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REPORT

with recommendations to the Commission on proposed interim measures for the freezing and disclosure of debtors' assets in cross-border cases (2009/2169(INI))

Committee on Legal Affairs

Rapporteur: Arlene McCarthy

(Initiative – Rule 42 of the Rules of Procedure)

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MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION

with recommendations to the Commission on proposed interim measures for the freezing and disclosure of debtors' assets in cross-border cases (2009/2169(INI))

The European Parliament,

- having regard to Article 225 of the Treaty on the Functioning of the European Union,
 - having regard to its resolution of 25 October 2007 on the Green Paper on improving the efficiency of the enforcement of judgments in the European Union: the attachment of bank accounts¹,
 - having regard to its resolution of 22 April 2009 on the effective enforcement of judgments in the European Union: the transparency of debtors' assets²,
 - having regard to its resolution of 25 November 2009 on the Communication from the Commission to the European Parliament and the Council – An area of freedom, security and justice serving the citizen – Stockholm programme³,
 - having regard to the Stockholm Programme for 2010-2014 – An open and secure Europe serving and protecting its citizens⁴, adopted by the European Council on 10 December 2009⁵, and in particular point 3.4.2 thereof,
 - having regard to Rules 42 and 48 of its Rules of Procedure,
 - having regard to the report of the Committee on Legal Affairs and the opinion of the Committee on Economic and Monetary Affairs (A7-0147/2011),
- A. whereas the Union's most important tool in promoting growth in the aftermath of the financial crisis is its internal market; whereas it is essential that the millions of businesses and citizens who make use of the internal market and the right to live, work and travel throughout the EU have effective remedies in the event that they have a claim against another citizen or business,
- B. whereas the internal market and the area of freedom, security and justice become a reality for citizens and businesses only where Union law, in particular in the area of civil justice, is effectively applied, from transposition and awareness-raising to application and enforcement,
- C. whereas the current level of successful cross-border debt recovery is remarkably low, as regards both the assets of natural persons and those of undertakings; whereas this state of

¹ OJ C 263 E, 16.10.2008, p. 655.

² OJ C 184 E, 8.7.2010, p. 7.

³ OJ C 285 E, 21.10.2010, p. 12.

⁴ OJ C 115, 4.5.2010, p. 1.

⁵ European Council Conclusions – 10-11 December 2009 – EUCO 6/09.

affairs discourages cross-border trade, sends a message of impunity to recalcitrant debtors and hinders the Union's economic performance,

- D. whereas the cost of cross-border debt recovery is currently prohibitive for creditors in cases where a debtor has assets in several Member States; whereas the time has come to simplify and speed up this recovery process,
- E. whereas such prohibitive costs have a negative impact on the extension of cross-border loans and even cross-border commercial transactions, representing a major barrier for the full functioning of the internal market,
- F. whereas cross-border enforcement must be a priority in the internal market and courts must be able to act swiftly to order the freezing of the debtor's or alleged debtor's assets; whereas in the absence of such a facility rogue traders and others who deliberately seek to evade their responsibilities can move their assets to another jurisdiction, forcing citizens and small businesses who have already secured a court judgment to go before another Member State's courts in an effort to recover assets,
- G. whereas an order for the disclosure of information about assets is required, given the practical difficulties creditors face in accessing information on debtors from public or private sources in a cross-border context,
- H. whereas the legislative action requested in this resolution should be based on detailed impact assessments, as requested by Parliament,
- I. whereas detailed information on the procedures for enforcing claims in every Member State should be available through the European e-Justice portal; whereas cooperation between enforcement authorities in the Member States should be stepped up in order to speed up debt recovery,
- J. whereas the instruments proposed should complement existing Union law and initiatives, in particular Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions¹, Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters², Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure³, Regulation (EC) No 861/2007 of the European Parliament and of the Council establishing a European Small Claims Procedure⁴, and the European e-Justice portal,
- K. whereas the instruments should be simple and should avoid delay and unnecessary expense; whereas they must be available where appropriate *ex parte*, with 'surprise effect'; whereas debtors' and alleged debtors' rights should be correspondingly safeguarded in order to avoid any misuse of the measures requested,

¹ OJ L 48, 23.2.2011, p. 1.

