Access to information for enforcement and recovery purposes and international co-operation, annex to the Swedish national report on European transparency of assets in Study JAI/02/03/2002

1. Introduction

There exists a need for efficient access to information, which can be used for enforcement and recovery purposes, in a national context for both private and public creditors, who would like to realize the assets of their debtors in order to achieve payments for their claims. Such a need has of course to be balanced against the interests of humanity, dignity and privacy of the debtor.

The needs of efficient access to information about the assets of the debtor for enforcement and recovery purposes are obvious for various reasons.

Access to information makes enforcement and recovery of claims, in the quality of ordinary and provisional titles of execution, more efficient on behalf of the creditors. This also supports a higher degree of respect for court judgments and decisions by authorities in society.

A similar need of access to information also exists, for the same reasons and purposes, particularly in the civil law area in an international context, i.e. regarding the needs to exchange information between states in order to promote a more efficient enforcement of claims, e.g. when enforcement agents need more information, in a specific enforcement matter, from colleagues abroad in order to make the enforcement of a domestic or a foreign claim more secure and efficient.

In 1994 a proposal was published in a report by a group of European experts, which emphasized the importance and needs for access to information for enforcement purposes in the civil law area.1

In article 12.4 of the proposal from the group of experts a more efficient access to national information for enforcement purposes was suggested regarding the judgment debtor. The article reads:

---

1 See article 12.4 in the proposal from the group of experts in the report Rapprochement du Droit Judiciaire de l’Union européenne, pp. 210-211. The report, sometimes also referred to in literature as the “Storme-report”, after the name of the editor of the report prof. Marcel Storme, has been elaborated with the unanimous agreement of the whole group, which consisted by the following persons; A. Pessoa Vaz, M. Storme, J. Normand, J.A. Jolowicz, E. Smith, P. Meyknecht, G. Tarzia, H. Prüttng, C. de Miguel, G. de Leval and K. Kerameus, i.b., p. 63. C. de Miguel and G. de Leval had a special responsibility for the aspects on the execution of judgments or orders for the payment of money in the report.
Annex to the Swedish national report on European transparency of assets in Study JAI/02/03/2002

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

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

Several other authors in literature have also emphasized the importance, and confirmed the needs, for access to information based on various aspects particularly in the civil law area and sometimes also included the twofold objectives to increase access to national information and to establish a multilateral co-operation system between states for the exchange of national available information.²

