-border attachments by the banks could be equally inaccurate given that banks do not identify cross-border situations in their statistics.

53 2009 Eurobarometer survey; CSES study Data collection and impact analysis – Certain aspects of a possible revision of regulation 44/2001 (to be published), p. 128 ss; see also the 2011 Eurobarometer survey on consumer empowerment.

justice in another EU Member State and one in two thinks that the EU should adopt additional measures to help them for this purposes. This situation will improve somewhat due to the revision of Regulation Brussels I.

3.4.4. Maintenance creditors

On the basis of an estimated 4 million households with children and a parent who is a citizen from another EU Member State, a divorce rate of 40% and average marriage duration of 12 years, the number of maintenance claims in a given year has been estimated to be around 134.000[54]. On the assumption that 50% of claims are not settled, and therefore can potentially be subject to legal action, the number of 'problematic' cross-border maintenance claims could be up to 67.000. Assuming that the average net annual earnings of a spouse in the EU27 is around €20.000 per year, the average size of a maintenance claim, estimated at 20% of earnings[55], would be around €4.000 per year. Thus, the monetary value of 'problematic' cross-border maintenance claims can be estimated to amount up to €268 million per year. However a considerable part of this amount will not need be preserved because it is directly enforced.

The situation for maintenance creditors will improve to some extent due to the Maintenance Regulation which replaces Regulation Brussels I in this specific field.

3.5. Illustration of the problems

The following case studies are based on the assumption that the revision of Regulation Brussels I is adopted as proposed by the Commission, i.e. that the *exequatur* procedure has been abolished for judgments in civil and commercial areas with few exceptions[56] and that provisional measures issued by the court competent on the merits in one Member State are automatically enforceable throughout the EU even if they have been issued without a prior hearing of the debtor.

3.5.1. Companies

Case Study 1a: Basic Commercial Case

A Belgium-based SME negotiates to supply a German discounter with €20000 worth of goods. Some time after the contract is signed and the Belgian company has started

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54 Commission Impact Assessment accompanying the proposal on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations of 15.12. 2005, SEC (2005) 1629 p. 9., data updated EUR27, 2010.

55 Commission Impact Assessment accompanying the proposal on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations of 15.12. 2005, SEC (2005) 1629 p. 9., data updated EUR27, 2010.

56 The revision of Regulation Brussels I does not abolish exequatur in defamation and collective redress cases; moreover the proposals for Regulations on jurisdiction, applicable law and the recognition and enforcement of successions and matrimonial property regimes respectively do not propose the abolition of exequatur in these areas.

delivery, the German discounter falls behind with payment. After numerous fruitless contacts with the German client, the Belgian company decides to try to obtain a court order preserving the debtor' bank accounts for the amount of the invoice, in view of securing further payment.

According to the rules of Regulation Brussels I, the Belgian company is obliged to go to court in Germany. The company asks his lawyer to take contact with a German lawyer to help assemble the necessary evidence required by the German court, to support its application and to represent it.

In Germany, the creditor spends about €4.000 in legal fees[57]. The procedure leads to a preservation order being granted against the debtor.

In addition, the Belgian SME has to pay an amount to its Belgian lawyer which has been charged with preparing the evidence, identifying the foreign lawyer, liaising with him throughout the procedure, coordinating the evidence to be submitted in the proceedings. The bill from its Belgian lawyer amounts to about €2.000. Eventually the preservation order is granted by the German court. It can be implemented to the debtor's bank account and notified afterwards to the debtor. Following discussions with his bank and the creditor, the debtor decides to pay the debt in view of suspending the effect of the preservation order. As an alternative, the debtor may decide not to pay. Following the final judgment on the merits the creditor will need additional lawyers for the enforcement part. The case study does not distinguish the costs of lawyers for the preservation order and the enforcement phase which is outside of the scope of the proposed instrument.

Overall, the Belgian SME had to invest more than €6.000 to be able to block €20.000 pending the outcome of proceedings on the substance. If the SME has no sufficient cash flow to cover costs of proceedings – as a rule lawyer's fees are to be partly paid in advance and legal aid schemes are not applicable to legal persons- eventually it will decide not to sue its claim further.

Case Study 1b: Complex Commercial Case

A French-based SME negotiates to supply a German-headquartered multinational with a total €600000 worth of goods. The German company wishes delivery to be made to its subsidiaries in UK, Spain and Holland and therefore contracts are entered into directly between the French company and the UK, Spanish and Dutch subsidiaries specifying equal deliveries for € 200.000 respectively in ten tranches of €20.000 in each of those countries. Since the French company as an SME has limited market power, it is not able to impose its standard choice of court agreement in favour of French courts on its

[57] For a detailed explanation of the costs involved, see Annex VI.

business partners. Instead, it was agreed to leave this question to be determined by the rules of Regulation Brussels I.

Some time after the contracts are signed and the French company has started deliveries, the three subsidiary companies fall behind with payments for one of the tranches, i.e. for a total of 60.000. The French company then discovers that the German client and its subsidiaries have a habit of defaulting and avoiding judgments by transferring assets between related companies in different countries. In the course of its dealings it has become aware of the bank accounts of each of the subsidiaries in their respective countries. After numerous fruitless contacts with the German client and its subsidiaries, the French company decides to try to obtain court orders preserving the subsidiaries' bank accounts in order to ensure that any judgments it succeeds in eventually obtaining against them can be enforced and will not be rendered valueless by the disappearance of any assets.

Since according to the rules of Regulation Brussels I, jurisdiction lies with the courts at the place of delivery of the goods, the French company is obliged to go to courts in the UK, Spain and the Netherlands to obtain preservation orders over the respective bank accounts in each country. The company asks his lawyer to take contact with an English, Spanish and Dutch lawyer to help assemble the necessary evidence required by the courts in each country to support its application and to represent it.

In the UK, the creditor spends about 3.040 GBP (€3.580) in legal fees[58]. The procedure leads to a preservation order being granted against the UK subsidiary.

In Spain, the French SME invests €4.200 in legal fees to obtain a preservation order. However, in the course of the proceedings, it learns that on the basis of the evidence it can present to the court in its case, it is not possible to obtain a preservation order ex parte, i.e. without the Spanish company being heard prior to the order being issued. As a consequence, the Spanish subsidiary was warned of the attempts to block its accounts and emptied its account before the preservation order could be implemented. As a consequence, the SME is not able to recover €20.000 from the Spanish subsidiary.

In the Netherlands, the French SME pays about € 2.500 in, legal fees to obtain a preservation order against the bank account which was indicated on the letterhead of the Dutch subsidiary as well as on its homepage. However, it turns out that this account does not contain funds sufficient to cover the full amount of the order; the balance is at €5.000. The French SME suspects that the Dutch company has other accounts from which it manages its cash flow. However, it is unable to find out the details of these accounts. As a consequence, it is only able to block €5.000.

In addition to the costs incurred in each of the countries, the French SME has to pay a significant amount to its French lawyer which has been charged with preparing the

[58] For a detailed explanation of the costs involved, see Annex VI.

evidence, identifying the foreign lawyers, liaising with them throughout the procedure, coordinating the evidence to be submitted in the proceedings in the different Member States etc. The bill from its French lawyer amounts to about €5.000.

Overall, the French SME had to invest more than €15.000 to be able to block €25.000 pending the outcome of proceedings on the substance.

3.5.2. Consumers

Case Study 2: Consumer Case

Mr B living in Lille, France has ordered on the Internet – through a website registered in Belgium - various goods for a total amount of 500 Euros. The payment was made by credit card at the time of the order. The time of delivery of the goods announced on the website passes and he never received the goods. However, when Mr B checks his accounts statements, he discovers that the purchase price has been deducted from his credit card. Following unsuccessful e-mail reminders and attempts to contact the trader under the phone number indicated on the website, Mr B decides to go to court to get his money back. .

Since the claim is under 2.000€, Mr B follows the simplified European procedure for small claims[59]. He starts the procedure by filling in a standardized form (attaching all the relevant documentation) and lodging them to the competent French court[60]. There are no court fees payable in France for this procedure. There is no need for Mr B to be represented by a lawyer before the court. The trader does not defend himself in the proceedings and eventually a default judgment is issued.

Mr B, despite the benefits of the EU fast-track proceedings for small claims, when he wants to enforce his judgment in Belgium, he finds out that this procedure does not cover enforcement as such, which is a matter for national law. He contacts a bailiff and is told that a preservation order procedure was the most promising means to recover his monetary claim in his case but that he would need to identify where the debtor's bank account(s) are located. Moreover, he would have to pay a considerable amount in bailiff's fees for notifying the measure to the bank and the debtor as well as bank fees for implementing it. Mr B returns to the trader's website but no account information is provided there. The bailiff explains to him that different informal means of finding out the relevant information could be tested which would cost €20 per hour; he would need approximately 6 hours. Moreover, since the trader is domiciled in Antwerp, the documents from the French court would need to be translated into Flemish in order to apply for enforcement measures in that part of Belgium which costs between €20 and €30 per page. Overall, the procedure would cost Mr B more than the amount of the claim.

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[59] Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, OJ L 199, 31.7.2007, p. 1.

[60] Under Regulation Brussels I, consumers are entitled to sue a foreign seller of goods at home.

Given that he is not certain to get his €500 back from the trader, Mr B does not want "to throw good money after bad" and decides not to try to enforce his judgment through a preservation order in Belgium.

3.5.3. Maintenance creditors

Case Study 3: Matrimonial Case

Ms C living in Madrid, Spain separates from her partner who decides to return back to Italy where he originally came from. This leaves her in a difficult position because she is trying to bring up a child alone and without the necessary financial support.

After contacting her former partner many times asking for money to help cover the cost of bringing up the child, Ms C is advised by a lawyer to obtain a maintenance order. While proceedings are pending, she learns that her former partner is likely to move to Denmark to take up a job there and is advised by her lawyer to seek a preservation order to ensure that money is kept in her former partner's account in Italy pending the outcome of the maintenance proceedings in Spain.

Ms C returns to the court in Madrid and applies for a protective order. Given that Spanish law does not allow ex parte orders, Ms C's former partner is notified that an application has been made but he does not contest the case and the court rules in her favour. Ms C hires a lawyer in Italy to deal with the enforcement of the Madrid court's order. He also applies for a disclosure order of the maintenance debtor's bank accounts in Italy. This involves costs amounting to about €200 in court and bailiff fees and €600[61] in lawyer's fees. These costs represent a significant proportion of the outstanding amounts of maintenance of about €3.000 for which she obtained a preservation order.

At the time when the order preserving the account of her former partner is enforced in Italy her former partner has moved to Denmark. The bank where his account in held in Italy confirms that the balance has been transferred to another institution in Denmark. Having already incurred considerable costs in pursuing the case through the Italian courts, Ms A decides not to take the matter any further.

3.6. Need for action at EU level

3.6.1. Does the EU have the power to act?

According to Article 81 TFEU, the Union shall develop judicial cooperation in civil matters having cross-border implications. The European Parliament and the Council are entitled, particularly when necessary for the proper functioning of the internal market, to adopt measures aiming at ensuring i.a. the mutual recognition and enforcement of

[61] Legal costs may vary from € 100 to € 4000 depending on the amount claimed.

judgments between Member States (paragraf 2 lit a) and the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of rules on civil procedure applicable in the Member States (paragraf 2 lit f).

Any new European instrument on the preservation of bank accounts in cross-border situations would be a matter of recognition and enforcement of a judicial decision and as such be covered by paragraf 2 lit a) of Article 81. A European instrument in this area would also eliminate the obstacles to the proper functioning of civil proceedings in cross-border cases which are caused by the differences in national procedural laws, hence being covered by paragraf 2 lit f) of Article 81.

3.6.2. Subsidiarity

The problems outlined above (see section 3.3. above) have a clear cross-border dimension and they cannot be adequately attained by the Member States alone.

Although theoretically possible, it is highly unlikely that Member States would undertake a concerted action to align their legislation on the preservation of bank accounts which would make EU action unnecessary. The issue of enforcement has never been the subject of international agreements or model laws put forward by international organisations and there is no indication that an international initiative would materialise in the foreseeable future. Moreover, even if this were the case, the differences of the current enforcement systems in the EU make it highly unlikely that agreement on a common approach be reached between Member States within a reasonable time, notably given that any agreement outside the European legislative process would require unanimity.

4. OBJECTIVES

The overall objectives of the initiative are to contribute to the development of the EU's internal market and to the Europe 2020 Strategy for Growth[62] and to contribute to the creation of a genuine European area of civil justice in the area of enforcement.

The **general objectives** of this initiative are to:

- Facilitate the recovery of cross-border claims for citizens and businesses, particularly SMEs;

- Increase confidence of traders and improve payment morale of debtors in cross-border situations;

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62 At the European Council meeting on 26 March 2010, European Union leaders set out their plan for "Europe 2020", a strategy to enhance the competitiveness of the EU and to create more growth and jobs. http://ec.europa.eu/europe2020/index_en.htm

- Making it easier to recover cross-border debts, reduce the risks involved in cross-border trade and encourage more cross- border business activity;

- Improve the efficiency of enforcement of judgements in civil and commercial matters concerning cross-border disputes.

The **specific objective** is to increase effectiveness of the procedure for cross-border preservation orders for SMEs, consumers and individuals by:

– Enabling creditors to obtain preservation orders or attachments on the basis of the same conditions irrespective of the country where the competent court is located;

– Allowing creditors to obtain information on the whereabouts of their debtors' bank accounts;

– Reducing costs and delays for creditors seeking to obtain and enforce a preservation order in cross-border situations.

– Increase awareness of creditors and debtors that a European procedure is available

5. DESCRIPTION OF POLICY OPTIONS

Five main policy options have been defined in view of promoting the objectives outlined above. The analysis will focus at this stage only on the high level policy options, i.e. the respective merits of doing nothing, creating a self-standing European procedure or harmonising national law. Once the preferred high-level option is identified, further sub-options will be discussed.

5.1. Option A: Status quo after revision of Regulation Brussels I

Under this option, the Commission would not take any action in addition to the proposal for a revision of Regulation Brussels I adopted in December 2010[63]. **This option assumes that all changes proposed to Regulation Brussels I which are relevant in the context of this analysis will be enacted by the European legislator.** This means that under Option A, the current intermediate procedure required for rendering a court decision enforceable abroad (the so-called *exequatur* procedure) would be abolished and all court decisions given in one Member State would be automatically enforceable in another Member State. Moreover, the revision of Regulation Brussels I would make protective measures including preservation orders on bank accounts automatically enforceable in another Member State if they have been granted by a court having jurisdiction on the substance of the case. This is also the case for orders which are granted without a prior hearing of the debtor (*ex parte*), provided that the debtor has a possibility to challenge the order in the Member State of origin.

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63 COM (2010) 748 final of 14 December 2010.

Under this option, a creditor could apply for a preservation order either in the Member State where the court with jurisdiction of the substance is situated or in the Member State where the bank account to be preserved is located (see section 3.2. above for details on the different stages of the procedure). The conditions for issuing the preservation order and the procedure for enforcing it would be exclusively governed by national law. European law would determine which court has jurisdiction on the substance of the matter (and thereby also jurisdiction for issuing a preservation order) and ensure that a preservation order issued in one Member State would be automatically enforceable in another Member State.

