

Position Paper

UEAPME¹ position on the Green Paper on improving the efficiency of the Enforcement of Judgments in the European Union: the Attachment of bank accounts (“freezing of bank accounts”).

Introduction

UEAPME highly appreciates the fact that the European Commission has given us still the opportunity to comment on the Green Paper.

Indeed, UEAPME welcomes all initiatives that can contribute to the enhancement of effective enforcement of contracts. Effective measures to enforce payment are to be welcomed, under the condition that this would not result in a tool to prohibit SME's to continue their activities on a sustainable basis.

As always, care must be taken that any instrument, introduced by the EU, entails a coherent approach. Therefore, we feel that due care must be taken to make sure that this proposed instrument, considers two crucial elements:

1. Abuse should be avoided as much as possible

The underlying reasoning for the introduction of this instrument is the fact that at this time a debtor has the possibility to withdraw all funds from a bank-account that is the subject of a claim by a creditor. Therefore, the instrument foresees the possibility to attach a bank -account without the debtor knowing of it. While we understand the underlying reasoning, we urge that due care is taken to prohibit misuse of this instrument. Indeed, SME's are often confronted with claims of larger creditors (such as banks, suppliers ...) that claim a debt that is insufficiently founded. Therefore it is of utmost importance to restrict this instrument to uncontested claims.

2. An easy procedure

Recovery procedures for uncontested claims must be made as easy as possible. This means that we do not see the benefit of several procedures: one to ask for preliminary measures, another one for the main claim, and then a series of exequatur-procedures to make sure that a verdict can be carried out in another country.

As long as a claim cannot be contested, one procedure should be the objective, of which the verdict can be carried out in all member states, without the need of further exequatur procedures.

¹ UEAPME subscribes to the European Commission's Register of Interest Representatives and to the related code of conduct as requested by the European Transparency Initiative. Our ID number is [55820581197-35](#).

Position of UEAPME in relation to the specific questions

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

As mentioned above, UEAPME can support the idea of attachment of bank accounts as one of several means to improve debt recovery, on the condition that it can only be used for claims that cannot be contested. However, we wonder how this new instrument would stand in relation to the existing instruments of Regulation (EC) 44/2001, Regulation (EC) 805/2004 and Regulation (EC) 861/2007. Therefore the relation between these Directives and the proposal needs to be further clarified.

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

Yes.

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

UEAPME is of the opinion that for the sake of ease of use of the proposed instrument, the creditor should have the choice as to the point at which he makes the demand.

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

As outlined above, UEAPME reiterates the importance that this instrument should be limited to claims that cannot be contested.

If the claim can still be contested, UEAPME fears that abusive use of this instrument will be too easy. One cannot forget that, in particular for SME's, the freezing of bank-accounts is a drastic measure, which has far-reaching consequences. Certainly in the light of prevention of insolvency-procedures, this instrument should be dealt with very carefully.

Therefore, we are of the opinion that the possibility to use this instrument as a preventive action should be absolutely excluded in cases where the creditor is not able to take away any form of doubt as to the uncontested nature of his claim.

Therefore UEAPME is of the opinion that only authenticated documents (judicial decisions for example) should be allowed as basis for the award of this measure.

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

According to UEAPME, urgency is not a relevant criterion in this matter. The relevant criterion is the question whether or not the risk/possibility exists that a debtor will deliberately take away sums of his bank- account in order to harm the creditor. In some cases this could entail an element of urgency; however the two criteria are not necessarily linked. Therefore we do not see a need to consider urgency as one of the necessary conditions.

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

According to UEAPME this is an absolute must. Although we insist that this instrument can only be used in case of uncontested claims, no one can exclude the possibility that a claim that is thought of to be uncontested, turns out to be contestable after all. Therefore, the option in this question needs to be considered.

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

In UEAPMEs view this is absolutely necessary. As stated above, this instrument should only be useable in case of uncontested claims. Therefore, we see no reason why the hearing of the debtor should be excluded. The hearing of the debtor will give a much higher certainty with regard to the uncontested nature. It might be worth to think about making this hearing obligatory prior to the effectuation of a granted bank attachment.

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

In our view the account should be identifiable. Normally, a creditor seeking this kind of measure, will at least have some details to identify the bank account, since it would be unwise to ask this measure if the creditor has no idea as to the funds that are present on the bank-account. Certainly the IBAN and BIC-identifier codes should form the basis of the request.

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

In general UEAPME position is that procedures should be kept as simple as possible. However in this specific case, a little more care should be taken, since the risks of misuse are very high. The court of the defendant's domicile should always be able to judge the attachment of a bank –account, and should be able to involve the debtor in this judgment.

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

The attachment should be limited in relation to the necessity of the claim. For example: if a bank wants to attach a bank-account of one of her clients, the bank normally has relatively more funds at its possession than the client. Therefore this instrument is relatively speaking less necessary in this relation, than it would be in an SME-to SME relation.

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

No opinion

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

The emphasis should be to restrict an emphasis to as little accounts as possible. So instead of freezing a little sum on a lot of accounts, it would be better to limit the number of accounts attached and raise the sum attached on these accounts.

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

Attachment should be limited to accounts of the debtor himself. It would be against the logic of this instrument to involve accounts of people who are just indirectly linked to the debtor.

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

UEAPME supports an ex officio determination.

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

See our answer to question number 9.

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

When an attachment is ordered rightfully, there is no need to postpone the implementation of the order.

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

UEAPME agrees with this statement.

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

By the court that takes the decision.

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

It is absolutely necessary that, when an attachment order is not executed in time, it should be null and void.

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

Since this is such a delicate instrument to use, UEAPME is of the opinion that a debtor should be able to object the attachment at the court of the defendant's domicile.

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

This possibility should at first instance be excluded as much as possible, by making the burden of proof significant enough, so that only uncontested claims can be accepted.

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

This would interfere with the different insolvency – procedures, so that first the impact of a harmonisation at this level on the insolvency-procedures should be studied.

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

UEAPME is not in favour of the obligation to get an exequatur. However, the possibility should exist for the debtor to object to the attachment.

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