² See Berglund, Les recherches et l’accès aux informations des agents chargés de l’exécution, Le droit processuel et le droit de l’exécution, pp. 288-290 regarding the twofold objectives of creating a European system for the exchange of information and of harmonization of national provisions of access to information. In order to make this work advance he proposes that harmonization of national provisions should begin with the identification of common principles, “minimum standards”, which e.g. might concern bank accounts and corporate registers, Bertaux, Les dérives de l’exécution forcée: vers un régime d’exécution privé, Le droit processuel et le droit de l’exécution, pp. 279 and 283 where he states that enforcement measures do not become effective mainly due to the impossibility; to obtain the address of the debtor, identify and locate his assets and to receive information about his employer. He further concludes that if such access to information would be given to the enforcement agents/execution officers it should also contribute to suppress the use of obscure private recovery agencies and Hesslén, Asset transparency – finding information – measures to make enforcement more effective, pp. 28-30 where she concludes that there still exists a great variety in an international context in terms of access to information for enforcement purposes. She further concludes, i.e., p. 31, that there often exists problems at an international level to achieve information from other states, i.a. due to; different organisation structures in other states and language obstacles and proposes, i.e., p. 41, a data base on the civil status on all citizens of the European union for those member states, which will become parties to an international co-operation. In addition she emphasizes the importance of an international exchange directly between the professionals of the member states and she also promotes the idea of setting up an international center, an “Interex”, as an analogue to Interpol, to support the international exchange of information between professionals of the concerned states. Also see Jeuland, Les garanties de la saisie européenne de créances bancaires, Le droit processuel et le droit de l’exécution, p. 404 on the needs of obtaining information about assets in bank accounts, Kennet, Aperçus comparatifs des différents modes d’exécution forcée des obligations pécuniaires dans l’Union Européenne, Le droit processuel et le droit de l’exécution, p. 264 where she suggests, based on the care of making judgments effective, that access to confidential information on the debtor (address, employment and assets) should be justified and be provided by the state, and maybe by financial institutions, to the enforcement agents, not to the creditors and Kennett, The Enforcement of Judgments in Europe, p. 123 where she concludes that exchanges of information between regulated professionals may be hampered by lack of transparency of the sources of information available to enforcement agents in other member states and uncertainty about the quality of information. Also see Leroy, L’efficacité des procédures judiciaires au sein de l’union Européenne et les garanties des droits de la défense. Transparence patrimoniale, L’efficacité de la justice civile en Europe, p. 379 where he argues in favor of an international co-operation for the exchange of information for enforcement purposes. Also see de Leval, The execution of court decisions in civil cases, pp. 48 and 51-52 on some guiding principles on securing information and respectively on some suggestions on how to increase the effectiveness of the law of execution in the European union. He concludes that, if such suggestions are implemented in all member states, and --- “supplemented by the requirement to repatriate attached assets --- it would not only increase the effectiveness of procedures in each country but also make transfers of assets between countries to enable the debtor to avoid attachment ineffective.”
Access to information regarding the assets of the debtor for enforcement and recovery purposes calls for a balanced equilibrium between the creditor’s right to efficient enforcement and recovery of his claim and the debtor’s right to humanity and privacy in such situations. Those rights are, among others, influenced by the European convention for the protection of human rights and fundamental freedoms.  

Strong arguments exist, i.a. based on the interpretation of article 6, 1 of the European convention for the protection of human rights and fundamental freedoms, in favour to consider a demand of access to information for enforcement purposes as an important requirement in order to make the execution of a judgment efficient.

It could be argued that efficiency in this context also should mean a demand on the availability of all necessary information for enforcement and recovery purposes, in order to safeguard the creditor’s right of efficient recovery, and by those means promote a realization of the creditor’s claim in the assets of the debtor.

This means that there exist strong arguments in favour of the principle to consider the availability of information for enforcement purposes, of the assets of the debtor at the enforcement and seizure of a creditor’s claim, to constitute a fundamental right based on article 6, 1 of the European convention for the protection of human rights and fundamental freedoms.

Also see Tarzia, Vers un concept européen du droit de l’exécution ?, Le droit processuel et le droit de l’exécution, p. 165 where he emphasizes the importance of efficient access to national information as an unconditional requirement for an international co-operation, Verbeke, Quel Huissier de Justice pour l’Europe ?, Le droit processuel et le droit de l’exécution, pp. 309-313 on the balance for enforcement purposes between the creditor’s right to access to information and the debtor’s right of privacy and Verbeke, Execution Officers as a Balance Wheel in Insolvency Cases, pp. 16-17 where he argues in favour of an extensive access, by various means, to information on the debtor’s assets to execution officers, however taking into account the privacy of the debtor. He concludes that the execution officers should, in order to effectuate an efficient recovery, have; “ --- a general and unlimited power of inquiry and examination of the patrimony and income of the debtor, giving him the power, without court authorisation but under the condition that the debtor can at any time oppose any abusive action of the execution officer before the court --- “. He also suggests that the proposed system should be applied internationally, eventually leading to co-operation and exchange of information between execution officers of different countries.