5.2. Option B: Creation of a European Account Preservation Order

This option would create a new and self-standing European procedure with protective effect only which would be available to citizens and companies in addition to existing national procedures for provisional preservation orders. The creation of a self-standing European procedure would supplement existing remedies under national law without requiring EU Member States to modify their national law on civil procedure or their enforcement systems. The European procedure would regulate the procedure for issuing the preservation order as well as rules for its implementation by the bank holding the account targeted. In line with the approach taken in the large majority of Member States – albeit with differences in detail, the possible instrument would require the creditor to show that he has a good prospect of succeeding his case on the substance, i.e. that his claim is well-founded, and that there is the risk of dissipation of assets by the debtor if the measure is not granted. The European Order will provide measures enabling the creditor to disclose debtor's account.

5.3. Option B1: Bank attachment - Creation of a European Order for preservation of bank accounts combined with transfer of monies to the creditor

This option would provide for a protective order like option B but, in addition, contain rules providing for the transfer of the monies blocked to the creditor once a judgment on the merits has been issued by the competent court. This is already possible in some Member States were a previously granted preservation order is switched into a bank attachment under certain conditions that are set out by national law. For the protective part of the European Order, the same features as for option B would apply.

5.4. Option C: Harmonising national rules for the preservation of bank accounts

This option would harmonise the main elements of the national rules of civil procedure for the preservation of bank accounts in cross-border cases by way of a European directive. It would harmonise the main elements of the procedure for issuing and implementing the order – i.e the conditions for application, the delays, the minimum

information on the debtor's account required, the rules of evidence, the hearing of the debtor, the right of appeal, service of the order on the bank and the obligation of the bank to report whether it caught any funds. It would oblige the Member States to implement common European rules for the procedure issuing the preservation order and its implementation by the banks into their national legal systems. It would also oblige Member States to provide a mechanism allowing a creditor or the enforcement authorities to trace his debtor's bank accounts. It would be left for the Member States to decide whether to adopt the same rules for internal purposes or whether to have two parallel systems for the issue and implementation of preservation orders.

5.5. Option C1: Harmonisation of national rules for bank attachment, i.e. the preservation of bank accounts and for the transfer of funds to the creditor

As option C, this option would harmonise national rules in cross-border cases by way of a European directive. However, option C1 would go further than option C and cover (like option B1) both the granting of a protective preservation order and the transfer of funds from the preserved account to the creditor once a judgment on the merits has been issued by the competent court. It would be left for the Member States to decide whether to adopt the same rules for internal purposes or whether to have two parallel systems for the issue and implementation of preservation orders. For the protective part, the same features as for option C would apply.

6. DISCARDED POLICY OPTIONS

Option B1 (Bank attachment: Creation of a European Order for the preservation of bank accounts as well as for the transfer of funds to the creditor) and **option C1** (Harmonisation of national rules for the bank attachment, i.e the preservation of bank accounts and for the transfer of funds to the creditor) would both regulate not only the granting and enforcement of a preservation order but also the enforcement of the final judgment on the merits which would consist in transferring the funds blocked to the creditor.

Both options would further reduce the cost of cross-border debt recovery by facilitating the enforcement of the final judgment. To date, enforcement costs vary widely between Member States. This is due to different schemes of enforcement and different systems of professionals (for example independent bailiffs, court’s agents, State officers or Enforcement Authorities). There is no data on the specific costs of enforcement as this issue is not covered by the study and the proposed initiative.These options have nevertheless been discarded because they would cut too deeply into areas of national legal systems which have so far been left untouched by European law. A harmonisation of the rules for transferring the preserved assets to the creditor would interfere heavily with fundamental principles of national enforcement and insolvency law. This concerns in particular the treatment of competing creditors where significant differences exist between Member States. Some Member States have adopted a "first come first served" principle whereby the first creditor to block the account has priority over subsequent

creditors. Other Member States follow a "group principle" or collective distribution schemes which are more akin to insolvency proceedings and deny the priority of the first creditor. Matters are complicated by the fact that within these two main approaches individual differences exist, relating, for example to the event which determines the priority of the first creditor.

The harmonisation of these priority rules in the limited scope of an instrument on bank accounts would create costly and confusing friction between European and national rules. It also has to be borne in mind that this initiative constitutes the first inroad of European law into the domain of enforcement of decisions in civil and commercial matters which is to date governed exclusively by national law. In line with the approach of the 2000 Programme on Mutual Recognition, it was considered preferable to achieve progress in this area in stages[64] and to limit the reflection at this point in time to an instrument with provisional/protective effect only. The stage of final enforcement could be tackled once this initiative is successfully operating in practice.

This approach is confirmed by the results of the public consultation. Most of those who have been consulted consider that the eventual enforcement of any judgment given in the substantive proceedings should remain subject to national rules. Feedback from the key stakeholder survey also supported this view that any European procedure should be limited to being a protective order. As to the public hearing, although some participants suggested that with momentum having now been developed to bring about change, there was a 'window of opportunity' to also tackle the rules of enforcing final judgments, a large majority of participants argued that any European instrument should be limited to being a protective measure.

7. EVALUATION OF RETAINED POLICY OPTIONS AND IMPACT ASSESSMENT

7.1. Option A: Status Quo after revision of Regulation Brussels I

N.B. The assessment of this option assumes that the revision of Regulation Brussels I is adopted as proposed by the Commission.

(a) Objectives to achieve: Maintaining the status quo would have no effect on the four problems identified above (in section 3.3) and would not contribute to achieving the specific policy objectives outlined above (in section 4).

(b) Economic impact: Under the status quo, there are 60% more companies applying for provisional measures preserving a debtor's bank account in domestic than in cross-border cases[65]. This means that companies make less use of the possibility to secure payment of their debts by way of preservation orders in cross-border transactions than in domestic

[64] See p. 6/7 of the programme, OJ C 12 of 15.1.2001.

[65] See above section 3.4.2; difference between 11.6% of companies applying for a bank attachment cross-border and 19.2% applying for it domestically.

cases and, as a result, write off more cross-border than domestic debt. This amount can be quantified at between €441 Mio and €800 Mio[66]. The difficulties of cross-border debt recovery are putting off companies and consumers from making full use of the Single Market. According to the EBTP survey, about one third of businesses that currently do not sell goods or provide services in another Member State have not developed or stopped cross-border business because of potential or actual difficulties with cross-border debt recovery.[67] This affects particularly **SMEs** which are generally more reluctant to expand cross-border than big companies.

As a result of the revision of Regulation Brussels I, it is expected that the number of companies taking advantage of preservation orders in a cross border situation would increase to some extent, i.e. by 10% compared to current situation without the revision, leading to the increase of the debt preserved corresponding to estimated €68-120 Mio (see section 3.4.2).

(c) Fundamental rights: The Status quo would not contradict the requirements of the Charter of Fundamental Rights of the European Union since the Charter only requires Member States to respect the rights set out therein when they are implementing Union law and the process of enforcement of civil judgment is currently not covered by EU instruments. The conditions for processing personal data in the context of a preservation order issued under national law should already today comply with the requirements of Directive 95/46/EC on data protection.

(d) Views of stakeholders: There have been no requests from the stakeholders to keep only the status quo. Instead, there have been recent calls, like from the European parliament, for developing specific European instruments on securing assets for cross-border debt recovery.

7.2. Option B: European Account Preservation Order

(a) Objectives to achieve: Option B would further facilitate the recovery of cross-border claims by making it easier for the creditor to obtain a preservation order ensuring that assets of the debtor remain available for final enforcement once a judgment on the merits has been issued. As explained under section 3.4.2. the relative contribution of this option to the objectives would be an improvement of 50% compared to the current situation as weighted against to the contribution of the revised Regulation Brussels I which would bring an estimated improvement of 10% compared to the current situation. Therefore it will have a significant effect on top of the effect of the revised Regulation Brussels I.

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66 Range based on estimations presented in section 3.4. above on difference between the amounts currently and potentially secured by preservation orders: Estimate on the basis of sample of bank institutions was €1.12bn – €678 Mio making €440 Mio and the second estimate was €2 bn – €1.2 bn making €800 Mio.

67 EBTP survey question 1. Out of 107 companies not involved in cross-border commercial activities, 32 replied that this was due to potential or actual cross-border disputes or problems with debt recovery.

Option B would respond by solving the problems described in section 3.3. and address the major part of the specific policy objectives outlined above in section 4. The creation of a uniform European procedure would enable creditors to obtain preservation orders on the basis of the same conditions. This would overall make it easier for creditors to obtain a preservation order. While the conditions of issue of the European order would not be more advantageous to the creditor compared to all national systems, the creditor could continue to avail himselves of measures existing under national law which would be more advantageous to him. The creation of a European procedure would also allow the creditor to obtain information on the debtor's accounts, if necessary.

The existence of a uniform and simple procedure would also reduce the costs of obtaining and enforcing a preservation order against a debtor in another Member State by doing away with the need to hire one lawyer per jurisdiction. Depending on the specific features of the European procedure, it could also contribute to reducing delays in enforcing preservation orders. The European procedure could clarify who is responsible for serving the order on the bank and provide rules on time limits for the bank to implement the order, on information to the creditor that the order has actually caught funds and regulate how long the order remains in force, thus improving the current situation. Even if the initiative would not harmonise differences related to authorities that are competent for enforcment in the Member States, but it could improve the clarity by setting obligation to Member States to provide information available to public on their systems.

Option B would, however, not eliminate all costs and delays inherent in the process of debt recovery because the creditor would still incur certain costs and delays when enforcing his judgment on the merits under national law to actually obtain his money.

(b) Economic impact: Option B would generally enable or encourage more creditors to make use of the possibility to secure payment of their claims in cross-border dsituations and to ultimately recover their debt. The exact economic impact of option B would depend on the specific sub-options (outlined below in section 9), in particular relating to the conditions of issue and the time-limits for implementing the measure. In the best of cases, creditors would use the European procedure for cross-border cases as often as in domestic cases, thereby creating a potential of securing an additional 50% of cross-border commercial debt compared to the above status quo and an amount of between **€373 Mio and €600 Mio per year**[68]

Option B would also save legal costs mainly for SMEs which do not have an in-house lawyer. Since the conditions for issue and the procedure would be identical in all Member States, it would no longer be necessary to engage one lawyer per targeted country. In addition, the use of standard forms for the application, issue of the order and its transmission to the bank where the account is located would facilitate the task of the lawyer, thereby further reducing costs. Cost savings would very much depend on the

[68] For the current levels of cross-border debts secured by preservation orders and for the description of estimations see section 3.4 above.

circumstances of the case and are therefore difficult to quantify. Moreover, legal fees are not in all Member States determined on the basis of the time spent by the lawyer but can be determined on the basis of the amount in dispute[69]. With these caveats and on the basis of the savings set out in the case studies (below), it can be assumed that option B would allow claimants to save about 10h of legal fees per case. On an EU average, this would amount to about €2.410 per case[70].

Option B would not eliminate cost of translating documents for a creditor having to litigate in another Member State. However, the use of standard forms for the application, the issue of the preservation order and the communciation with the bank will reduce the cost of translation because these forms would be available in all official EU languages. Moreover, in the context of the Small Claims Procedure, Member States have agreed to accept documents in languages other than their official language which further reduces the cost of translation[71].

It is also likely that the mere existence of an effective enforcement measure will improve the payment behaviour of debtors, thereby making it unnecessary for the creditor to actually resort to the application of a preservation order. In this respect, option B would complement the incentives for punctual payment set by the Late Payment Directive[72] which entitles the creditor to an additional amount on top of his claim in case of late payment.

SMEs: Since SMEs have fewer resources to devote to litigation, resort less frequently to commercial intermediaries to secure themselves against non-payment by their clients and are consequently more likely to write their cross-border debts off, the impact of option B is likely to be more positive on SMEs engaged in cross-border trade than on larger firms. Similarly, option B might encourage more SMEs than larger firms to engage in cross border trade. According to the EBTP survey, 58% of the firms employing up to 250 people said they would be 'more likely' to engage in cross-border trade if bank attachment/preservation order rules are made easier. This compares with just 33% of firms employing more than 250 people who gave this answer.

The economic impact of option B on case studies No 1a and 1b (commercial cases) can be illustrated as follows:

Case 1a: Basic Commercial case (debtor's bank accounts in another Member State)

The Belgian SME would no longer need to hire two lawyers both in Belgium and in Germany where it tries to obtain a preservation order. Since the conditions for issue and

69 See Annex IV for details on national legal systems.

70 For details of lawyers' hourly fees in the EU see Annex VI.

71 Thus, e.g. France accepts five languages in addition to French in the context of the small claims procedure.

72 Directive 2011/7/EU on combating late payment in commercial transactions (recast). This Directive replaces Directive 2000/35/EU.

the procedure would be identical in all Member States and there would be a standard form for the application, the proceedings could be handled by the Company's lawyer or even by its in house legal counsel. The use of standard forms for the application, issue of the order and its transmission to the bank where the account is located would facilitate the task of the lawyer, thereby further reducing costs. The European procedure would lead to savings in foreign lawyers' fees of approximately €4.000. (lawyer's fee in Germany). Given the reduction in costs of proceedings, the SME would not hesitate to go to German courts. Eventually if it wins its case and the money is secured on the debtor's bank account, it will be able to recover its claim of €20.000 – either the debtor pays or a preservation order under German law is applied which requires additional lawyers for actual transfer of monies to the creditor. The case study does not evaluates the costs of lawyers for the enforcement phase which is outside of the scope of the proposed instrument.

Total benefits to the Belgian SME: €4.000 (lawyer's fees savings). It may well be the case that the Belgian SMEs would only now be encouraged to launch proceedings and recover its claim of €20.000

Case 1b: Complex Commercial case (debtor's bank accounts in several other Member States:

The French company would no longer need to hire a lawyer in each of the countries where it tries to obtain a preservation order. The European procedure would lead to savings in lawyers' fees of approximately €10.000 because instead of three foreign lawyers –whose fees are respectively €3.580, €4.200 and €2.500 and a coordinating lawyer (fees: €5.000 in France) only one lawyer (fees: €5.000) would be able to deal with the procedures in all three Member States. Most importantly, obtaining a speedy and efficient European Account Preservation Order would allow the creditor to secure part of the claims that it was not possible to recover under Status Quo – i.e. €20.000 in Spain and €15.000 in the Netherlands. At the time of enforcement of the final judgment, the creditor will be able to obtain the recovery of his secured claims amounting to €35.000.

Total benefits to the French company: €10.000 (lawyers' fees savings). Knowing that the money now will not disappear the French company would now be encouraged to launch proceedings and recover its claim of €60.000.

Similar benefits can be held for case study 3 (matrimonial case)

Legal professions: The impact of option B on lawyers and bailiffs (in those Member States where they are organised as liberal professions) depends on the development of the number of cases generating revenues. Some aspects of the proposed initiative - the creation of a uniform procedure reducing the need to engage foreign lawyers and the improvement of payment behaviour of debtors - would take away work and/or thereby revenue from legal professions. Other aspects – the facilitation of obtaining a preservation order and the increase in cross-border trade – would lead to more cases

being dealt with. On balance, a net increase in the number of cross-border cases can be expected.