² OJ L 21, 16.1.2001, p. 1.

³ OJ L 399, 30.12.2006, p. 1.

⁴ OJ L 199, 31.7.2007, p. 1.

1. Requests the Commission swiftly to submit to Parliament, on the basis of Article 81(2) of the Treaty on the Functioning of the European Union, legislative proposals on measures for the freezing and disclosure of debtors' and alleged debtors' assets in cross-border cases, following the detailed recommendations below;
2. Confirms that the recommendations respect the principle of subsidiarity and the fundamental rights of citizens;
3. Considers that the requested proposal does not have financial implications for the Union budget;
4. Instructs its President to forward this resolution and the accompanying detailed recommendations to the Commission and the Council.

ANNEX TO THE MOTION FOR A RESOLUTION: DETAILED RECOMMENDATIONS AS TO THE CONTENT OF THE PROPOSAL REQUESTED

Part 1: Instruments requested

Recommendation 1 (on the form and nature of the instruments to be adopted)

The European Parliament requests the following instruments: a European order for the preservation of assets (EOPA) and a European order for the disclosure of assets (EODA). The form of Union action should be that of a regulation. Both instruments should be free-standing remedies additional to those available under national law. They should apply only in cross-border cases.

Part 2: Recommendations common to both instruments

Recommendation 2 (on jurisdiction to issue such an order)

The European Parliament considers that the requested instruments should contain uniform jurisdictional rules specifying which national courts are competent to issue them. These uniform rules should take into account the fact that the court having substantive jurisdiction under Council Regulation (EC) No 44/2001¹ is generally best placed to deal with such orders. They should also take into account the stage reached in the main proceedings in the course of which the order is requested.

Recommendation 3 (on jurisdiction to hear oppositions to the orders)

The European Parliament considers that the court which has initiated the EOPA or EODA should have exclusive jurisdiction to hear oppositions to it where such oppositions are to the EU-wide effect of an order. Where the opposition is to the effect of an order in a specific Member State other than the one of the initiating court, this rule could be tempered, in order to protect debtors, alleged debtors and third parties, by also conferring jurisdiction on the courts of the Member State in which the assets are located. The grounds for opposition to the orders should be listed exhaustively in the instruments requested.

Recommendation 4 (on the standard form for requesting the orders and on reporting)

The European Parliament considers that both orders should be requestable via a standard multilingual form, including through the European e-Justice portal. The form should be as simple as possible. Communication should also be standardised in connection with the execution of the orders (e.g. in the case of the EOPA: the response of the bank to the enforcement authority as to the success of the attachment, the notification of the debtor, etc.).

¹ Council 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).

Recommendation 5 (on reporting)

The Commission should be under an obligation to report on the implementation of the requested instruments and, in particular, on their uptake.

Part 3: Recommendations specific to the European Order for the Preservation of Assets

Recommendation 6 (on the stage of the main proceedings at which such an order may be sought)

The European Parliament is of the opinion that it is essential to be able to obtain an EOPA *ex parte*, that is, without initial notice being served on the party whose assets are concerned. The order should be available before, during, and after the main proceedings.

Recommendation 7 (on the case to be made out by the creditor)

The European Parliament considers that the granting of an EOPA by a national court should be discretionary. Furthermore, the burden of proof should be on the claimant to make a good *prima facie* case (*fumus boni juris*) and to establish urgency (*periculum in mora*). These criteria should be assessed by national courts on the basis of the existing case-law of the Court of Justice.

Recommendation 8 (on the minimum amount of information necessary to issue an EOPA)

The European Parliament is of the opinion that precise information concerning the debtor or alleged debtor, as opposed to actual bank account numbers, should be sufficient. Such information should be sufficient to prevent confusion in the case of homonymy.

Recommendation 9 (on the enforceability of such an order)

If the order has been obtained prior to a judgment establishing a debt, as is most often the case, it should be enforceable throughout the EU subject to minimal necessary intermediate measures. By contrast, if the order has been obtained after a judgment establishing a debt, then it should be enforceable throughout the EU without any intermediate measures being required.