The European court of human rights has in it’s ruling Hornby v. Greece of 19 March 1997, see paragraph 40, on www.echr.coe.int (2003-05 26), confirmed that the execution of a judgment given by any court must be regarded as an integral part of the “trial” for the purpose of article 6 of the European convention for the protection of human rights and fundamental freedoms. This has also been confirmed in the preamble to the Council of Europe’s recommendation on enforcement and in the introduction to it’s explanatory memorandum, section I, 2. This principal understanding of the court’s ruling and by other rulings of the court on the same issue has also been supported by several authors in literature, see Danelius, Mänskliga rättigheter i europeisk praxis, pp. 143-144 and 225, Fricerio, Le droit européen à l’exécution des judgments, pp. 6-8, Yessiou Faltsi, Le droit de l’exécution selon la cour Européenne des droits de l’homme: analyse et prospective, Le droit processuel et le droit de l’exécution, pp. 198-199 and 205-206 and Verbeke, Execution Officers as a Balance Wheel in Insolvency Cases, pp. 8-9.

Cf Verbeke, Execution Officers as a Balance Wheel in Insolvency Cases, pp. 8-9 where he argues that a demand on efficiency, i.a. implies the availability of all necessary information to realize such efficient recovery in due time and concludes that debtor patrimonial transparency and asset information constitute a fundamental right (under article 6, 1 of the convention) for each creditor. He also adds some additional arguments in support of his opinion: “One might add, in support of this argument, the first article of the First Additional Protocol of 20 March 1952 to the European Rights Treaty, warranting each person the right to an undisturbed enjoyment of his property and ownership. Since a creditor’s claim is a valuable patrimonial asset, the creditor has a fundamental
Efficient access to information regarding the assets of the debtor must, however, be balanced against the rights to a treatment of humanity and dignity for the debtor, and in case of a collision between those interests, in favour of the latter.\textsuperscript{6}

This access to information must also be balanced against the right of privacy for the debtor and be proportionate in relation to the needs of information for enforcement and recovery purposes in order to avoid that the debtor is exposed to injuries as far as possible.\textsuperscript{7}

This means that no more information should be able to be obtained, and used for the enforcement and recovery of a claim, than information corresponding to the necessary needs, for the purpose of efficient enforcement or recovery of the creditor’s specific claim. In this way only such a proportionate part of information should be made available, which should contribute to avoid an excessive abuse of information of the assets of the debtor and subsequently minimize the risk to injure the debtor.

Access to information should also be acceptable, and even beneficial, to the debtors under the conditions that it is used in a balanced way for enforcement and recovery purposes, not by the creditor in person or by obscure private recovery agencies, but under the control of an independent neutral third party, an enforcement agent/execution officer, who has the task of establishing this balanced equilibrium between the rights of the creditors and the debtors, under the rules of law and the supervision of state bodies; courts and authorities.\textsuperscript{8}

---

\textsuperscript{6} Cf Verbeke, Execution Officers as a Balance Wheel in Insolvency Cases, p. 10. He there argues that: “--- this (existential) value of humanity and dignity of a debtor cannot be in conflict with the creditor’s right of recovery, since the former invariability is a superior right. Put that way, there will be no conflict, nor will there be any balancing needed. A person’s insolvency can never be an excuse to injure his humanity and dignity. The latter is such an essential right that it can never be violated. Therefore, the basic right of human dignity constitutes the very minimum of protection for each debtor.”

\textsuperscript{7} Cf Verbeke, Execution Officers as a Balance Wheel in Insolvency Cases, pp. 11 and 15.

