Zentraler Kreditausschuss

Comments on the

European Commission's Green Paper "on Improving the Efficiency of the Enforcement of Judgements in the European Union: The Attachment of Bank Accounts";

COM (2006) 618 final

R 9.1.1 – Lo

The ZKA is the joint committee operated by the central associations of the German banking industry. These associations are the Bundesverband der Deutschen Volksbanken und Raiffeisenbanken (BVR), for the cooperative banks, the Bundesverband deutscher Banken (BdB), for the private commercial banks, the Bundesverband Öffentlicher Banken Deutschlands (VÖB), for the public-sector banks, the Deutscher Sparkassen- und Giroverband (DSGV), for the savings banks financial group, and the Verband deutscher Pfandbriefbanken (VdP), for the mortgage banks. Collectively, they represent more than 2300 banks.

I. Basic points

The Zentraler Kreditausschuss supports the European Commission's aim to introduce a fast and effective procedure for the attachment of bank accounts in the EU. Such an instrument appears particularly appropriate in the context of progressive integration of the single Euro payments area. The structural differences in national attachment procedures that have been identified in the so-called Hess report favour debtors aiming to evade their creditors' grasp. For an internal market to function, an efficient standardised European procedure to combat circumvention of enforcement is needed.

German law also incorporates instruments to secure legal enforcement and maintain the priority order in favour of creditors (pre-garnishment, arrest, temporary injunction). A Community instrument for the attachment of bank accounts should initially be available to creditors as an additional and optional procedure in cross-border cases. Given the low occurrence of cases in the cross-border field, the inclusion of intrastate circumstances is currently not necessary to ensure smooth functioning of the internal market. Application of the procedure should be optional leaving creditors to decide whether to proceed in accordance with the Community instrument for the (cross-border) attachment of bank accounts or to follow a proven national procedure in order to secure enforcement. However, a Community instrument must not favour foreign creditors over domestic creditors.

In their capacity as garnishees, credit institutions are spending considerable human and hence financial resources on processing and supervising attachment measures. A Europe-wide instrument for the attachment of bank accounts would have to ensure that the associated expense incurred by the banking sector was limited to an appropriate level and would particularly have to avoid creating additional obligations for the banking sector, for example by introducing an obligation to determine the amounts exempt from execution[1]. In their capacity as garnishees, credit institutions should receive compensation from creditors for enforcing the attachment of bank accounts[2]. Otherwise, the costs arising from the attachment that result exclusively from the debtor-creditor relationship would have to be charged to all customers (for example via the account charges). Many, partially abusive, attachment attempts are made exclusively for investigative purposes or with the aim of putting pressure on the debtor. The Community instrument should not support this kind of conduct. The creditor's obligation to pay a fee before the enforcement of the attachment should, at least partially, work against this practice.

A Community instrument for the attachment of bank accounts should provide standard forms for the attachment application, the attachment decision and the garnishee declaration in order

[1] For details see our reply to question 14.
[2] See also our reply to question 11.

to speed up the procedure and guarantee its uniform application in the EU. Furthermore, procedural law must, among other aspects, clearly determine legal standards, such as the extent to which courts must examine the claim that justifies the attachment of a bank account[3] and the admissible evidence. (National) leeway, as a consequence of which attachments of bank accounts in the EU would be subject to the different conditions, should not be granted in this context. Furthermore, an appropriately short time limit should apply to each procedural step and a maximum time limit to the overall procedure both of which should apply at the European level. In addition it must be guaranteed that neither the debtor nor the credit institution as garnishee incur any disadvantages from the fact that the procedure is carried out in a language which they may not understand. All relevant documents should therefore either be composed in an official language spoken by the debtor and the credit institution as garnishee, or a certified translation should be prepared into a language that the debtor and the credit institution as garnishee understand. This responsibility could be fulfilled either by the court or by the creditor. Neither the debtor nor the credit institution as garnishee should be liable for incorrect translations.

II. Individual comments

Question 1:

We consider a Community instrument for the attachment of bank accounts to be necessary. A self-standing European procedure is the most effective way of stopping the circumvention of enforcement by way of a cross-border transfer of assets (see our explanations under I.).