Recommendation 10 (on the effect of such an order)

The European Parliament is of the opinion that the effect of the EOPA must be confined to the attachment of bank accounts and the temporary freezing of bank deposits, and should not grant the creditor any form of ownership of the assets. Further consideration should be given to the issue of whether the order could cover other types of assets, such as immovable property or future assets (a claim about to become payable or an inheritance).

The EOPA should affect no more bank accounts than necessary, and should be limited to the amount of the debt, plus any legal fees and interest. It should be possible for the initiating court to limit the order in time on a case-by-case basis, taking the merits of each case into account.

Recommendation 11 (on the processing of EOPAs)

The European Parliament would prefer the use of an electronic transmission system linking the issuing court with the bank holding the accounts, accessible via the European e-Justice portal, but remains open to all alternatives.

The European Parliament is of the opinion that the EOPA should impose on banks an obligation to give effect to the order immediately (i.e. within certain strictly defined time-limits) and a further obligation to inform the enforcement authority of the success or failure of any attachment. This processing should comply with applicable data protection rules.

The European Parliament urges the Commission to design the requested instrument in such a way as to minimise the cost of its use. Given the substantial differences in the cost of bank attachments between Member States, consideration should be given to the issue of whether the requested instrument should aim to harmonise such costs, or whether it should leave a decision on their level to Member States. In any event, such costs should not exceed a maximum set in the regulation, should be transparent and non-discriminatory, should reflect the actual costs incurred and should take into account the establishment of the Single Euro Payments Area and the fact that such procedures should be standardised as much as possible.

The European Parliament calls for detailed consideration to be given to the issue of who should bear the cost of processing an EOPA, including an examination of best practices at national and regional level.

Recommendation 12 (on procedural safeguards for debtors and alleged debtors)

The European Parliament considers that the requested instrument should include a comprehensive set of safeguards for debtors and alleged debtors:

A. When requested prior to a judgment establishing a debt, the granting of an EOPA should be conditional on the claimant providing security or other guarantees at the discretion of the initiating court, in order to compensate the defendant and any third parties for any damage suffered. The defendant should be able to terminate the EOPA by providing security. Member States should ensure that these provisions do not constitute a barrier to access to those with limited financial means.

B. If an EOPA is granted without notice (*ex parte*), the defendant should be notified formally and given all information required to prepare an opposition to the Order without delay after execution.

C. The defendant should have a right to submit an *ex post* opposition to an EOPA. Grounds for such an opposition should be harmonised in the requested instrument. Jurisdiction to hear such an opposition should also be harmonised in the instrument.

D. A clear time frame should be set for the EOPA. In particular, if main proceedings have not yet been brought, a time-limit for so doing should be set by the issuing court.

E. The instrument should take due account of the diversity of practices at domestic level concerning debtor hardship, including existing thresholds below which the bank account of a natural person cannot be attached. Such matters should therefore be left to the law of the debtor's or alleged debtor's Member State of habitual residence. However, to increase legal certainty for creditors, Member States should be under an obligation to communicate to the Commission information on the existence of such exemptions, which would be made public.

F. The EOPA should stipulate that the creditor enforces an EOPA at his own risk and may be liable to compensate the debtor for any damage suffered as a result of the enforcement measures.

Part 4: Recommendations specific to the European Order for the Disclosure of Assets

Recommendation 13 (on the nature of such an order)

The European Parliament considers that it should be possible to seek the order at least following a judgment establishing a debt. The Commission should consider whether the order should be available at an earlier stage in the proceedings, for instance when the court having jurisdiction on the substance considers that there is a real risk that its judgment would not be satisfied, and what corresponding safeguards should be put in place.

The European Parliament further considers that each Member State should be required to decide which authority or authorities are competent to initiate an EODA. Such designated authorities would be able to issue EODAs on a case-by-case basis, taking into account the circumstances of each case.

Recommendation 14 (on the material scope of such an order)

The European Parliament considers that debtors should as a general rule be required to disclose all assets located within the area of freedom, security and justice, in order to give the creditor the widest possible choice of action.