For lawyers who currently generate part of their income from obtaining or enforcing preservation orders against domestic debtors for their foreign clients, option B is likely to entail a reduction in fees . The reduction in fees has been estimated at €17 Mio per year[73]. This amount represents, however, only 0.015% of the estimated €1.2 bn fee income of law firms specializing in cross-border commercial cases[74] and would therefore not have a significant negative impact on lawyers. Moreover, the reduction in fees per case is likely to be offset by the estimated increase in the overall volume of cases which would continue to be handled by lawyers. Bailiffs and enforcement officers would equally benefit from an overall increased in preservation orders in cross-border cases and the corresponding increase in revenues triggered by option B.

For both lawyers and bailiffs, this increase in revenues is likely to off-set the costs of having to familiarize themselves with the new procedure and of haing to handle national and the European procedure in parallel. Overall, option B would therefore entail a neutral or positive economic impact on these intermediaries.

(c) Impact on Member States: Since it would create an entirely new European procedure, option B would impose certain costs on Member States to familiarize their legal professionals (judges and – in court-based enforcement systems the court officers in charge of implementing it) with the new system. These costs would, however, be triggered in the short term only. Option B might also lead to an increase in applications for European Account Preservation Orders which would increase the workload of judges and court staff. It is difficult to quantify the costs which such an increase would trigger. However, part of these costs would be covered by a corresponding increase in court fee revenues; moreover it can be safely assumed that these costs are largely outweighed by the economic benefit of the measure identified above.

In some Member States, option B will lead to a more favourable tratment of cross-border than domestic cases, thereby leading to a "reverse discrimination" of residents in that Member State. Such a situation potentially arises under several instruments in the area of civil justice which are all limited to cross-border cases because their legal basis requires such limitation[75]. However, this is not regarded as a breach of European law; only the opposite – i.e. discrimination against non-nationals – is prohibited by the Treaties. Member States are free to apply the European rules to domestic cases[76]. Option B would

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73 CSES study page p. 126.

74 CSES study p. 64.

75 E.g. the European Small Claims procedure, the European Order for Payment procedure, the Directive on certain aspects of mediation in civil and commercial matters, the Directive relating to the compensation of crime victims and the Directive to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.

76 This is being done by several Member States, e.g. in the transposition of the Mediation Directive.

therefore encourage those Member States which currently provide less efficient rules to their creditors in domestic cases to reform their systems.

(d) Fundamental Rights: The creation of a European Account Preservation Order would give a creditor an efficient means to secure himself against the non-payment of a cross-border debt, thereby facilitating the exercise of the right to effective enforcement (Article 47 (1) Charter) and to property (Article 17 Charter). The procedure envisaged by option B for the granting of an order would need to give the alleged debtor an effective right to judicial protection and enable him to defend himself against abusive and unjustifiable preservation of his bank accounts (see below at section 9.1. and 9.2.). The court can also require the creditor to provide security to compensate the debtor for any loss resulting from an unjustified order unless the court waives this requirement in exceptional circumstances. Moreover, option B would need to ensure that the respect for private and family life (Article 7) is ensured by excluding amounts necessary for the debtor's and his family's livelihood from enforcement and by appropriately addressing the seizure of accounts which do not exclusively belong to the debtor but also to a spouse who is not liable for the debt.

Concerning the transfer of personal data, the European Account Preservation Order would have to comply with the requirements of Directive 95/46/EC on data protection. Data protection concerns can arise notably in relation to account information provided by the bank or public authorities if the creditor does not know the whereabouts of his debtor's account (depending on the suboption chosen at section 9.3 below) or by the bank to the creditor and the court about the funds caught by the order. The instrument would need to ensure that the debtor's personal data is fairly and lawfully processed; the purpose of processing this data is restricted to the sole purpose of preserving the amount of the claim; that the debtor's data is not kept for longer than is necessary and that he has a right to recourse against the processing of his data. In order to ensure such compliance, the instrument would notably provide that only the necessary minimum of information is transferred when the bank informs the court issuing the order about the success of the seizure[77].

(e) Views of stakeholders

The replies to the public consultation show that the majority of those that responded favoured the creation of a European instrument for preservation order (about 75% of the responses). Very few replies did not support a separate instrument at all. Those arguing against an initiative generally did so on the grounds that their own national procedures

[77] Thus, if accounts held by the debtor with the targeted bank held sufficient funds, the bank would only have to communicate to the court that the order was successfully implemented against accounts even though it represents administrative burden as marked at the end of report. It would not be necessary to specify the exact account balance or the fact that the debtor held further accounts with the bank. By contrast, if there were not sufficient funds in the account to satisfy the order, the bank would have to communicate the exact account balance as well as whether the debtor held any additional accounts with that institution.

work well. However, others acknowledged that while a new European procedure would not be needed to improve procedures in their own Member State, it would have added value for 'out-going' applications that are dealt with in other countries, some of which are seen as having very inefficient procedures for preservation orders. The generally positive attitude to option B was also evident from the debate that took place at the public hearing in Brussels in June 2010.

The Member States have generally welcomed the current initiative in the format of option B, because a European procedure for a preservation order is seen helpful as it would accelerate trans-border enforcement proceedings (see Annex 3B on the meeting of 31 March 2011). They have thus positive views on option B.

The European Parliament adopted in May 2011 an own-initiative *report with recommendations to the Commission on proposed interim measures for the freezing and disclosure of debtor's assets in cross-border cases*[78]. The EP advocates the adoption of European instruments on the freezing of assets and on the disclosure of assets. Concerning the freezing of assets, the EP sees bank accounts as the core scope of the instrument. As regards the disclosure of assets, the EP supports an order obliging the debtor to disclose all of his assets. In particular on the freezing order, the ideas of the EP comply to a very large extent with the current iniatiative on preservation order under option B.

7.3. Option C: Harmonisation of national rules on the preservation of bank accounts

(a) Objectives to achieve: This option would also partly achieve the policy objectives set out above, albeit to a lesser extent than option B. The harmonisation of national procedural rules for the preservation of bank accounts would reduce the existing divergences between national laws in this area and create an 'island of harmonisation' between the legal systems of Member States in respect of preservation orders. Option C would align the conditions for issue of a cross border preservation order, its procedure and implementation in the Member States. The features chosen would be similar to the procedure contemplated in option B. In contrast to option B, however, option C would not allow national procedures to coexist with the harmonised "European" procedure.

(b) Economic impact: Option C would have a slightly different economic impact than option B. While option C would align the conditions of issue of preservation orders, e.g. ensuring that throughout the Union, preservation orders could be obtained under the same conditions, e.g. – depending on the specific features of this option – without the hearing of the debtor, eventually differences between the procedures would continue to persist if the harmonisation instrument (e.g. by way of a Directive) did not deal with all detailed aspects of the procedural law of the Member States. Such differences are inherent in the

[78] EP plenary of 10 May 2011. Document P7_TA(2011)0193, , Rapporteur Arlene McCarthy *(S-D/UK)*

technique of harmonising national law by way of directive since a directive, according to Article 288 TFEU, is only binding as to the result to be achieved but leaves to the Member States the choice of form and method. Consequently, option C would not achieve the same degree of uniformity as a self-standing European procedure established by a Regulation would.

The remaining differences between Member States' national procedural and enforcement law are likely to continue to require the involvement of a lawyer licensed to practice in each of the Member States in which the preservation order is to be obtained and/or enforced. Enforcement costs vary widely between Member States. This is due to different schemes of enforcement and different systems of professionals (for example independent bailiffs or court's agents). There is no data on the specific costs of enforcement as this issue is not covered by the study and the proposed initiative. This would not allow for the same cost reduction under option C than under option B. Option C is therefore likely to have a less positive economic benefit on **SMEs** which are less likely to have in-house legal departments and are generally more sensitive to legal costs than large companies.

The impact of option C on case studies No 1a and 1b can be illustrated as follows:

Commercial cases: Although the basic features of the procedure for obtaining and enforcing a preservation order would be the same in the Member States, the persisting differences between national rules would still require creditor to hire a lawyer in the other country(ies) where it needs to obtain a preservation order. As concerns delays, option C would have the same effect as option B to reduce (on average) the time necessary for the issuing, transmission and implementation of the preservation order.

The impact of option C on the **legal professions** (lawyers and bailiffs) is difficult to quantify but is overall likely to be similar to the impact of option B. Option C is less likely to lead to a reduction of lawyers' fees in existing cases but is equally less likely to entail a significant increase in the use of preservation orders with its corresponding increase in revenue.

The impact of any measure improving the efficiency of enforcement would benefit the individual consumers and maintenance creditors. However, the economic impact of option C would not be as beneficial for these categories of people as option B.

As option B, option C is also likely to improve the payment behaviour by providing an efficient sanction against recalcitrant debtors, thereby complementing the Late Payment Directive.

(c) Impact on Member States: (1) Costs for implementation: Option C would require Member States to implement the rules harmonised by the directive into their national law. Member States would therefore have to adopt legislation, both for the procedure of issuing the order and for the mechanism of enforcement. Costs of implementing the new rules would, however, be one-off costs which would only arise once. **(2) National legal traditions**: The implementation of the new rules risks creating difficulties for Member

States in several respects. First, the European rules are broadly aimed at addressing cross-border cases whereas national law on banking seizures is applicable also in domestic cases. Member States would have the "choice" of either having two procedures for the preservation of bank accounts in place in their country or to replace the national procedure by the European one. In terms of transparency and user-friendliness of national law, both solutions have their drawbacks. More importantly, however, it seems inevitable that the procedures prescribed by the instrument would not be totally in line with those currently existing under national law. A given rule of the European instrument might be easy to implement in a national system which has served as a model for the particular provision, but would be more difficult to digest for systems following a different approach. The need to implement the rules harmonised by the European instrument into national law would therefore put Member States in a difficult position of either accepting a "contaminant" in their national rules on procedure and enforcement of preservation orders or to align their entire procedural and enforcement system with the approach taken in the instrument on the preservation of bank accounts. Option C would therefore be more costly to implement and be more intrusive into national legal traditions than option B.

Option C could also in some Member States lead to a more favourable treatment of cross-border than domestic cases (see above at point 7.2. c for details).

(d) Fundamental rights: As outlined above for option B, option C would have a positive impact on the right of the creditor to an effective enforcement. Compliance with the requirements of the Charter would, however, equally require that the rights to judicial protection (Article 47) as well as his or her human dignity (Article 1) of the debtor are adequately protected. As to data protection, this option would contain similar provisions as option C to ensure that the procedure complies with the provisions of Directive 95/46/EC on data protection.

(e) Views of stakeholders: Only few stakeholders support this option. The overwhelming majority considers that any harmonisation of existing domestic laws by way of directives would not solve intricate problems of enforcement of domestic attachment orders in other Member States and that it was uncertain that the intrusion into national legal systems required to harmonise procedures would be justified in terms of the potential benefits in improving the process of cross-border preservation orders. This option has not been supported neither by the Member States nor by the European parliament.

8. COMPARING THE OPTIONS

The table below summarizes the impacts of the different options analysed above:

Key: ++ = very positive impact; 0=no or neutral impact; - - = very negative impact.

Policy options	Effectiveness to reach objectives	Economic impact	Impact on Member States	Fundamental Rights
Option A: Status Quo after revision of Regulation Brussels I	0	0	0	0
Option B: European Account Preservation Order	++	++	1) implementing costs – 2) legal traditions 0	+
Option C: Harmonisation of national rules for preservation orders	+	+	1) implementing costs – – 2) legal traditions – –	+

In conclusion, option A fails to address efficiently the problem of facilitating debt recovery and the policy objective, since the current obstacle of divergent criteria for obtaining bank preservation orders and their effects within national legal systems still remains. Option C does not ensure the same economic and social benefit as option B and would be unnecessarily intrusive for national legal systems. Option B offers the most comprehensive solution, and therefore **option B** is the preferred option.

9. THE PREFERRED POLICY OPTION AND ITS FURTHER SUB-OPTIONS

This section discusses sub-options for key features of the possible European Account Preservation Order. For the purpose of this report, four key features of the instrument have been identified which take into account the divergence in the views of stakeholders and the importance of their impact on fundamental rights, notably the position of the debtor.

9.1. Sub-options relating to the hearing of the debtor

Sub-option 1: No hearing of the debtor prior to issuing the measure: Under this sub-option, the order would always be issued without a hearing of the debtor (*ex parte*) but the debtor would be immediately notified of the preservation order and would be given the possibility to contest it in the competent court.

Sub-option 2: Prior hearing of the debtor: Under this sub-option, the debtor would have to be heard prior to the issue of the order.

Impact of the sub-options:

Sub-option 2 would only to a limited extend achieve the **policy objective** to facilitate cross-border debt recovery. If the debtor is heard prior to issuing a preservation order aiming to block his bank account, the surprise effect of the measure is lost and there is a real risk that a recalcitrant or fraudulent debtor will withdraw or transfer his assets from the account targeted in the envisaged order. This is illustrated in case study No 1b:

Case study 1b - Commercial case: Sub-option 1 would allow the French company to safeguard the surprise effect of the preservation order also against the Spanish subsidiary although Spanish national rules of civil procedure currently do not easily grant *ex parte* preservation orders. This would allow the French SME to have the order implemented before his Spanish debtor withdraws funds from the account, thereby allowing him to secure them until the subsequent enforcement of the judgment on the merits. Sub-option 2 would not change the situation vis-à-vis the status quo in this respect.

Since sub-option 2 would be a less effective tool for cross-border debt recovery, its **economic impact** would not be as positive as that of sub-option 1. As to **fundamental rights**, sub-option 1 ensures the "right to enforcement" of the creditor by safeguarding the surprise effect of the measure but seems problematic for the debtor because he is not heard in the process. However, sub-option 1 would comply with the requirements of Article 47 (2) of the Charter because it would ensure that the debtor receives notice of the order immediately after it is implemented by the bank and that he has the possibility to contest the measure immediately afterwards.

Comparison of the sub-options:

Policy options	Effectiveness to achieve objectives	Fundamental rights impact
Sub-option 1: hearing of the debtor only after the order is issued	++	0
Sub-option 2: Prior hearing of the debtor	0	0

Overall**,** sub-option 1 would better achieve the policy objectives than sub-option 2. As regards fundamental rights both options comply with the Charter.

9.2. Sub-options relating to jurisdiction for issuing and contesting the order

Rules on jurisdiction determine which court is competent to hear a case. In the context of a preservation order, this issue is relevant in two situations: The regulation first has to determine which courts are competent for issuing the order. There was general agreement among stakeholders in the public consultation that the courts having jurisdiction on the merits of the case should be also competent to issue preservation orders. In addition, the courts where the account is located or the courts of the debtor's domicile would also have

jurisdiction to issue the order. Second, the Regulation has to determine which courts are competent to deal with the objections of the debtor against the order (assuming that he has not been heard prior to its issue as per sub-option 1 in section 9.1). In this respect, two sub-options can be considered.