However, it should be remembered that proceedings instituted against contractual partners resident in different EU member states may face obstacles that cannot be removed by a Community instrument for the attachment of bank accounts. It is true that Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (EuGVO) has simplified the cross-border assertion and enforcement of claims to a considerable extent. However, several aspects, among them different enforcement periods in the EU member states, problems with transmission in other EU member states (especially in countries that do not have official registers of residents), and increased costs associated with proceedings at courts in different EU member states still represent major obstacles. Hence, in the medium term, harmonisation of enforcement procedures in the EU member states appears desirable. All participants in legal and business relations in the EU should have access to effective legal protection under the same conditions.

[3] For details see our reply to question 3.

Question 2:

Limiting the Community instrument to temporary protective measures, i.e. the attachment of potential bank accounts (current accounts and savings accounts), appears sufficient at the start.

Question 3:

The general prerequisite for an attachment order should be the existence of a monetary claim. Further conditions for an attachment of bank accounts should depend on the extent to which the respective court has examined the creditor's factual entitlement: proceedings should generally be admissible, without special evidence of urgency, if a legally valid title has been granted. Furthermore, proceeding should be admissible if a preliminary enforceable title exists and the creditor has submitted a security deposit in the amount and of the type and manner to be decided by the respective court (see also our reply to question 6). Furthermore, especially during the proceedings on the merits of the claim, the creditor must be able to secure his payment claims even before a title is granted since this is the moment when the danger of a transfer of assets is particularly great. This could be effected in the context of summary proceedings as, for example, in the case of interim proceedings in Germany.

Question 4:

The submission of a copy of the enforcement right should be sufficient to assert a claim. Before the right has been granted, respective suitable documents could be admitted (for example contracts, bank receipts, etc.) in line with the documentary evidence approach. However, unambiguous regulations would be required as to the documents that satisfy the requirements of documentary evidence. The applicable requirements should be rather strict in order to prevent abuse of the attachment procedure. Standardised regulations pertaining to the presentation of evidence before the court, the onus of proof and the degree of required probability would have to apply in the entire EU. In this respect, national leeway should not be granted in order to ensure that orders for the attachment of bank accounts are granted under equal conditions (which the preamble of the green paper refers to with good reason).

Question 5:

Insofar as no enforcement right exists, the creditor should be under obligation to persuade the court of the urgency of the attachment order in addition to his entitlement to a claim. In this context, the creditor would have to demonstrate and provide documentary evidence of the fact that circumvention or substantial aggravation of enforcement must be expected if the title must first be granted. Whether or not urgency in the above sense actually applies should be

ascertained by the objective decision of a third party that has carried out a comprehensible and diligent examination; the creditor's personal view should not be decisive. In contrast, in the context of securing the enforcement of a title that has already been granted, urgency should not be a prerequisite for the attachment of bank accounts.

Question 6:

For the debtor’s protection, the attachment of bank accounts should principally depend on the provision of a security deposit; however, where required, exceptions should be admissible. It would also be conceivable to provide for a minimum amount (e.g. 10% of the enforceable claim) as a security deposit. The amount of the security deposit should depend on the amount of the enforceable claim and on the facts and legal situation of each individual case. Again, a Community instrument must not favour foreign creditors over domestic creditors. However, a security deposit should not be required if the creditor has already been awarded the amount in the context of a legally valid title.

Question 7:

The hearing of the debtor can be dispensed with if the bank attachment is intended to serve the purpose of guaranteeing the enforcement of a title that has already been granted. In this case, the debtor already had an opportunity to submit his opinion in the context of the proceedings and thereby avoid interim measures of protection.