Recommendation 15 (on the enforceability of such an order)

The European Parliament considers that only the court or authority which has initiated the EODA should be able to modify it or set it aside. Such an order should be enforceable throughout the EU without any intermediate measures being required.

Recommendation 16 (on procedural safeguards for debtors and alleged debtors)

The European Parliament considers that the requested instrument should include a comprehensive set of safeguards for debtors:

A. The instrument should strike an appropriate balance between the right to the protection of personal data, as guaranteed by Directive 95/46/EC and as enshrined in the Charter of Fundamental Rights of the European Union, and the effective enforcement of judgments. In particular, safeguards should be put in place to protect the information disclosed as a result of an EODA and prevent its misuse.

B. The EODA should stipulate that the creditor enforces it at his own risk and may be liable to compensate the debtor for any damage suffered as a result of the disclosure.

C. Full payment of the debt must lead to the EODA being immediately set aside, including upon a unilateral application by the debtor providing proof that the debt has been settled.

Recommendation 17 (on penalties for incorrect statements in the declaration)

The European Parliament considers that the requested instrument should set out a framework of penalties for non-compliance or false statements, in order to achieve effective and uniform compliance with the order throughout the area of freedom, security and justice.

EXPLANATORY STATEMENT

Millions of businesses make use of the right to trade in the EU's internal market. Millions of citizens make use of the right to live, work and travel across the EU. It is essential that in the internal market citizens have effective remedies in the event they have a claim against another citizen or business.

The EU has legislation in place to enable cross-border claims and the mutual recognition of judgments of national courts, including the Brussels I Regulation, the European Enforcement Order, the Small Claims Procedure and the Order for Payment Procedure. But getting the judgment is only one part of the process; citizens and businesses must have the right to have their judgments effectively enforced.

One necessary component of effective enforcement is that courts must be able, as an interim measure, to act swiftly to order a disclosure of the debtor's assets and freeze them.

Without such a measure, rogue traders and others debtors may evade their responsibilities by simply moving their assets to another jurisdiction, thus denying the creditor effective enforcement of the judgment in the single market.

The citizen or small business will have spent both money and time in securing a court judgment, only to have to go to another Member State's courts with no guarantee of success or justice.

The European Institutions have drawn attention to the need for an effective regime for freezing and disclosure of debtors' assets:

There have been two Commission Green papers on the subject, in 2006 on the attachment of bank accounts, and in 2008 on the transparency of debtors' assets.

– The Parliament adopted resolutions calling for the establishment of a procedure for temporarily freezing bank accounts (rapporteur: Kurt Lechner)¹, and calling for the Commission to study a Community provisional measure for disclosure (rapporteur: Neena Gill)², in addition to those of national courts, which would have effect across the EU. Parliament took the view in both reports that any Union instrument should be limited to dealing with cross-border cases.

– The European Council's Stockholm Programme invites the Commission "to assess the need for, and the feasibility of, providing for certain provisional, including protective, measures at Union level, to prevent e.g. the disappearance of assets before the enforcement of a claim" and to "put forward appropriate proposals for improving the efficiency of enforcement of judgements in the EU regarding bank accounts and debtors' assets, based on the 2006 and 2008 Green Papers".

¹ 25 October 2007 on the attachment of bank accounts (2007/2026(INI)).

² 22 April 2009 on the transparency of debtors' assets (2008/2233(INI)).

– Parliament in its resolution of 25 November 2009 on the future Stockholm Programme called for "proposals for a simple and autonomous European system for the attachment of bank accounts and the temporary freezing of bank deposits".

– The Commission organised a hearing on 1 June and its proposal is foreseen for June 2011. A legislative initiative on the transparency of debtors' assets is scheduled for 2013.

The Committee has undertaken this legislative own-initiative report to

- call on the Commission to swiftly bring forward proposals on interim measures for the freezing and disclosure of debtors' assets in cross-border, and
- set out the key features that Parliament would wish to have included in these proposals.