Sub-option 1: The issuing court is competent in principle: Under this sub-option, the debtor would in principle have to contest the order in the court having issued it. However, objections against the process of enforcement or the amount exempt from execution would have to be raised in the Member State where the order is enforced. This will usually be the Member State where the debtor is domiciled unless he has an account in another Member State.

Sub-option 2: Only the court at the debtor's domicile is competent: Under this sub-option, the debtor would be able to contest the order "at home", i.e. in the Member State where he is domiciled. It could be considered to combine both options and limit sub-option 2 to certain categories of defendants such as consumers which are typically the "weaker" party in a dispute.

Impact of the sub-options:

In terms of achieving the **policy objectives** set out above, both sub-options are equally suitable. However, the sub-options raise an issue of coherence with existing EU instruments in the area of civil justice and compliance with the general principle of mutual recognition. Sub-option 1 corresponds to the general rule under the existing European instruments that objections relating to the substance of a judicial decision have to be raised in the court having issued it. Thus, sub-option 1 corresponds to the approach taken in the revision of Regulation Brussels I and the Maintenance Regulation. Sub-option 2 would allow a court in one Member State to review the substance of a decision given in another Member State which is not the case under the existing *acquis*.

As to the impact on **fundamental rights**, if the court having jurisdiction on the merits is situated in another Member State than the one where the debtor is domiciled, sub-option 1 imposes on him a potentially heavy burden for contesting the order due to geographical distance and linguistic barriers which might trigger costs (translation) and delays. In contrast, sub-option 2 would greatly facilitate the task of the debtor to contest the order because the competent court would be located in his own Member State (unless the account is not situated there). In order to comply with the requirements of the Charter, sub-option 1 would have to ensure that the right of the debtor to judicial protection is fully ensured in the Member State where the judicial decision is taken. Moreover, consideration would need to be given to facilitating the exercise of the debtor's right in practice, e.g. by ensuring that he is fully informed about his possibilities to contest the measure and the competent court to which he would have to address himself and by providing for easy-to-use standard forms in all EU official languages. This might not be sufficient to offset the disadvantages of having to contest the order in another Member State for the "weaker" party to the dispute, e.g. the consumer in B2C relations. Consumers will not often be the target of a preservation order because they are usually

required to pay in advance when buying goods or ordering services cross-border. However, such situations can arise, e.g. in the context of financial services. While the jurisdiction rules of Regulation Brussels I ensure that in most cases, jurisdiction on the substance is in the Member State where the consumer is domiciled, additional protection might arguably be needed if the consumer has an account in another Member State and the order is issued by the court of that Member State. Overall, both sub-options could be structured in a way that they comply with the rights of the debtor to an effective remedy.

Comparison of the sub-options:

Policy options	Effectiveness to the objectives	Impact on Member States	Fundamental Rights
Sub-option 1: Jurisdiction of the Court issuing the order	++	++	0
Sub-option 2: Jurisdiction of the court of the debtor's domicile (at least for weaker parties)	++	1) compliance costs – 2) inconsistent with Regulation Brussels I _	++

Overall, in light of the positive effect on the defendant's fundamental rights, sub-option 2 is preferable at least for "weaker" defendants.

9.3. Sub-options relating to obtaining information on the debtor's account

Sub-option 1: Status quo. The European procedure would not contain any rules facilitating obtaining information on the debtor's account for the creditor.

Sub-option 2: Introducing an order for disclosure: Under this sub-option, the Regulation would allow the creditor to obtain information on the whereabouts of his debtor's account by providing for the issue of an order for disclosure by the court which would oblige all banks located in a given Member State to check if the debtor holds an account with them and, if so, to inform the court accordingly[79]. This sub-option could be combined with sub-option 3 to leave Member States more flexibility.

Sub-option 3: Giving to court and Enforcement Authority access to public registers: Alternatively, the regulation could ensure access to information on the whereabouts of a debtor's account by granting the court or the enforcement authorities' access to existing

[79] This is the case e.g. in Spain where the order for disclosure is channelled through to the banks by a limited number of banking associations.

registers containing the necessary information. In this respect, tax registers would play an important role. In the context of fighting organised crime, some Member States have created registers of bank accounts held in their territory to which access could be given. This sub-option could also be combined with the sub-option 2.

Impact of the sub-options

Both sub-options 2 and 3 would achieve the **policy objective** of facilitating obtaining relevant account information of his debtor which the status quo does not ensure in the majority of Member States. Sub-option 3 might be a little less efficient than sub-option 2 as it would not systematically ensure that information on debtor's bank accounts is available in a Member State. Public registers holding relevant account information like tax registers do not exist in all countries[80]. Nevertheless, even in those Member States which do not have registers, public authorities dispose of relevant account information which could be disclosed if necessary.

Case Study 1b: Commercial case: Sub-option 2 would enable the French SME to obtain the information about additional bank accounts of the Dutch subsidiary through a disclosure order to all banks in NL thereby increasing its chances to successfully recover its claim over €20.000. This would cost him € 30-100. Sub-option 3 could achieve the same result by granting the Dutch enforcement authority access to information held in the Dutch tax register.

As to the impact on **Member States** and banks, sub-option 2 would trigger considerable costs for banks having to comply with an order for disclosure which can be estimated at around between €30 and €100 per case depending on its complexity (e.g. research of several accounts in different establishments). This could lead to a negative impact on banks unless they are compensated for their costs. If the costs are eventually born by the creditor, this would reduce the economic benefit of the measure. Under sub-option 3, Member States would have to set up a system of access to information by enforcement authorities. Such a system is, however, already in place in all Member States in the area of family maintenance[81], which would reduce implementation costs. On the other hand, some Member States already allow disclosure orders to be addressed to their banks and might find it difficult to implement suboption 3 beyond the area of maintenance. It should therefore be considered to leave Member States a choice between suboptions 2 and 3.

Sub-options 2 and 3 would have particularly positive **social impact** because the most vulnerable creditors have limited means to find out about their debtor's account by turning to a private debt recovery or investigation agency as illustrated by case study No 2.

[80] No such registers exist e.g. in Belgium and the UK.

[81] Cf Article 61 of the Maintenance Regulation.

Case Study 2: Consumer case: Sub-option 2 would enable the French authorities to issue a disclosure order or to access the relevant registers in Belgium to find out with which bank the Belgium trader has an account. It would spare Mr B the costs of having to turn to private debt collecting agencies amounting to €120 (€ 20 per hour, and 6 hours is needed)

In terms of **fundamental rights**, while the status quo is not violating the Charter of Fundamental Rights or the ECHR, both sub-options 2 and 3 would improve the effectiveness of the creditor's right to enforcement by allowing him to find out where his debtor's bank account is located which is a prerequisite for any further enforcement action relating to it. Both sub-options would need to ensure that the debtor's rights to a protection of his personal data are safeguarded by providing that any information obtained must be processed in compliance with the Directive on data protection.

As regards the views of the stakeholders, the only point raising concerns for the Member States has been the disclosure of information on the bank accounts (see Annex 3B). On the other hand, the EP has called for an order obliging the debtor to disclose all of his assets. The approach of sub-obtions 2 and 3 is different but arguably also more efficient because only bank accounts are concerned and the relevant information is not sought from the defendant but from other sources.

Comparing the sub-options:

Policy options	Effectiveness to reach policy objectives	Economic impact	Impact on Member States	Fundamental rights impact
Sub-option 1: Status Quo	0	0	0	0
Sub-option 2: Disclosure Order	++	- (costs of banks)	0	+
Sub-option 3: Access to public registers	+	+	- (implementation costs)	+

Overall, given the similar effectiveness to reach objectives and the impact on Member States, the preferred option would give Member States the possibility to opt for either sub-option 2 or 3.

9.4. Sub-options relating to time-limits for issuing and enforcing the preservation order

Sub-option 1: No time limits: Under this sub-option the European procedure would not set any specific time-limits for issuing and implementing the preservation order. It would only contain unspecific requirements relating to time such as "without undue delay" or "as soon as possible".

Sub-option 2: No slower implementation than for national measures: This sub-option would require Member States to administer the European procedure at least as speedily as their national procedures.

Sub-option 3: Introducing specific time-limits: Under this sub-option, the European procedure would establish specific time-limits for all or at least some of the different stages of the procedure. Thus, for example, the Regulation could impose time-limits for issuing the order, for serving it on the bank and the debtor, for the bank to provide information about whether and to what extent the order caught any funds, for deciding on an application for review by the debtor etc. When specifying how many days a given stage of the procedure may take, consideration would need to be given to the time these stages currently take in the Member States. Different alternatives could be considered in this respect: one approach would be to establish the current EU-average as the maximum time, thereby changing the status quo essentially only for those Member States which currently have particularly long delays of procedure. A more ambitious approach would consist in taking a group of fastest Member States as a model for defining concrete time limits, thereby obliging the majority of Member States to deal with the European procedure more quickly than with their national ones. This sub-option could also be combined with sub-option 2.

The future initiative establishes time-limits for issuing and implementing the European Account Preservation order. However, where the court or enforcement authority is in exceptional circumstances not able to comply with these time limits it has to justify why an additional delay is needed. Where an application for a European Account Preservation Order is made prior to the initiation of proceedings on the substance, the claimant must initiate such proceedings within **30 days** of the date of issue of the order; upon application prior to an enforceable title, the court should issue the order as soon as possible but in any event within **7 calendar days** of the lodging of the application, unless exceptional circumstances make it necessary to hold an oral hearing; where the application is based on an enforceable title, the competent authority shall issue the order within **3 days**; if the court refuses to issue the order, the claimant may lodge appeal against this decision within **30 days**. The bank is obliged to implement the order **immediately** by blocking an amount corresponding to the amount of the order. Within **3 days**, the bank has to issue a declaration on whether the order has caught sufficient funds. The debtor has to be notified **immediately** after the measure took effect in order to be able to prepare his defence. The European Account Preservation Order remains in force until proceedings on the substance have ended. As remedies of the defendant, the application for a review should be made promptly, in any event within **45 days** from the

day the defendant was effectively acquainted with the contents of the order and was able to react. If the application is manifestly unfounded, the court dismisses the application immediately and in any event within **7 days** from the receipt of the application. Finally the court has to give its decision as soon as possible but in any event with **30 calendar days** from the lodging of the application.

Impact of the sub-options:

In terms of achieving **policy objectives**, sub-options 1 and 2 would not achieve the objective of reducing the existing delays in some Member States for obtaining and enforcing a preservation order. Only sub-option 3 would contribute to speeding up the process of debt recovery in comparison to the status quo in those countries. However, sub-option 2 would ensure that a creditor opting for the new procedure in a Member State where the system currently works efficiently is not worse off than if opting for a preservation order under national law.

As to the **economic impact**, similarly, only sub-option 3 would have a positive economic impact on creditors seeking to block money in a bank account located in a Member State where this process is currently very slow, since it would enable him to obtain and enforce the order more quickly. The same is true for the **social impact** on the most vulnerable groups. The impact of the sub-options on case study No 3 can be illustrated as follows:

Case study 3: Family law case: If the time-limits set by sub-option 3 were less than the four months it took Ms C to obtain her order in Spain and to have it implemented in Italy, the European procedure would allow Ms C to obtain and implement a preservation order more quickly than under the status quo. The quicker she obtains and implements the order, the better are her chances to be able to block her ex-partner's account before he leaves the country. On the basis of specific time-limits proposed in the future initiative, the court in Spain shall grant a preservation order to Ms C within 7 days from her application. The bank in Italy is obliged to block the monies on the debtor's account immediately and it shall inform Ms C within 8 days if the order was successfully implemented (whether there was enough funds on the account). The monies on the account are preserved until the maintenance judgment is enforceable. This will allow her to fully enforce the judgment by obtaining the definitive transfer of monies from the debtor's bank account to the credit of her bank account.

As regards the commercial matters, the analysis of sub-option 2 to case study No 1a is as follows:

Case study 1a: Basic commercial case: Since the Belgian SME is seeking a preservation order before the German Court which is competent on the merits, this court should have the duty to treat the application for a European Account Preservation Order as diligently as for a German preservation order in accordance with sub-option 2. On the basis of specific time-limits proposed in the future initiative, the German court shall grant a preservation order to the Belgian SME within 7 days from its application. The bank in Germany is obliged to block the monies on the debtor's account immediately and it shall

inform the claimant within 8 days if the order was successfully implemented (whether there was enough funds on the account). The monies on the account are preserved until the definitive judgment on the merits is enforceable. This will allow the Belgian SME to fully enforce the judgment by obtaining the definitive transfer of monies from the debtor's bank account to the credit of its bank account. Accordingly sub-option 2 would have a neutral or positive effect on the length of proceedings, depending on further progress expected from multi-language forms and their electronic transmission.

Turning to the c**osts for Member States** having to implement and comply with the requirements of the European procedure, sub-option 2 would entail only minimal costs for Member States by requiring them to ensure that the new procedure is applied as swiftly as the national one. By contrast, sub-option 3 would entail additional costs for those Member States which are currently slow to grant and enforce preservation orders. For example in order to speed-up proceedings there would be a need for recruiting and training additional judges, equipping courts with computers and software. However part of these costs will be compensated by the EU financial programmes (civil justice, e-justice, European Judicial Network) The extent of these costs would depend on the step of the procedure for which a time-limit is set, the level of ambition of the time-limits and the extent of current delays in the national procedure. There is no available data on existing time-limits in national enforcement law. Where legal time-limits exist in some Member States – in other countries it is a matter to be decided by the court- it is difficult to compare them between Member States as they refer to different stages of different procedures. Possibly certain Member States may encounter difficulties to apply some of the proposed time-limits. However the additional administrative burden in those Member States should be spread over time as it is proposed that the future initiative will apply only from 24 months after its entry into force. This will allow those Member States to adapt their judiciary in view of respecting the new time-limits. Specific training sessions for judges will also be organised through the European Judicial Network in civil and commercial matters. Finally, the electronic implementation of the new procedure would contribute to the respect of the time-limits. It is important to note in this context that procedural time-limits have already been established in existing instruments, notably the Small Claims procedure and the Service of Documents Regulation. While the evaluation of these instruments is ongoing and no exact data on compliance or implementation costs is available, the impression is that over time such deadlines contribute to reducing procedural delays in national courts. Any time-limit set under sub- option 3 should therefore correspond to the extent possible with those of the existing acquis and draw on lessons from the mentioned evaluations. Moreover, the impact on Member States could be mitigated by introducing an "escape clause" allowing Member States in exceptional cases to derogate from the established deadline and to take the relevant step of procedure as soon as possible. Such a provision figures already in the Small Claims Regulation. Finally, if sub-option 3 was chosen, it would need to be considered whether transitional periods for implementing time-limits could mitigate the costs for Member States.

As to the impact on **fundamental rights,** all sub-options comply with the Charter of Fundamental Rights and the European Convention on Human Rights respectively. The

ECHR already imposes an obligation on Member States to obtain and enforce a judicial decision within a reasonable time (Article 6). Sub-option 2 would ensure that a creditor using the European procedure is not worse off in terms of timing than if he was applying for a national measure but would not speed up the process in a Member State where the judiciary works notoriously slow. Sub-option 3 would improve the fundamental rights situation for the creditor by enabling him to obtain and enforce a preservation order more quickly than under the status quo.