In all other cases, it should be at the dutiful discretion of the court whether a decision will be taken without or after the hearing of the debtor. The choice of procedure should depend on the facts and legal situation as set out in the creditor's application. Where facts are doubtful and legal questions complicated, courts should have a greater obligation to hear the debtor. If the creditor's claim is beyond doubt, the court should principally desist from arranging such a hearing before making its decision in order to safeguard the efficiency of the proceedings since the surprise effect frequently determines the success of an attachment. However, should the debtor lodge an appeal, the court should arrange a hearing without undue delay during the further course of the proceedings, and the lawfulness of the attachment should be examined. Furthermore, credit institutions as garnishees should also be able to lodge appeals since attachments of bank accounts may place a burden on them, e.g. if it is not possible to ascertain the "correct“ debtor on the basis of the creditor's information. However, the time limits applying to the procedural steps (hearing of the debtor, lodging of the appeal, court decision) must be specified in detail in all cases in order to avoid unnecessary delays in the proceedings.

Question 8:

The creditor must provide such information regarding the debtor that the garnishee (e.g. the credit institution) is in a position to identify him. The requirements should not be excessive since detailed information (e.g. exact account numbers, bank branch, etc.) is frequently not available to creditors. Creditors' applications for an attachment order should therefore include the following information:

- Detailed description of the debtor (name, first name or company and address)
- Trade register number in the case of commercial companies or date of birth in the case of natural entities

Account number and sort code or IBAN and BIC would also appear appropriate as further information in order to correctly identify the debtor. Experience in Germany has shown that, in principle, the debtor's address alone can be an identifier. However, one move to a different address, a secondary residence, or diverging private and business addresses, of which the bank has not been informed, may lead to identification problems. The (additional) statement of IBAN and BIC would be a suitable measure to prevent numerous, partially abusive, attachment attempts that are carried out for investigative purposes only. However, in view of the fact that some EU member states do not offer creditors effective facilities to swiftly and accurately identify debtors' accounts, applications should currently be accepted without this information. The exact information that should be included in the creditor's application for an attachment of bank accounts will depend in particular on the measures to improve "transparency of the debtor's assets" that will be taken at the European level.

Question 9:

The courts' decisions in this matter should not be based on the (free) discretion of the creditor. Nevertheless, it should be kept in mind that debtors are frequently no longer resident in their home country and creditors do not know the debtors' address abroad.

Given the territorial principle and the associated sovereign powers of the EU member states in their national territories, a Community instrument must take account of the fact that, according to constitutional law, coercive measures can only be taken by the court that is responsible for domestic enforcement matters vis-à-vis garnishees according to national law, i.e. in the country which the account is held. It might be appropriate to concentrate the (exclusive) competence in each EU member state at one central office in the respective EU country in line with the EuGVO. Examinations under substantive law following the existing agreements pertaining to the recognition of foreign titles could thus be significantly reduced. Although the (foreign) court giving judgment on the merits should create the conditions for the granting of a European attachment order (title, interim proceedings, etc.), the implementation should be based on the national law of the country in which the account is held. This would prevent unequal treatment of national and foreign creditors similar to the effects of Art. 40 EuGVO.

Question 10:

Bank attachments should be limited to a certain amount. The amount should depend on the degree to which the court has acknowledged the creditor's claim – be it in the context of the proceedings on the merits of the claim or in summary proceedings (see our reply to question 3). The limit should generally be fixed at the principal claim plus interest and enforcement costs.

The determination of a limit ensures that no more than said amount is subject to the attachment and that, especially in the case of current accounts, the account can be released for payments. Furthermore, the attachment order should clearly specify in which order the debtor's assets should be blocked. For example, if the current account balance is not sufficient to provide the security deposit, and savings balances exist, ranking would be necessary due to the less stringent conditions applying to the transfer of current account balances compared to savings account balances, e.g. potential notice periods or submission of the savings book for withdrawals. Not being directly involved in the proceedings, credit institution as garnishees should definitely not be responsible for determining the order and hence incur liability.

In addition, it should be considered whether the attachment order should simultaneously include the credit institution's authorisation as garnishee to separate the attached assets and release the remaining assets for further business once the attachment amount has been covered. Otherwise, as a consequence of the attachment, the entire account would be blocked and would lose its function as a cashless payment instrument.