5.10.2010

OPINION OF THE COMMITTEE ON ECONOMIC AND MONETARY AFFAIRS

for the Committee on Legal Affairs

on proposed interim measures for the freezing and disclosure of debtors' assets in cross-border cases
(2009/2169(INI))

Rapporteur: Theodor Dumitru Stolojan

SUGGESTIONS

The Committee on Economic and Monetary Affairs calls on the Committee on Legal Affairs, as the committee responsible, to incorporate the following suggestions in its motion for a resolution:

1. Welcomes the Committee on Legal Affairs' own-initiative report, as it addresses the problems raised by the increasing number of cross-border commercial litigations and the need for internal market coherence;
2. Notes that economic downturns are frequently accompanied by an increase in fraud; considers that this leads to the increased urgency of cross-border transparency of assets and streamlined mechanisms for cross-border debt recovery;
3. Observes that a central premise for the level playing-field that a single market demands has to be functional and affordable access to cross-border debt recovery;
4. Points out that appropriate and prompt information on debtors' assets is vital for debt recovery, protection of creditors' interests and enforcement of the law; therefore calls on the Commission to step up action to harmonise information sources in the Member States, such as commercial registers;
5. Emphasises that banks and other institutions should have costs covered for services, but these should be a true reflection of necessary and actual costs;
6. Supports the implementation of interim or provisional measures which may settle debt recovery cases or disputes concerning this process before cases reach the courts, thus reducing the cost of debt recovery;

7. Suggests that standardised instruments for disclosure and freezing of debtors' assets in cross-border commercial litigations be introduced, as these instruments have already been accepted by the Member States for cases involving recovery of tax liabilities;
8. Points out that disclosures need only be made sufficient to cover monetary claims and to establish the ability to cover any expenses, such as basic living costs that might be exempted from seizure; observes that there should be an assumption of equal shares in joint ownership unless the contrary is demonstrated;
9. Insists that any interim or provisional measures and any other legally binding instruments for disclosure and/or freezing of debtors' assets should be communicated in electronic form;
10. Proposes that cooperation between enforcement authorities in the Member States be stepped up in order to speed up debt recovery;
11. Calls on the Commission to speed up the legislative initiative on the transparency of debtors' assets, which is scheduled for 2013.

RESULT OF FINAL VOTE IN COMMITTEE

Date adopted	5.10.2010
Result of final vote	+: 41 -: 0 0: 0
Members present for the final vote	Sharon Bowles, Udo Bullmann, George Sabin Cutaş, Leonardo Domenici, Derk Jan Eppink, Diogo Feio, Elisa Ferreira, José Manuel García-Margallo y Marfil, Jean-Paul Gauzès, Sven Giegold, Sylvie Goulard, Liem Hoang Ngoc, Gunnar Hökmark, Othmar Karas, Wolf Klinz, Jürgen Klute, Rodi Kratsa-Tsagaropoulou, Philippe Lamberts, Astrid Lulling, Hans-Peter Martin, Arlene McCarthy, Ivari Padar, Anni Podimata, Antolín Sánchez Presedo, Olle Schmidt, Edward Scicluna, Peter Simon, Theodor Dumitru Stolojan, Ivo Strejček, Marianne Thyssen, Ramon Tremosa i Balcells, Corien Wortmann-Kool
Substitutes present for the final vote	Pervenche Berès, David Casa, Sari Essayah, Thomas Händel, Danuta Maria Hübner, Arturs Krišjānis Kariņš, Thomas Mann, Pablo Zalba Bidegain
Substitutes under Rule 187(2) present for the final vote	Elżbieta Katarzyna Łukacijewska

RESULT OF FINAL VOTE IN COMMITTEE

Date adopted	12.4.2011
Result of final vote	+ : 20 - : 0 0 : 1
Members present for the final vote	Sebastian Valentin Bodu, Christian Engström, Lidia Joanna Geringer de Oedenberg, Klaus-Heiner Lehne, Antonio López-Istúriz White, Antonio Masip Hidalgo, Alajos Mészáros, Bernhard Rapkay, Evelyn Regner, Alexandra Thein, Diana Wallis, Rainer Wieland, Cecilia Wikström, Tadeusz Zwiefka
Substitute(s) present for the final vote	Piotr Borys, Sergio Gaetano Cofferati, Sajjad Karim, Kurt Lechner, Eva Lichtenberger, Arlene McCarthy, Angelika Niebler