Comparing the sub-options:

Policy options	Effectiveness to reach policy objectives	Economic impact	Impact on Member States	Fundamental rights impact
Sub-option 1: Status Quo	0	0	0	0
Sub-option 2: No discrimination	+	+	0	+
Sub-option 3: Specific time-limits	++	++	- (additional implementation costs for "slower" Member States)	++

Overall, a combination of sub-options 2 and 3 is the preferred option.

10. SUMMARY OF THE PREFERRED OPTION AND ITS IMPACT

It results from the above analysis that the **preferred option is the creation of a European Account Preservation Order** which would be available to citizens and companies in addition to existing national procedures. Thus, the order would be issued *ex parte*, i.e. without the prior hearing of the debtor but the debtor would be immediately notified and be able to contest the order in a special review procedure. The court competent for the review would be the court issuing the order; however, certain "weaker parties" could contest the order at the court at the debtor's domicile. The new procedure will enable a debtor or the competent authorities to find out the whereabouts of a debtor's bank account if the creditor does not have that information. It will introduce time-limits for certain key steps of the procedure.

a) **Effectiveness to achieve policy objectives:** The preferred option achieves the **general policy objective** to facilitate the recovery of cross-border claims for citizens and businesses by making it easier to obtain a preservation order securing the recovery of

cross-border debt. The preferred option achieves **the specific policy objectives** set out above to a significant extent as follows:

- It will enable a creditor to obtain a preservation order on the basis of an efficient and uniform European procedure under the same conditions in all Member States of the EU. This will enable creditors seeking to recover debt in countries where conditions for issuing such orders are currently more restrictive than those envisaged by the initiative to obtain a preservation order in situations where this is currently not possible. It will notably enable a creditor to obtain a preservation order without a prior hearing of the debtor, thereby safeguarding the surprise effect of the measure.

- It will enable a creditor to obtain information about the whereabouts of his debtor's accounts without having to pay the services of private debt collecting or investigation agencies.

- It will enable a creditor to reduce costs of obtaining a preservation order by doing away with the need for an additional lawyer per each foreign jurisdiction where a preservation order is sought or enforced. It will also reduce costs of translation by providing standard forms both for the application, the decision and the communication with the bank. Costs of banks and bailiffs will be made more transparent by obliging Member States to fix a single fee for their respective services. Reference in 3.3.2.

- It will enable a creditor to obtain and enforce a preservation order more quickly in Member States where this procedure is currently comparatively slow by introducing time-limits for certain key steps of the procedure.

b) Economic impact: The preferred option would have a positive economic impact and contribute to reducing the overall amount of the €55bn bad debt. It would enable companies to secure the recovery of **additional bad debt of between €373Mio and €600Mio** per year[82], thereby increasing the **overall level of bad debt secured** by preservation orders from €679 Mio - €1.2 bn to **between €1.12 bn and €2bn per year[83]** over time. Additional debt recovered by consumers and maintenance creditors will add to these figures which is, however, difficult to quantify. **An estimation of cost savings** for companies currently involved in cross-border trade would be in **the range of €81,9Mio to €149Mio annually[84].** In addition, there would be savings also for consumers and maintenance creditors. The preferred option will benefit in particular **SMEs** which have

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82 See section 3.4. and 7.2. for details. These figures assume that the success rates remains the same at 53.3% although an argument could be made that the creation of uniform conditions for issue would also increase the success rate of cross-border applications.

83 Current levels of bad debt recovered in cross-border situations are estimated to be between €679Mio and 1.2bn annually, cf section 3.4. above.

84 See section 7.2. b). This assumes that once lawyers are familiar with the European procedure, companies can save an average of 10h in lawyers' fees per cross-border case which amounts on an EU average to €2.410 per case (see Annex VI). This amount is multiplied with the estimated current number of cross-border preservation orders per year of between 34.000 and 61.828 (see section 3.4.).

little cash flow and limited access to credit and are therefore more reluctant than big companies to pursue their claims under the status quo.

Given that more than half of European companies stated that they would undertake more cross-border trade if common rules would allow them to obtain easily a preservation order/bank attachment in another Member State, the preferred option is likely to encourage more companies to expand their business into other Member States, thereby making full use of the possibilities offered by the Single Market. The availability of an efficient and low cost means of redress in case of a dispute with the trader is also likely to encourage more consumers to shop cross-border.

The availability of an effective sanction in case of non-payment (in addition to the increase in the amount of the claim already provided by the Late Payment Directive) is also likely to increase the payment behaviour of debtors. This could reduce in the long term the number of disputes for debt recovery.

It would need to be considered whether additional flanking measures, such as targeted information campaign about the new possibilities, would be necessary to produce the full benefit of the preferred option[85].

The increase in the number of preservation orders which the preferred option is expected to bring about at least in the medium term risks having a negative economic impact on **banks** at least in those Member States where they are currently not allowed to charge a fee for implementing the measure. Economic impact on **legal professions** is likely to be neutral since any decrease in revenue is likely to be compensated by an increase in the number of cases.

c) Social impact: The creation of a low-cost and efficient procedure for securing payment of sums due will also have a positive social impact by facilitating debt recovery for the most vulnerable creditors who cannot spend much money to assert their rights in judicial proceedings. This concerns in particular maintenance creditors who depend on the payment of alimonies for their or their children's livelihood. The preferred option together with the implementation of the Maintenance Regulation is expected to allow maintenance creditors to recover a notable proportion of claims from recalcitrant debtors.

d) Impact on Member States: Member States will incur costs in implementing the preferred option. However, the costs of implementing a self-standing procedure are in general considerably lower than the alternative option of harmonising national rules. Costs of familiarising the judges and enforcement officers with the new instrument should be small and would, moreover, be one-off costs. The definition of time limits for certain key steps of the procedure is likely to require some Member States whose judicial system is currently comparatively slow to incur higher implementation costs to comply

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[85] Such an information campaign and training programme is currently being devised by Employment, social affairs and inclusion DG with the assistance of Justice DG to promote the use of the European Small Claims and European order for payment procedure.

with the deadlines. The cost will be however spread in time due to transition periods. The creation of a self-standing procedure envisaged in the preferred option will also respect Member States legal traditions because it will not require them to align their national system with the European procedure. Preservation orders under national law would continue to be available.

e) Fundamental rights: The preferred option would improve the right of the creditor to an effective enforcement of his debts. At the same time, the new procedure would ensure that the rights of the debtor are safeguarded in full compliance with the requirements of the Charter of Fundamental Rights, notably by granting prompt and adequate remedies against the preservation order and by ensuring that amounts necessary to ensure his livelihood will be exempt from execution.

f) Stakeholders: At the public hearing on cross-border debt recovery on 1 June 2010, most of the 88 participants (businesses, academics, lawyers, bailiffs, banks) broadly welcomed the Commission initiative towards a European procedure for bank attachment/preservation order provided that it is a precautionary measure only.

The Member States have shown generally positive attitude on the current initiative for a preservation order, which is seen helpful as it would accelerate trans-border enforcement proceedings.

The European Parliament adopted in May 2011 an own-initiative report with recommendations to the Commission on proposed interim measures for the freezing and disclosure of debtor's assets in cross-border cases[86]. The EP advocates the adoption of European instruments on the freezing of assets and on the disclosure of assets. Concerning the reezing of assets, the EP sees bank accounts as the core scope of the instrument. As regards the disclosure of assets, the EP supports an order obliging the debtor to disclose all of his assets. In particular on the freezing order, the recommendations of the EP comply to a very large extent with the current iniatiative on preservation order under option B.

Comparing the options:

Policy options	Effectiveness to reach policy objectives	Economic impact	Social impact	Impact on Member States	Fundamental rights impact
Status Quo	0	0	0	0	0
Preferred	++	++	+	- (implementation	+

[86] EP plenary of 10 May 2011. JURI document 2009/2169(INI) of 16.2.2011, Rapporteur Arlene McCarthy *(S-D/UK)*

option				costs)	

Thus, it can be concluded that the preferred option improves the status quo situation.

11. MONITORING AND EVALUATION

In order to monitor the effective application of the new instrument, regular evaluation and reporting by the Commission will take place. To fulfil these tasks, the Commission will prepare regular evaluation reports on the application of the new procedure, based on consultations of Member States, stakeholders and external experts. Regular expert meetings will also take place to discuss application problems and exchange best practices between Member States in the framework of the European Judicial Network in Civil and Commercial Matters.

In order to ensure that adequate statistical data is available to be able to assess the proper functioning of the European Account Preservation Order, the Commission will include in the proposed instrument a requirement on Member States to provide information on the application of the instrument in practice. Member States will notably be required to collect information on

- The number of applications and the amount covered by a European Account Preservation Order and their rate of success;
- the number of recourses to the review procedures created to safeguard the debtor's rights and on the outcome of these procedures.

In the monitoring, specific attention will be paid for the development of costs and delays.

ANNEX I
GLOSSARY OF LEGAL TERMS

Term	Definition
Bank attachment (order)	Order issued by a court or enforcement authority on the basis of a judgment on the merits which blocks the debtor's assets in a bank account and effects their transfer to the creditor. Bank attachments are the most frequently used form for enforcing monetary claims. Given that part of the effect of an attachment order is identical with the effect of a preservation order, the term is sometimes used interchangeably with preservation orders.
Civil and commercial matters	Matters relating to legal relationships between private individuals, as opposed to the relationship between an individual and the State.
Civil justice / civil law	Law that governs the relationships between private individuals, as opposed to public law which governs the relationship between the individual and the State.
Claim	A possible right of the creditor to the payment of a sum of money that has fallen due from the debtor
Claimant	Any natural or legal person bringing an action against somebody (the defendant) in court. In the case of a monetary claim, the claimant is usually the creditor or his representative.
Defendant	Any natural or legal person against whom an action is brought in court. In the case of a monetary claim, the defendant is usually the debtor or his representative.
Enforcement	The act of an enforcement agent by which a judgment or administrative order is put into practice (e.g. a judgment ordering a debtor to pay 100 Euros may be enforced by attaching the requisite sum in a bank account of the debtor's and then disbursing it to the creditor). Enforcement agents are either public officials or private persons like bailiffs mandated by the State to act on its behalf.
Ex parte order/procedure	A measure which is ordered *ex parte* by a court is a measure decided by the judge on a request from the claimant without hearing the defendant. The aim is to speed-up the procedure and to keep the surprise effect

	on the defendant. Ex parte orders are available in many Member States for provisional and protective measures
Exequatur procedure	Formal court procedure by which a foreign judgment is declared enforceable (i.e. "validated" for enforcement) in the state where enforcement is sought. Under the proposed revision of the Brussels I Regulation this intermediary procedure is abolished, except for judgments in defamation cases and collective redress. Further it is maintained in other EU instruments (i.e. in the Insolvency Regulation) and the proposed instruments on successions and matrimonial property rights.
Preservation order	Protective measure ordered by a court which prevents any transfer or withdrawal by the debtor of funds in the account preserved. The aim of a preservation order is to secure the availability of certain funds pending the outcome of proceedings on the merit. The preservation order is enforced by serving it on the bank and having the bank block the account. The funds will remain preserved until the judgment on the merit is being given.
Jurisdiction	Jurisdiction is the power conferred upon a court or tribunal to hear a specific case. Where a case involves more than one country, the jurisdiction of EU courts in civil and commercial matters is determined by EU instruments, notably Regulation Brussels I.
Proceedings on the merits/substance	Main proceedings initiated by a party who wants the merits of his claim (unpaid debt, consumer claim, damage, maintenance) to be determined by the competent court.
Provisional/protective measures	Measures ordered by a court which are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is otherwise sought from the courts on the merits. For example, a court can issue a preservation order against assets of the debtor in a bank account in order to ensure that these assets will not disappear during the time it takes to obtain a judgment on the merits.
Recognition	The act of accepting a judgment or other act of sovereignty of another state as if it had been issued by an authority of one's own state. In civil and commercial matters, EU law (in particular Regulation Brussels I) ensures that a judgment given in one Member State is recognised in another Member State (unless the defendant raises specific reasons to refuse

	recognition).

ANNEX II
SUMMARY OF CONTRIBUTIONS TO THE PUBLIC CONSULTATION

SUMMARY OF REPLIES TO GREEN PAPER

ON IMPROVING THE EFFICIENCY OF THE ENFORCEMENT OF JUDGMENTS IN THE EUROPEAN UNION: THE ATTACHMENT OF BANK ACCOUNTS

In October 2006, the European Commission presented a Green Paper on "***improving the efficiency of the enforcement of judgments in the European Union: the Attachment of Bank Accounts***"[87]. With the purpose of improving enforcement legislation within the EU, the Commission launched a broad consultation process to gather opinions on the possible creation of an **instrument aiming at improving cross-border debt collection.**

The Commission received a total of 67 replies from Member States and other interested parties. These can be **accessed on the DG Justice, Liberty and Security website[88],** except in cases where the author has requested confidentiality. The replies can be summarised as follows.

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

Most of the replies thanked the Commission for its initiative and **recognised the necessity of facilitating cross-border debt collection** in an area where free movement of capital and new information and communication technologies could contribute to the dissipation of assets. Therefore, **the creation of a new instrument was welcomed by many Member States and stakeholders through the establishment of an independent European procedure**.

While some Member States and stakeholders were in favour of a directive, a majority of respondents regarded harmonisation of national laws by means of a directive as **complex** and **unnecessary.**

A minority of respondents still had **doubts about the necessity of any kind of instrument**, preferring to await the results of the impact assessment in order to be sure that the instrument would meet a real need. A few stakeholders expressed their strong disapproval of the Commission initiative, arguing that there was no legal basis for such an instrument

A majority of replies agreed that the instrument should be no more than a **protective order preventing the withdrawal and the transfer of monies standing to the credit of bank accounts.** However, some Member States and stakeholders suggested that it should be possible to attach other assets, while others suggested that the order should not be merely protective, or that it should be a first step towards a real harmonisation of the attachment of bank accounts.

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87 COM(2006) 618 final, 24.10.2006

88 http://ec.europa.eu/justice_home

2. PROCEDURE FOR OBTAINING AN ATTACHMENT ORDER

2.2 Circumstances in which a creditor can apply for an Attachment Order

Most of the replies expressed their support, or their willingness in principle to agree to the **order being available at all stages of the procedure**, namely: i) prior to the initiation of legal proceedings on the merits of the claim, ii) concurrently with the raising of the principal action, iii) at any subsequent stage during the judicial proceedings and iv) during the period between the issuing of an order in one Member State and of the declaration of enforceability of the order in the Member State where the debtor's account is situated.

Agreement on the order being available at the first stage of the procedure would be contingent on a **clause stating that the main proceeding should be filed within a fixed period of time** or, in certain circumstances, be accompanied by strong safeguards. While it is necessary to seriously address the legal issues which this kind of availability might raise, there were some replies which were opposed to the order being available before the main proceeding had begun.