Question 11:

Credit institutions should receive advance remuneration for the enforcement of attachments. In their capacity as garnishees, credit institutions have to invest considerable human and financial resources in the processing of attachment orders. To cover these expenses, credit institutions should receive either remuneration or fees payable by the creditor in accordance with the "principle of causation". Otherwise, the additional burdens arising from attachments, which result exclusively from the debtor-creditor relationship, would have to be charged to all customers (for example via the account charges). We consider this inappropriate.
The amount of the cost-covering remuneration should be determined at the European level. It should be independent from the amount to be attached since the processing expense remains the same irrespective of the attachment amount.

The creditor should be under obligation to transfer the remuneration to the bank before the enforcement of the attachment, perhaps in the form a of court fee that is to be transferred to

the bank. Neither the account holder nor the debtor can be held liable for the costs since the bank would be not be able to realise these costs in cases whereby accounts have no credit balances or the respective business relationships have been terminated. In addition, one should consider cases whereby the account has already been attached in favour of other creditors beyond its existing credit balance with the consequence that the bank would not be able to collect a fee for the new EU creditor without infringing other creditors' priority rights.

Question 12:

In principle, all accounts that are subject to the attachment should be blocked in the amount of the attached sum. It is the debtor's responsibility to obtain a release in the case of excessive attachment. Credit institutions as garnishees cannot take this decision. In addition, garnishees generally do not know whether the creditor has instigated further, successful, attachments. Hence, it must be solely the court's responsibility to release attached bank accounts either entirely or partially upon the debtor's request, and to determine the order of the allocation.

Question 13:

In the current legal situation, a complete blocking and the inclusion of the account balance in the attachment appears to be unavoidable in the case of joint accounts in order to prevent the debtor's circumvention of enforcement. As stated in our reply to question 12, the credit institution cannot be responsible for an allocation to different bank accounts. On the contrary, it is the joint account holder, who got involved in this close relationship with the debtor, who must (in part) proceed against the attachment by taking recourse to national legal remedies.

In principle, an attachment of nominee accounts should also be admissible against the account-holding trustee. However, this depends on the fact that the creditor has a claim against the trustee as account holder, for example in cases whereby a trustee supports a debtor who is acting with intent to defraud. Should no such claim exist, the only path open to the creditor beyond a EU bank attachment procedure is the attachment of the trustor's reassignment claim against the trustee pursuant to the relevant national regulations. In the case of an attachment of a nominee account, the trustee or trustor is responsible for asserting a release against the attachment creditor by taking legal action. Credit institutions as garnishees generally do not have sufficient information regarding the trustee relationship since they are not part thereof.

Question 14:

The enforcement court will generally not have the information required to define the amounts exempt from execution. Hence, it should be the debtor's responsibility to obtain a (partial) exemption of his account. The exempted amount should be calculated by the enforcement court, hence a standardised European procedure should also include standardised enforcement

protection regulations. However, the amounts exempt from execution must reflect the actual cost of living in the different EU member states.

Credit institutions as garnishees must not be responsible for the determination of the amounts exempt from execution. Apart from the considerable additional expense they would incur, credit institutions as garnishees generally do not have the required information. In addition, they are not in a position to verify the debtor's information. Nor do they know whether the debtor holds further accounts, perhaps even in other EU countries, or has further sources of income. Hence, credit institutions should not be responsible for calculating the amounts exempt from execution, nor could they reasonably be expected to take on the associated liability risks.

Question 15:

In the context of a standardised European enforcement procedure, the most consistent approach to this issue would be an abolishment of the exequatur procedure for attachment orders. However, it must be guaranteed that the attachment order transmitted to the credit institution as garnishee is composed in the official language of the garnishee in addition to the language of the debtor.
This requirement could be fulfilled by enclosing a certified translation. The letter should be transmitted pursuant to the provisions applying in the addressee’s (garnishee, debtor) respective EU member state.