2.2 Conditions of issue

A majority of replies argued that the conditions for granting the protective order should be: **the probability of the existence of a claim** (*fumus in boni juri)* and **the probability of a difficult recovery** (*periculum in mora*). Replies as to the degree of probability vary from likelihood to substantive grounds for action. Other conditions could be required, such as written evidence, proof that the debtor holds an account in a specific institution, complete disclosure of all material facts, or proof that the collection of the debt has already been partially unsuccessful.

The question of **imposing a mandatory security deposit or bank guarantee** on the creditor was **generally approved as a practical way of protecting the debtor against wrongful use of an Attachment Order**. Nevertheless, a balance has to be struck between deterring illegitimate claims and raising too many obstacles to the use of such an order. Most of the replies argued that **providing a bank guarantee/security deposit should be left to the discretion of the court**.

2.3 Hearing of the debtor

All the replies agreed that, in order to preserve the "surprise effect", **hearing of the debtor prior to granting the attachment should be avoided**, at least in those cases where an attachment might be required, provided that the debtor's rights are protected.

2.4 Details of account information required

Providing **the full name and the address of the debtor** - plus a registration number if the debtor is a legal entity - and **the name and address of its bank and bank branch** seems to be a consensual requirement from the creditor's side. However, some replies argued that more information might be required, such as the **account number**, where known, although it was acknowledged that such an obligation might have a deterrent effect. Providing the court with

the **debtor's ID or social security number** was suggested as a way of avoiding any case of homonymy.

Some replies suggested that the implementation requirements be drawn up in line with national legislation, or that the order be transmitted to the **enforcement authority,** which would be in charge of finding detailed information about the debtor.

2.5 Jurisdictional issues

Opinions on this issue differed sharply. A **majority** of the replies were in favour of granting competence to issue an order **solely to the court having jurisdiction on the merit of the case according to Regulation (EC) No 44/2001**[89]. One reply suggested that sole jurisdiction should be granted to the court of the debtor's domicile.

Others argued that **joint jurisdiction should be granted** not only to the court having jurisdiction on the merit of the case, but also **to the court of the Member State where the account is held**, or **to the court of the debtor's domicile**. Several replies suggested that jurisdiction should be granted to **all three courts mentioned**. A minority proposed modulating jurisdiction according to when the order is granted. One reply proposed that **the court of the creditor's domicile** should have jurisdiction.

3. AMOUNT AND LIMITS OF AN ATTACHMENT ORDER IN THE EUROPEAN SYSTEM

3.1 Amount to be secured

Limiting the attachment to a maximum amount was the favoured option in most of the replies. For a majority of Member States and stakeholders this maximum should include **the amount of the claim, the legal fees and any interest**. To simplify matters, the amount of the claim could be increased by a fixed percentage to cover costs and interest.

3.2 Costs of the banks

The enforcement of the order is likely to create certain **costs for the banks** (execution of the order, monitoring of the account). The issue is whether those costs should be considered to be part of the public duty of the bank, as this might also lead to the banks increasing the operating fees they charge all their customers.

Very few respondents opposed the principle of remunerating the banks or were willing to leave this matter to national law. Some argued that enforcement authorities, such as bailiffs, should be given an important role in serving the order, which would reduce additional costs for the banks.

Most of the stakeholders declared themselves in favour of charging specific fees for executing the order. A majority was in favour of **capping the fees**. Some replies suggested that fees should be set at EU level, while others preferred to leave them to the discretion of the Member State.

3.3 Attachment of several, joint and nominee accounts

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89 Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001 p. 1.

In order to preserve the total amount of the claim, the creditor could be willing to **attach several accounts simultaneously**. Therefore, the question arises as to how the order should be served so as not to block a sum which might exceed the amount of the claim. The replies to the Green Paper suggested a wide range of possibilities.

The option that garnered the most support was to allow the **attachment of several accounts simultaneously and the release of the surplus funds after the attachment** ordered by the court, by the enforcement authority, in accordance with Community rules. An alternative would be for the release to take place following an agreement between the creditor and the debtor.

The method of dealing with **joint and nominee accounts** may also seem problematic. The protection of the interests of the co-holder of the account and of the third party holding monies on behalf of the debtor must be addressed, in conjunction with the actual effectiveness of the order.

Most of the replies considered that **attachment of joint accounts was feasible** once the **co-holder of the account** has been given **the possibility to protect its rights on the monies it owns** or if only **half of the monies of the account are subject to attachment**.

Some respondents were against the attachment of **nominee accounts** on the grounds that it was **too complicated**.

3.4 Amounts exempted from execution

Nearly all Member States and stakeholders welcomed the exemption of certain sums from the attachment as a part of the debtor's protection, enabling the debtor and its family to pursue a normal life. **Particular attention should be paid to certain types of income**, such as social benefits, as in some Member States these cannot be attached.

As regards applicable law, most of the replies suggested that **the law of the state of enforcement** or the **law of the state of the debtor's habitual residence should apply,** while a minority proposed that **rules or guidelines should be laid down at Community level**.

4. EFFECTS OF AN ATTACHMENT ORDER

4.1 Implementation

Almost all of respondents agreed with the **removal of the interim measure (*exequatur*)** in the Member State requested to enforce the order granted by the court of another Member State. This option would **allow the prompt serving of the enforcement order**, which would have direct effect throughout the EU.

Numerous Member States and stakeholders advocated the **use of electronic transmission** as a way to make enforcement of the order easier, although this could involve creating a European database to gather all the information needed for the transmission. On the other hand, a number of respondents stressed **the technical difficulties in making resources of this kind available in all Member States with the same level of efficiency and data protection**. Because of those possible obstacles, a number of replies suggested **using the provisions**

introduced by Regulation 1348/2000[90] **to transmit the order by registered post or to leave the transmission to the rules of the Member State of enforcement**. Some respondents were against direct transmission from court to bank, and suggested the **use of enforcement authorities (bailiffs)** instead**.** Alternatively, it was proposed that the **creditor should be made responsible for transmission**.

The question concerning the time that would remain for banks to implement the order and the effect this would have on ongoing operations gave rise to differing replies. **A majority acknowledged that the order should be served as quickly as possible**, but opinions on when this should be done varied **from immediate entry into force to a couple of days**, allowing the bank enough time to perform the operation. It was also suggested that an **EU standard processing period** should be laid down.

A large majority of replies supported the idea that **banks should inform the court or the enforcement authority whether and to what extent the order has been successfully implemented,** provided that the bank can do so in the language with which it is the most familiar, and that banking secrecy can be preserved. Some suggested that the bank **should also inform the parties** or **only the creditor**, who would then have the duty to inform the court. A very small number of Member States and stakeholders rejected the idea that the banks should provide information, arguing that this would impose too big a burden on them.

4.2 Protection of the debtor

Protection of the debtor was a key issue in most of replies. Ensuring rapid information for the debtor as well as facilitating the debtor's access to court to lodge possible objections were highlighted as issues of the utmost importance, since the debtor would not be informed prior to the granting of the order.

A large majority of Member States and stakeholders considered that informing the debtor of the existence and enforcement of the order should be the duty of the **enforcement authority and/or the issuing court**. For others, this obligation should rest with the banks. They could also have the option of informing their customers if they so wished, as part of their customer relations. Another option would be to make the **creditor responsible for notifying the debtor**.

It was suggested that the instrument should set minimum rules, modelled on those **contained in Regulation (EC) No 805/2004**[91] creating a European Enforcement Order for uncontested claims, or alternatively that **this matter be left to the application of national law**.

In the view of a majority of Member States and stakeholders, the debtor should be informed after the order has been executed, whereas a minority proposed that the debtor be informed immediately after the issuing of the order, or after the bank has been notified thereof.

The responses to the Green Paper overwhelmingly supported the **automatic lapse of the order after a certain time**, as part of the mechanism to protect the debtor against wrongful

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

91 Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, OJ L 143 , 30.04.2004, pp. 0015 - 0039

attachment. Therefore it was suggested **that the order be closely linked to predefined time limits,** within which the creditor had to start the main proceeding or obtain an enforceable title. However, it was proposed that this time period could be extended under certain conditions.

The debtor's right to object to the order raised certain issues in connection with possible grounds for objection or the courts having jurisdiction to hear them.

As regards the grounds for objection, a number of replies suggested that **this should be harmonised** at European level, whereas **the overwhelming majority referred to the possibility of contesting any point that had been raised by the creditor to obtain the order**. Generally, replies focused on the demonstration by the debtor of the non-existence of the claim, or the usefulness of the order, or any objections of a substantive or procedural nature.

A closely related issue is the question of **which court should be given jurisdiction to hear those objections**. Several options were mentioned by the Member States and the stakeholders. A majority of them **would be willing to give jurisdiction to the court that issued the order,** while others would give jurisdiction to **the court having jurisdiction on the merit of the claim** (which could be the same court that issued the order), **the court of the debtor's domicile**, **the court of the State of enforcement**, **the court of the creditor's domicile, the court of the country in which the account is held**.

4.3 Ranking of competing creditors

As regards the ranking of competing creditors, **where several creditors might ask for an Attachment Order against the same debtor**, most respondents were willing **to leave the matter to the application of national law**, without any harmonisation at EU level.

4.4 "Transformation" into an executory measure

The large majority of the replies rejected a clause on this issue in the future instrument, preferring it to be left instead to the application of national provisions and especially to the provisions on enforceability under Regulation (EC) No 44/2001[92] and Regulation (EC) No 805/2004[93]. **Thus, the two orders, i.e. both protective and enforceable**, **should remain separate processes without any automatic transformation**. A few respondents agreed that a **uniform procedure should be set up** allowing the court that issued the Attachment Order to change it into an enforceable measure.

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92 Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001 p1

93 Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, OJ L 143 , 30.04.2004 p. 0015 - 0039

ANNEX IIIA
SHORT SUMMARY OF THE PUBLIC HEARING

On 1 June 2010, a public hearing on facilitating cross-border debt recovery was held in Brussels which gathered 84 participants representing ministries of justice, judges, law firms, bailiffs, academics, banks, businesses and citizens.

The Head of Cabinet of Vice President Reding opened the hearing by a key note speech highlighting the shortcomings of the current situation and stressed the need to reactivate the single market as a source of economic growth. The speech was well received by the audience which raised different aspects of the background for a European bank attachment: i.e. cross-border versus domestic scope, debt evasion and criminal sanctions, need for more information on current enforcement schemes.

The contractor for the IA study presented some parts of the interim report and the structure of the questionnaires that are being sent.

The first speaker presented a research project on protective measures carried out by the Utrecht University which showed that the Dutch leave for an attachment is so easy to obtain that it is not as balanced as it should be for the protection of debtor's rights. In the light of these risks the structure of the European proposal should be balanced by an investigation of creditor's claim and the legal defence.

The second speaker from the University of Heidelberg explained that under option 2 (revision on Brussels I) it would be possible to propose a suppression of the exequatur for the enforcement of protective measures; however a self-standing European procedure for bank attachment could only be created through a specific instrument (Regulation).

A representative from the bailiffs' association focused on the role of his profession as only competent officials should ensure the protection of defendant's rights in domestic and cross-border enforcement. An academic supported the role of bailiffs who have contributed to reducing the time for enforcement in Eastern countries where they have been introduced.

A representative from the European Banking Federation explained that banks are also interested in a European procedure as banks are often creditors as such. It asked to quantify cross-border aspects of the problem and that any common procedure should include strict conditions. One question was raised about assets tracing.

In the general discussion, the following points were raised: A majority of participants expressed that the envisaged instrument should be a provisional/protective measure only and not deal with the transfer of the funds to the creditor. The need to define responsibilities in data collection and the availability of the order (pre- or post-judgment) were also raised.

In the closure speech, a representative of the Commission noted that nobody had challenged the problem definition, although more data was required to substantiate its scale. The debate on the policy options had indicated a consensus in favour of a self-standing European order for the preservation of bank accounts, even though many details were still to be decided (e.g. whether the instrument should be limited to provisional measures or also cover enforcement,

limited to the debtor or covering other assets, protection of debtor's rights, protection of personal data, banks' costs etc). It was hoped that a Commission proposal could be put forward in 2011.

ANNEX IIIB
SHORT SUMMARY OF THE MEETING WITH MEMBER STATES' EXPERTS

The meeting was held on 31 March 2011 in Brussels. The purpose of the meeting arranged by the Commission was to have an exchange of views on the working document distributed by the Commission services - i.e. a preliminary draft Regulation on facilitating cross-border debt recovery. The meeting was chaired by Salla Saastamoinen, Head of Unit JUST A/1. In total 22 countries participated to the meeting -incl. DK which showed great interest in the project despite the position of DK in the Treaties which does not allow it to participate to EU judicial co-operation. Five missing countries were CY, LV, MT, NL, and RO.

The Member States' experts generally welcomed the future proposal, so the atmosphere has developed very positively towards acceptance of Union measures concerning enforcement. In the general discussion, the Commission initiative for a preservation order was seen helpful as it would accelerate trans-border enforcement proceedings. The experts also provided constructive comments to the provisions of the draft Regulation in view of making it consistent with existing EU instruments (Regulation Brussels I, Regulation on Service of Documents) and with national enforcement rules – e.g. on the conditions for application for the order, for disclosure of banking information, for remedies of the defendant/debtor.

The results of discussion on the specific provisions of the working documents are as follows: Comments were made on a number of provisions (e.g. scope, conditions for issue, requirement for a security deposit, jurisdiction for the debtor's remedies etc). However, in general, the only point that raised serious concerns was the disclosure of information on the bank accounts (Art 15-16) which is clearly difficult to several Member States.

A majority of experts stressed that their comments are initial and asked more time to allow them to engage in necessary internal consultation and in-depth examination of the text in the Member States. Upon several requests, the Member States were allowed to provide written comments to the Commission after the meeting.

The EP participated with three persons who were impressed about the Commission's progress and speed. They were positive on the draft. The expert from the future PL Presidency thanked for good work and thought that the Commission's proposal could advance well in the Council under the PL Presidency,

ANNEX IV
REVIEW OF EXISTING SCHEMES FOR PRESERVATION ORDER AND BANK ATTACHMENT

Table: Summary Matrix – Comparative Analysis of Bank Attachment Procedures[94]

Key Features		Member State(s) to which key feature applies[95]
Types of assets subject to bank attachment orders		
	Assets attached *in rem*	AT, BE, DA, DE, ES, FI, FR, GR, IT, LU, MT, PT, RO, SI, SE and the UK (Scotland),
	Assets attached *in personam*	AT, CY, IE and the UK (England & Wales)
	All assets in bank account(s) can be attached	FR, NL
	Carve-out for essential / protected assets	BE, FI, FR, GR, IE, LU, MT, NL and PT.

94 CSES study, p. 90.

95 According to the following sources:
(1) the website of the European Judicial Network in civil and commercial matters: Interim and precautionary measures.
(http://ec.europa.eu/civiljustice/interim_measures/interim_measures_gen_en.htm); and
(2) the annex on provisional measures (Securing the enforcement of judgment attachment/preservation injunctions) to "*Study No. JAI/A3/2002/02 on making more efficient the enforcement of judicial decisions within the European Union: Transparency of a Debtor's Assets, Attachment of Bank Accounts, Provisional Enforcement and Protective Measures*", Professor Hess, 18/02/2004. It should be noted that **5 Member States** (Bulgaria, Cyprus, Estonia, Lithuania and Poland) are not covered by the above sources.

Procedure under which bank attachment orders may be issued		
	Legal representation required	ES, MT and PT
	Standard of proof lower than for substantive proceedings	AT, BE, CZ, DA, DE, ES, FI, FR, GR, HU, IE, IT, LU, LV, MT, NL, PT, RO, SI, SK, SE and the UK.
	Ex parte hearings permitted	AT, BE, CZ, DE, ES(*), FI(*), FR, GR(*), IE, IT(*), LU, NL, PT(*) and the UK.
Conditions under which bank attachment orders are granted		
	Applications must be urgent	AT, BE,DA, DE, FI, FR, GR, IT, PT
	There must be a risk of frustration	AT, BE, FI, FR, DA, DE, ES, GR, IE, IT, LU, NL, PT, SK, SE and the UK
	Creditor may be required to provide security/undertaking	AT, CZ, DA, DE, ES, FI, FR, GR, HU, IE, IT, LV, MA, NL, RO, SE and the UK (England & Wales)
Effects of bank attachment orders or equivalent measures		
	Obligation on banks to provide information to courts	AT, BE, DA, DE, ES, FI, FR, GR, IT, LU, PT, RO,

		SE , SI and the UK (Scotland)
	Time limit for expiry of BAO or equivalent measure	AT, BE, DE, ES, IT, LU and the UK (England & Wales)
	Preferential rights afforded vis-à-vis third party creditors	AT, DA, DE, FR, ES, IE, PT, SE and the UK (Scotland)
	Criminal as well as civil offence	CZ, DE, FR, GR, IT, MA, RO, SE and the UK (England & Wales).
Possibility of appeal against granting of a bank attachment order		
	Debtor may appeal	AT, BE, CZ, DA, DE, ES, FI, FR, GR, HU, IE, IT, LU, LV, MT, NL, PT, RO, SI, SK, SE and the UK.
	Creditor may appeal	BE, CZ, ES, IT, RO, SE, SI, SK and the UK (Northern Ireland).

(*) = Exceptional cases only.

Types of assets subject to bank attachment orders or equivalent measures

The type of assets that can be subject to a bank attachment order or equivalent measures in the legislation of Member States is the same, in that it consistently covers **money held to the credit of the debtor one or several bank accounts**. As noted above, the preservation of the asset may operate *in rem* or *in personam*. Where the operation is *in rem*, there is some variation among Member States as to the **extent of the assets subject to the bank attachment order or equivalent measure.** In other words, as to whether the preserved assets amount to the entire content of the bank account or accounts of the debtor, or only the amount corresponding to the disputed debt (plus enforcement costs).

France and the Netherlands are examples of jurisdictions where the bank may be ordered to block the entire account of the debtor. However, in the material reviewed for this study there were very few references to measures that are capable of preserving all assets held in the debtor's bank account(s) regardless of the size of the disputed debt. Given the severe potential consequences of preserving a debtor's assets, a balance clearly needs to be struck between the creditor's rights and those of defendants enshrined in the provisions of the European Convention of Human Rights and the EU Charter of Fundamental Rights of the European Union.[96]

In their national legislation, several Member States make **provision for carve-outs for essential or protected items**.[97] However, the precise nature of these carve-outs differs according to the jurisdiction. For example, in France and Luxembourg the exemption applies to assets that are necessary in everyday life. In **Malta**, it is not lawful to attach a Garnishee Order *inter alia* to any salary or wages, or any prescribed pension, benefit, allowance or assistance. And in the **Netherlands**, wages and other claims to periodic payments are exempt from attachment up to a certain prescribed limit.

Procedures for bank attachment order or equivalent measures

Procedural considerations include such matters as:

- Any requirement for legal representation of the parties;
- The standard of proof required by the court;
- Whether the proceedings are *ex parte* (i.e. the debtor is not heard).

They also cover the circumstances in which a creditor can apply for a bank attachment order or equivalent measure. In particular, a key issue is whether, in the context of a proposed EU-wide instrument, it would be possible for a creditor to lodge an application both prior to the main proceedings, concurrently with lodging the main proceeding, or even during the main proceedings if specific circumstances have arisen (Paragraph 3.1 of the Annex to the Green Paper). The key procedural issues are considered below.

Requirement for legal representation

The requirement for legal representation is mandatory (always or in certain circumstances) for applications for bank attachment orders or equivalent measures in a relatively small number of Member States, namely: **Malta**; **Portugal** (if the value of the disputed debt is higher than 3,740 Euros); and **Spain**. It should also be noted that in certain jurisdictions legal representation is not mandatory but in practice considered essential, namely: **Luxembourg**, and **England and Wales**.

Standard of proof required by the court

It is common practice for Member States to require a lower standard of proof for establishing a claim on the merits in respect of applications for precautionary measures than would be

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96 Notably Articles 6 and 8 of ECHR and Articles 7 and 47 of the EU Charter.

97 Member States with 'carve-outs' include Belgium, Finland, France, Greece, Ireland, Luxembourg, Malta, Netherlands and Portugal.

required for the substantive proceedings. However, there is not a common formulation for this lower standard of proof in the different Member States. In **Denmark, Malta and Spain**, *prima facie* evidence is sufficient. But in **Hungary, Slovenia and Sweden**, to obtain an interim injunction the applicant must show that the eventual proof of the claim is *probable* while in Germany *sufficient evidence* needs to be provided but the grounds for an application for Preventive Annex do not need to be proved. Elsewhere, common law tests are applied. In **Ireland**, it is necessary to show that there is "*a fair or serious question to be tried*". In **England and Wales**, the applicant must present a "*good arguable case*". In some Member States, such as **Italy**, there are no formal evidentiary requirements.

As the Commission has noted (Paragraph 3.2.1 of the Annex to the Green Paper), it is unlikely that the use of varying terminology to express the standard of proof in precautionary measures proceedings would be problematic in the context of an EU-wide bank attachment order. This is because the terms express a similarly lower evidentiary standard than applies in the substantive proceedings.

Ex *parte hearings*

Whether or not proceedings are heard *ex parte* (i.e. without the debtor being heard) has significant bearing on the efficacy of the precautionary measure. If the bank attachment order or equivalent measure can be awarded without an oral hearing at which the debtor is present, the latter will have less notice of the preservation of his bank assets and therefore less opportunity to transfer these before the measure becomes effective.

The position in EU Member States varies a lot on the use of *ex parte* hearings for bank attachment orders or equivalent measures in their national legislation. Hearings can be *ex parte* in **Austria, Belgium, Czech Republic, England and Wales, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Northern Ireland, Portugal, Spain** and **Scotland (13 MS)** In some of these jurisdictions, *ex parte* applications are granted in exceptional circumstances only **(4 MS)**.[98]

Circumstances in which a creditor can apply for a bank attachment order or equivalent measure

In all EU Member States, applications for a bank attachment order or equivalent measure are made by the creditor to the court with appropriate jurisdiction. There is no single criterion for determining the court with appropriate jurisdiction across all Member States.

In many countries, including the **Czech Republic, Finland, Italy, Latvia, Portugal, Slovenia, Spain and Sweden** (**8 MS)** applications are made to the court where the substantive proceedings are being (or are likely to be) heard. In other Member States, the rules vary. Thus, in **Belgium**, applications are made to the court of seizures; in **France**, to the judge of the Regional Court with jurisdiction to decide questions relating to the execution of civil judgments; in **Luxembourg**, usually to the President of the District Court or a judge acting in his stead; in the **Netherlands**, to the Interim Relief Judge of the District Court; and in **England and Wales**, to the High Court.

There is some discrepancy as to the possible timing of lodging the application. It appears that in most Member States it is standard to lodge an application for a bank attachment order or

[98] In Greece, Italy, Portugal, Spain ex parte applications are granted in exceptional circumstances only.

equivalent measure before submitting a claim for substantive proceedings.[99] An exception is **Spain**, where commencement of the substantive proceedings is seen as a condition for applying for an Attachment of Assets. It is possible to lodge the bank attachment order application after the substantive proceedings have already commenced - certainly in **Austria, England and Wales, Finland, Northern Ireland, Scotland, Slovenia,** and **Sweden (5 MS)** It is presumed that it is also possible to lodge the application concurrently with the claim for substantive proceedings in these situations.

It should be noted generally that procedural timing requirements for bank attachment orders or equivalent measures are not 'harmonised' across Member States. By way of example: in some Member States, the court hearing the application must give judgment within a certain number of days of the application being heard (eight days in the case of **Belgium**) or being filed (seven days in the case of the **Czech Republic**); and in **Germany**, there is a time limit of one month within which the creditor may apply for enforcement of the Annex Order or Interim Injunction. These variations are unlikely to be of material concern in the context of a possible EU-wide bank attachment order.

Conditions under which a Bank Attachment Order is granted

Applications for a bank attachment order or equivalent measure in national legislation have to satisfy a number of conditions:

- Show **urgency,** i.e. the creditor must satisfy the court that rapid action is necessary because of the risk that the enforcement of a future judgment would be endangered if the attachment order were not granted.

- Demonstrate that the application is **prima facie justified** or there exists a good arguable case for the claim (see the 'standard of proof' procedural requirement above);

- Provide **security or some other undertaking** to the court so that the debtor's losses can be compensated if it later transpires that the bank attachment order should not have been awarded.

Taking the first of these conditions, urgency, it is generally necessary among Member States for applications for bank attachment orders or equivalent measures to be urgent. However, the nature of the urgency required is not consistent across Member States.

Taking some illustrative examples: in **Belgium**, 'urgency' implies that the debtor's solvency is in doubt; in **Denmark**, that there is potential harm, for example imminent frustration of enforcement of the substantive claim (as in **Italy**, competing claims from other creditors is not sufficient); in **Germany**, that there is an immediate risk of violation of the creditor's rights; while in in other jurisdictions like **Luxembourg**, urgency is assessed by the court on a case by case basis. The need for urgency is not omnipresent in all EU jurisdictions, and there appears to be no such requirement in a number of Member States including **England and Wales, France, Finland, Latvia, Netherlands, Northern Ireland, Romania, Slovakia, Scotland, Slovenia,** and **Sweden (9 MS).**

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[99] Some Member States stipulate that the substantive proceedings must be commenced by the creditor within a defined time period following the granting of the application for precautionary measures, e.g. within one week (domestic claims) or two weeks (cross-border claims) in Denmark; within one month in Finland; or within 30 days of notification of the precautionary measure to the debtor in Portugal.

Unlike the substantive condition of urgency, applicants must almost always be able to demonstrate **risk that the enforcement of the claim will be frustrated**, i.e. because the assets in the bank account(s) will be transferred or dissipated. The exceptions to this are **Romania**, where the creditor has the option rather than the requirement of proving that there is a risk that the decision will not be enforced because of the removal or dispersal of the debtor's assets (but the creditor must provide security – see below); and **Slovenia**, where the creditor is not required to demonstrate any risk if he is able to show it is probable the debtor would suffer only minor damage as a result of the precautionary measure (however, a risk is deemed to exist if the claim would have been enforced abroad) (**2 MS).**

The court requires some form of **security from the creditor** in most EU Member States. This is to compensate the debtor for damage flowing from the award of a bank attachment order or equivalent measure which should not have been granted, and to deter frivolous or vexatious applications for such measures on the part of the creditor.

Security is commonly provided in the form of a deposit of monies with or bank guarantee provided to the court. Sums can also be paid into a bailiff's deposit account (e.g. in Latvia). Security or other assets can also be deposited at court (for example in **Denmark**). In common law jurisdictions such as **England and Wales** and the **Republic of Ireland**, the security takes the form of an **undertaking as to damages provided to the court**. This means that if the applicant fails in the substantive proceedings, he must compensate the debtor for losses resulting from the granting of the injunction.

In other jurisdictions, the nature of the security is at the discretion of the court. This is the case in **Austria**, **France** and **Greece (3 MS).** Security is generally not required in **Belgium**, **Czech Republic**, **Luxembourg**, **Slovakia**, **Slovenia** and **Scotland (7 MS)** In **Sweden**, if the applicant is not able to provide security but, at the same time, demonstrates that he has special grounds for his claim, the court has the option of releasing him from the obligation to provide security.

In some cases (e.g. **Finland**, **Portugal** and **Scotland**) the **defendant** can prevent a bank attachment order or equivalent measure from being enforced by lodging security with the court. This enables the debtor to be protected against provisional measures whilst at the same time providing some assurance to the creditor that the debtor accepts that a claim may need to be settled.

Effect of Bank Attachment Orders or Equivalent Measures

As noted above, the purpose of a bank attachment order or equivalent precautionary measure is to enable a creditor to preserve, as security for the debt owed, money held to the credit of his debtor in one or several bank accounts. However, there are other important legal effects of the measures in the different EU Member States that need to be considered. Examples of these effects are:

- The extent to which the bank attachment order or equivalent measure imposes obligations on third parties (i.e. banks), e.g. with regard to providing information;
- Whether or not there a time limit after which the bank attachment order or equivalent measure expires;

- What the effect is of the bank attachment order or equivalent measure on the debtor's other creditors (i.e. does it confer any preferential rights on the applicant);

- Whether breach of the bank attachment order or equivalent measure gives rise to a criminal as well as a civil offence.

A further notable issue is whether the bank attachment or equivalent measure has effect *in personam*, i.e. is directed to the person of the debtor (as is commonly the case in common law jurisdictions such as England and Wales and some civil law jurisdictions such as Germany) or *in rem*, i.e. is against the account itself (as is the case in majority of Member States [100]) (15 MS).

The key legal effects of bank attachment orders or equivalent measures are considered below.

Obligation on third parties and information on debtors' accounts

In rem attachments are directed against the bank account(s) and so create a direct obligation on the bank to block any dealing with the asset on the part of the debtor. These attachments create additional obligations on banks to provide **information on debtors' accounts**, raising questions of banking protection and data secrecy.

Member States have different approaches to preserving debtors' data secrecy: in the **Czech Republic**, at the written request of a court a bank may report matters relating to debtors who are subject to banking secrecy without seeking their agreement. Likewise, in **France** banks receiving a court request for a preventive attachment relating to a debtor-client are obliged to report immediately to a bailiff all the accounts opened in the name of the debtor, and the amounts recorded in the accounts.

If the banks do not provide such details, and have no legitimate reason for not doing so, they may be ordered to pay the debt in place of the debtor. Similar notification obligations exist in **Portugal** and **Slovenia**. By contrast, in **Greece** and **Romania** there are more stringent confidentiality requirements on the data that banks can provide under local law. In **Italy**, banks have confidentiality obligations vis-à-vis other **third parties**, and may inform third parties only that the funds are not disposable – the reasons for the preservation of the account must be kept private.

Time limit for expiry of bank attachment orders or equivalent measure

There is an absence of uniformity in EU Member States' national legislation when it comes to time limits applicable to bank attachment orders or equivalent measures. Thus: the time limits can be specified at the discretion of the court (**Austria, Ireland** and **Luxembourg**); for a specified period (for example three years in **Belgium**); or valid until there is an order of the court to the contrary (**Finland**).