Question 16:

The attachment order should be transmitted following the regulations under Article 42 EuGVO and pursuant to the legal provisions applicable either in the addressee’s EU member state (garnishee, debtor) or the enforcing member state. After delivery, the bank should be under obligation to block the account without delay in compliance with an EU-wide standard (period of time). With respect to the treatment of ongoing account transactions, the attachment order’s delivery date (date and time) should be decisive since it must be clear which account balance is subject to the attachment. Since, in certain court districts, banks that transact bulk business regularly receive numerous simultaneous bank attachment orders, banks should be granted an EU-wide standard processing period (perhaps two days) to enforce the order.

We do not agree with the electronic transmission of attachment orders mentioned in the EU Commission’s green paper unless “transmission channels“ are restricted; i.e. transmission would be admissible to a certain e-mail address specified by the credit institution only. Otherwise, given their numerous transmission channels, banks would not be in a position to ensure swift processing of attachment orders. Furthermore, as stressed by the EU Commission, it must be guaranteed that, in the case of electronic transmission, the bank can

unambiguously establish the sender’s identity (court issuing the order) and the correctness of the transmitted data.

Once the attachment order becomes effective, the debtor’s claim should (preliminarily) be withdrawn from his power of disposition, which means that the credit institution as garnishee would not be permitted to make payments to the debtor (so-called interdiction of payment). However, this should not establish an obligation to reverse payments that have already been initiated (where possible). The occurrence of the performance should not necessarily be prevented by active intervention. Hence, the subsequent transmission of attachment orders should not lead to an obligation of the credit institutions as garnishees to revoke transfer orders for non-recurrent payments that had already been submitted.

Question 17:

Credit institutions should be permitted to submit garnishee declarations, for which an EU-wide standardised form should be provided, in the official language of the credit institution’s place of business. Should a translation be required, the creditor should be responsible for procuring the latter at his own expense. At present, garnishee declarations are addressed to the creditors only. An additional notification of the enforcement authority would lead to additional expenses / burdens on both the authority and the garnishee. It is not clear what benefit would be derived from such a procedure.

Question 18:

Either the enforcement court or the creditor should be responsible for officially notifying the debtor that an attachment of his bank account has been granted and taken effect. Whether or not a credit institution informs its customers of an attachment of bank accounts should be left to their discretion.

Question 19:

At all events, the attachment of bank accounts should be limited in time. Furthermore, both the courts and the creditors must be entitled to revoke the attachment at any time. However, creditors should be able to apply for an extension before the attachment order expires. In this context, the creditor must persuade the court that neither a collection nor the institution of proceedings on the merits of the claim has been possible to date due to reasons for which he is not responsible.

Furthermore, the Community instrument for the attachment of bank accounts should provide for the courts’ officially notification of the credit institutions as garnishees of the revocation of an attachment as well as for the latter’s refusal to permit the debtor to dispose of his account before it has gained knowledge of the revocation. In order to keep their burden at a

minimum, garnishees should not be responsible for investigating whether or not an attachment is still effective.

Question 20:

The debtor should be permitted to assert all grounds for objections to the attachment of bank accounts he considers relevant. Both formal grounds and grounds under substantive law should be admissible, for example the fact that the creditor has already received a sufficient security deposit or that the asserted claim is not valid. The court that has granted the attachment order should also be responsible for the appeal.

Question 21:

Harmonisation of liability appears appropriate in order to enable the creditor to assess potential liability risks arising from a subsequent acknowledgement that the attachment was unfounded. However, the liability risk must not deter creditors from having recourse to the protection offered by the attachment of bank accounts.

Question 22:

The ranking of competing creditors should be based on the law of the country in which the attachment is enforced. This approach avoids any (valuation) conflicts with national provisions, especially in terms of property law. Otherwise, there is a danger that creditors who enforce according to the national law of the respective EU member state are disadvantaged vis-à-vis creditors who enforce according to a European procedure. Should a Community instrument pertaining to the ranking of creditors be considered necessary, the priority principle appears appropriate and comprehensible, i.e. attachments become effective according to the date of the attachment order's transmission to the bank.

Question 23:

In legal terms, a "transformation" appears problematic. Should the creditor obtain a title, he should be able to apply to the enforcement court for the transfer of the attached claim which becomes effective according to its rank. .

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