Effect of the bank attachment order or equivalent measure on the debtor's other creditors

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[100] There are at least 15 Member States where the bank attachment order or equivalent measure has effect *in rem*, namely Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, Luxembourg, Portugal, Romania, Spain, Scotland, Slovenia and Sweden.

It is often not clear what effect a bank attachment order or equivalent measure has on the creditor in relation his ranking in relation to the debtor's other creditors. In **Finland**, a seizure order does not afford the applicant any preferential right to the funds which are the subject of the order; whereas in **Scotland**, if the creditor wins his case he enjoys a preferable right over the property arrested.

The Green Paper notes (Paragraph 5.3) that while some Member States give priority to the first creditor serving the protective order on the bank,[101] others apply a 'group principle' similar to the distribution of monies in insolvency proceedings. The 'group principle' does not confer any advantage on the creditor who has been granted a bank attachment or equivalent measure. There is in addition a smaller, third category of Member States, being common law jurisdictions such as **England and Wales** and **Ireland**, where preservation orders do not affect the ranking of competing creditors at all.

Civil/criminal offences for breaching Bank attachment or equivalent measure

It appears that breach of a bank attachment order or equivalent measure can be a criminal as well as civil offence for the debtor in some but not all jurisdictions. These include: **France, Germany, Greece, Italy, Malta, Romania** and **Sweden**. In a few jurisdictions (such as **Czech Republic** and **England and Wales**), not only the debtor but also third parties face potential criminal liability for assisting in the breach of a measure.

Possibility of Appealing against a Bank Attachment Order

There generally exists an appeal mechanism against a bank attachment order or equivalent measure in the national legislation of EU Member States. However, the nature and scope of the appeal is not standardised. Relevant variables are:

- Whether it is open to both parties to appeal the decision, or also a third party;
- The timeframe for making the appeal. There is a possibility in some Member States to convert a protective measure into an execution measure (enforcement) when the judgment on the substance of the claim becomes definitive (as pointed out by the 2006 Green Paper).
- Whether an appeal (in the strict legal sense) is not available, but there is nevertheless an 'effective' means of appeal.

In all Member States there exists some form of appeal mechanism against a bank attachment order or equivalent measure. However, the nature and scope of the appeal is not standardised. In particular: in several Member States (**Belgium, Czech Republic, Italy, Northern Ireland, Romania, Slovakia, Slovenia, Spain** and **Sweden**) (**9 MS)** the creditor, if his application is denied, may lodge an appeal as well as the debtor. In rarer cases, a third party may also appeal (**Belgium**, **England and Wales**, **Finland** and **Gibraltar**).

The timeframe for the making the appeal varies in different Member States, ranging from 15 days of delivery of the written decision for the **Czech Republic** to five days from the date of the judgment for **Romania**. In a minority of jurisdictions, a

[101] The Heidelberg report (p.72) states that these Member States are Austria, Denmark, England, France, Germany, Ireland, Portugal, Spain, Scotland and Sweden.

conventional appeal is not available, but there is nevertheless an 'effective' means of appeal. This could take the form of an option to apply to have the issuance of the bank attachment order or equivalent measure revoked (**Greece**), or an option to apply for a new measure suspending the effects of the previous measure (**Luxembourg**).

ANNEX V
SUMMARY OF EBTP SURVEY DATA

Commercial Disputes and Cross Border Debt Recovery

The European Business Test Panel (EBTP) was used to obtain views from the business community on the extent to which commercial disputes arise in cross-border trade in Europe (including the extent to which choice of court agreements are used in international contracts) and the scope for action to facilitate the recovery of debts. The survey was conducted over a one-month period from mid-July to mid-August 2010.

1. Objectives of the consultation

The EBTP survey was designed to provide evidence-based support to the work of the European Commission on possible amendments to the 'Brussels 1' Regulation (Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters) and a related initiative to facilitate the recovery of cross-border debt.

2. Respondents

A total of 422 responses were obtained to the EBTP survey with 281 members of the EBTP choosing to complete the questionnaire, i.e. an **overall response rate** of 66%. Further discussion of the results of the survey is therefore based on 281 responses which means that figures provided in the feedback report may differ from those included in the standard summary report generated by the on-line consultation tool and provided together with the feedback report.

The number of respondents who completed the questionnaire ranged from 0 to 81 in the 29 EU/EEA countries in which the EBTP is located. In terms of individual **Member States**, the most represented countries were DE (19%), PL (11%) and LU (8%). Other countries ranged from 0% to 7%.

As regards **business sectors**, the top three most represented sectors were real estate/renting/business activities (20%), manufacturing (19%) and wholesale and retail trade, repair of motor vehicles, motorcycles and personal and household goods (15%). Other business sectors ranged from 0% to 11%. As regards the **size of the businesses** responding to the survey, 63% were small enterprises (<50 employees), 16% medium-sized (>50 but <250 employees) and 21% large enterprises (>250 employees).

3. Analysis of survey responses

Below, we provide a summary of the survey responses. The questionnaire was divided into two main sections – commercial disputes and cross-border debt recovery.

3.1 Commercial disputes

• 83% of the businesses said that they provide services or sell goods to consumers or businesses in another EU Member State.

• 33% of the businesses had been involved in a **commercial dispute** in their own country compared with 23% where the other party was in another Member State and 6% where the other party was outside Europe.

• Amongst the factors considered important in deciding whether or not to pursue a commercial dispute through the courts in another EU Member State, the value of the claim was ranked by 92% of the respondents as either 'very important' or 'important', followed by the cost of going to court (88%) and the complexity of the proceedings (84%). These factors were also the topranked factors in relation to disputes between parties from the same country but in each case, they were seen as less important in deciding to go to court than in cross-border cases.

• The **costs of litigating abroad** were seen as being 'much more expensive' by 39% of businesses compared with 22% who said it was 'a little more expensive' and 12% who said the costs were about the same. Very few respondents said litigating abroad was cheaper although quite a high proportion (23%) indicated that they did not know.

• **Dispute resolution methods** – under half of survey respondents (42%) who had been involved in a cross-border dispute resolved it by going to court in another country, a significantly lower percentage than in the case of disputes taken to court where the creditor and debtor were in the same country (55%).

• **Choice of court agreements** are broadly used in the international contracts – almost 70% of business providing services or selling goods in another EU Member State have a choice of court agreements in their international contracts. 7,7% of the respondents reported that in the past five years their contractual counterpart did not comply with the clause designating the competent court and took the dispute before a different court.

3.2 Cross border debt recovery

• **Difficulties with debt recovery** when doing business in other EU Member States were seen as 'very important' in deciding whether or not to engage in cross-border trade by 32% of survey respondents and as 'important' by a further 39%. The smaller the business, the more likely it was to highlight the importance of debt recovery issues as a factor in cross-border trade.

• Various methods were used by survey respondents to help with **managing the risk of non-payment** including payment in advance (20% of respondents), factoring, credit insurance, invoice discounting. With the exception of credit insurance, less than half the respondents considered such methods as adequately meeting their needs. Small businesses were more likely than larger firms to ask for payment in advance. The explanation for this could be that smaller firms do not have the cash flow required to defer payment.

• Only 11% of the survey respondents had tried to obtain a **bank attachment order** in another EU Member State (there were nearly twice more (19%) who had done so in their own country). In 53% of cases, the order was granted (that means a lower rate (i.e. of 23%) than for applications through the courts in the home country (i.e. 65%). Concern that the defendant would move his assets away was the main reason for seeking a bank attachment order.

• The EBTP results point to other factors apart from the risk of assets being moved as influencing the **decision on whether or not to apply for a bank attachment order**. In

particular, the cost-benefit analysis that applied to decisions regarding cross-border litigation generally also applied with bank attachments with the value of the claim being 'very important' or 'important' to most (96%) respondents followed by the cost of proceedings (67%).

• Very few survey respondents (3%) favoured the **status quo** with the highest proportion (39%) arguing that the rules of different European countries regarding bank attachments should be harmonized so they are the same, or that there should be mutual recognition of national procedures (13%). **A further** 23% favoured a particular method of action through the creation of the **European bank attachment order**. The remaining respondents did not offer an opinion.

• 23% of the EBTP respondents said they would be 'a lot more likely' to be likely to undertake (more) cross-border trade if rules are adopted at a European level making it easier to obtain a bank attachment order. A further 29% said they would be quite likely to do so.

4. Conclusions

Overall, the EBTP survey results indicate that the risk of facing a commercial dispute and non-payment of debts is a significant deterrent to engaging in cross-border trade in the EU's Internal Market. The figures on the extent of the use of the choice of court agreements in international contracts evidences that such agreements are important tool in the cross-border trade. The cost of litigating abroad is higher than in the home country and this together with other complications puts businesses off going to court in another EU Member State to try and settle a dispute. Specifically in relation to debt recovery, similar factors mean that the business still hesitates before taking the decision to seek to obtain a bank attachment order in another country. The status quo is not seen as satisfactory and most businesses would welcome an initiative at a European level to improve the situation.

ANNEX VI
LAWYER'S FEES IN THE MEMBER STATES

EU Member State	Negotiable Legal Fees Average		Legal Fees			
				Regulation of law or of Bar		
	Fee €/h	x 10h	Freely negotiable	Exists	Applies if nothing was agreed	Set out rules on agreements
Austria	347	3470	√	√	√	no
Belgium	203	2030	√	no	-	-
Bulgaria	46	460	√	√	no	√
Cyprus	116	1160	√*	√	√	√
Czech Republic	87	870	√	√	√	√
Denmark	347	3470	√	no	-	-
Estonia	203	2030	√	no	-	-
Finland	347	3470	√	√	+	√
France	347	3470	√	√	+	√
Germany	347	3470	√*	√	√	√
Greece	203	2030	√	√	no	√
Hungary	87	870	√	√	no	√
Ireland	521	5210	√	√	+	+
Italy	521	5210	√	√	√	no
Latvia	347	3470	√	no	-	-
Lithuania	87	870	√	no	-	-

Luxembourg	203	2030	√	√	no	√
Malta	116	1160	√	√	?	√
Netherlands	347	3470	√	no	-	-
Poland	87	870	√	√	no	√
Portugal**	203	20308	+	√	+	+
Romania	87	870	√	√	+	√
Slovakia	87	870	√	√	√	no
Slovenia	203	2030	√*	√	+	√
Spain	347	3470	√	√	+	√
Sweden	347	3470	√	no	-	-
United Kingdom***	521	5210	√	√	√	√
Average	241,04	2410,40				

* on higher fee, there is a minimum in the regulation(s)

** regulation for solicitors and advocates, but no regulation for lawyers, barristers

*** freely negotiable in Scotland; in England and Wales for barristers and solicitors in contentious businesses, a regulation does not exist in Scotland. No data on Northern Ireland

\+ no data

ANNEX VII
ESTIMATING CROSS-BORDER BAD DEBT LEVELS

There is no data available from Eurostat or other official sources on the level of bad debt resulting from intra-EU trade. Debt collection agencies are an alternative source of information on bad debts. In addition to consulting FENCA, we sought the views of three large debt collection companies. However, although we could obtain information on bad debts overall (i.e. domestic and cross-border), none of those we consulted were able to provide us with an estimate specifically of the level of cross-border debt.[102]

To estimate the proportion of debts arising from cross-border trade that are written off, we have therefore adopted two approaches combining different sources of data.

(i) Estimate based on Eurostat and European Payment Index

Taking the first approach, according to the 2009 European Payment Index, 2.6% of all transactions in the EU are written off (in other words are bad debts)[103]. However, as noted above, this includes both debts arising from transactions within Member States as well cross-border trade between them.

In 2009, total intra-EU trade stood at €2,194 billion according to Eurostat (down from €2,714 billion in 2008 because of the global economic downturn). There is relatively little statistical data available on intra-EU trade and so it is not possible to disaggregate this global estimate to provide a more detailed breakdown.

Domestic demand in the EU stands at €11,672 billion according to Eurostat[104]. Intra-EU trade at €2,194 billion thus accounts for 18.8% of total domestic demand in the EU. Assuming debts are written-off at a similar rate for domestic and cross-border transactions, this would mean that cross-border bad debts amount to 0.45% of total bad debts (18.8% of the 2.6%[105]; 0.188 x 0.026 = 0.0048 = 0.48%). The total estimated bad debt resulting from cross-border transactions can thus be estimated at €56 billion (€11,672 billion x 0.48%).

(ii) Estimate based on Information from Debt Collection Agencies

According to an analysis of their annual reports and other publicly-available documents, the three largest debt collection companies - Atradius, COFAE and Interum Justitia - together represent some 20% of the European debt collection business by value.[106] In 2009, the three

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102 CSES draft final report (page 24) quotes the 2010 Intrum Justitia European Payment Index (EPI) which suggests that the 2.6% average amount being written off by companies across Europe equals 300 billion euros. However, this covers both domestic and cross-border debt.

103 2009 European Payment Index

104 Eurostat, all figures are for 2009

105 Representing bad debts according to the European Payment Index

106 Atraduis Annual Report, 2009 http://global.atradius.com/images/stories/Annual%20Reports/2009/atradius_annual_report_2009.pdf
Intrum Justitia Annual report, 2009 http://www.intrum.com/files/IJ_2009_EN.pdf
COFACE financial report, 2009

companies handled a combined total €2,885 million of debt. According to their market share (the combined 20%), we can therefore estimate the total debt collection market to represent €14,426 million (€2,885 million x 5):

Company	Debt (€million)	Notes
Atradius	1,358.6	includes Turkey
COFACE	1,065.0	includes Switzerland
Intrum Justitia	461.7	n/a
Total	2,885.3	n/a

This estimate covers both domestic and cross-border trade. However, it is reasonable to assume that the collection of cross-border bad debts accounts for a high proportion of their business. If it is assumed that twice as much debt collected by the companies is cross-border rather than domestic, the ratio of cross border debt would therefore be 37.6% (18.8% based on the Eurostat data explained above x 2). The total amount of cross debt collected by specialised companies can therefore be estimated at €5,424 million (€14,426 million x 37.6%).

According to Intrum Justitia's annual report, debt collection agencies currently cover approximately 10% of the debt collection market in mature economies (i.e. the total of written off or bad debt). We have confirmed through a telephone interview that this figure is similar for the European market. Considering the total debt collection market is estimated to be worth €14,426 million and represents 10% of domestic and cross-border bad debt in the EU, the total amount of bad debt is therefore € 54,240 million (€5,424 million x10).

It needs to be borne in mind that estimates provided by debt collection agencies drawing on their own business may underestimate the level of cross-border debt. This is because smaller businesses often do not use debt collection companies because of the costs involved (see draft final report, pages 17, 32-33) while larger undertakings do not use them because they have their own methods of trying to retrieve debts.

(iii) Conclusions

The two different calculation methods provide quite similar estimates. According to the first, based on Eurostat data and the European Payment Index, the total value of cross-border bad debt is **€56 billion** in 2009. The second method, based on information from a sample of three major debt collection agencies suggests that cross-border bad debt amounted to **€54.2 billion** in 2009 (a relatively small difference of some €1.8 billion).

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http://www.coface.com/CofacePortal/ShowBinary/BEA%20Repository/COM_en_EN/documents/Financial_report_2009