\textsuperscript{8} Cf Verbeke, Execution Officers as a Balance Wheel in Insolvency Cases, pp. 11-18. He there argues that through the intervention of the execution officer “as a balance wheel” the proportionality test can be met and secured because no information is given to the creditor in person, but to a neutral and objective party, the execution officer, who could not use it for any other purpose than the recovery of a specific claim. He also argues that the intervention of the execution officer has the advantages to answer to the needs of a balanced and controlled patrimonial transparency in execution law not only required for the sake of the debtor, but equally in the interest of protecting the debtor, and it also constitutes an important contra measure against the establishment outside the control of law of private obscure recovery agencies with unacceptable recovery methods. In addition he also argues that the execution officer should be entrusted a similar neutral and objective role of profession as compared to a trustee in bankruptcy or to a liquidator i.a. in terms of access of information about the entire estate in order to realize as efficient as possible the creditor’s claims with as few injuries as possible for the debtor and his privacy. Also see the preamble of the Council of Europe’s work on a recommendation on enforcement, which emphasizes; --- “that without an effective system of enforcement, other forms of “private justice” may flourish and have adverse consequences on the public’s confidence in and credibility of the legal system;", Council of Europe’s work on a recommendation on enforcement cf with final activity report from the committee of experts
In the European union at least two different kinds of principal techniques of access to information for enforcement purposes exist. The system of declaration of the entire patrimony by the debtor, which is applied in e.g. Germany,9 and the more individually related information research system for the attachment of specific assets. The more individually adopted system is applied in several states, however with big differences among them, in terms of access to registers and other sources of information and by means of support of powers of inquiry and examinations. One example of an individually adopted system, which also has a high degree of access to information and confers far-reaching powers of inquiry and examinations to enforcement agents/execution officers, is Sweden.10 Some states also combine features from both those systems, even if a national system mainly could be classified as falling under one of those systems.11

Strong arguments to favour an application of the technique of the more individually adopted system instead of the technique of the system of declaration are that the first system compared to the latter system is in a better way aimed to meet and satisfy the needs of proportionality and protection of the debtor and of efficiency.12

The idea of an introduction of a European community legislation, which would require the debtor to declare his assets in the European judicial area in an affidavit or other corresponding official document (“European Assets Declaration”) to the enforcement agents/execution officers or in court as a main option, instead of better access to information in registers, risks not to meet and satisfy the above mentioned needs, both in a national and internal context, and should therefore be abandoned.

---

9 See Hess, La Transparence patrimoniale, pp. 47-50. Also see Cuniberti, Les mesures conservatoires portant sur des biens situés à l’étranger, no. 160-162 on the use in England, in connection to a freezing order (in literature also sometimes referred to as a Mareva injunction) of a disclosure order, when the debtor has to appear before the court in order to give a declaration of his assets, including assets abroad. Third parties could also be obliged to make such a declaration.

10 See Berglund, La Transparence patrimoniale, pp. 61-62 and pp. 199-204. Also cf Verbeke, Execution Officers as a Balance Wheel in Insolvency Cases, p. 13. He there refers to Sweden as a notorious example where the patrimonial transparency is extremely large. Also cf Kennett, The Enforcement of Judgments in Europe, pp. 101-102 where she states that the Swedish system displays an unusual degree of openness and that the Dutch system has obtained a further advanced access to official records through computer support in recent years.

11 See Berglund, La Transparence patrimoniale, p. 202 on the possibilities for the Swedish enforcement authority to make the debtor declare his assets in a list under the threat of prescribed fines and under other sanctions.

12 See Verbeke, Execution Officers as a Balance Wheel in Insolvency Cases, pp. 16-18. Also cf Tarzia, Vers un concept européen du droit de l’exécution ?, Le droit processuel et le droit de l’exécution, p. 165 who states that the European legislator has to make a choice between two systems; the German system of debtor’s declaration of his entire patrimony, sanctioned in the worst case of disobedience of the debtor by his imprisonment, and the more individually related information research system for the attachment of specific assets as applied in France and in Spain. He concludes that the latter system seem to be more efficient. Also cf Hess, La Transparence patrimoniale, p. 50 where he argues in favor of replacing the system of debtor’s declaration and instead introducing a system with proper investigation powers conferred to the enforcement organs.
Civil law

The present variety of access to information for enforcement purposes in comparison between solutions in non-identical national legislations is particularly evident in the civil law area.13

The Council of Europe’s work on a recommendation on enforcement14 regarding the enforcement of judgments in civil cases and on the interoperability of information systems in the justice sector15 might, however, in a longer perspective contribute to alter this variety into more equal levels of access to information for enforcement purposes in national legislations of the member states of the Council of Europe.

In the Council of Europe’s work on a recommendation on enforcement the importance of debtors providing up-to-date information on their income, assets and on other relevant matters have been emphasized.16 Other important aspects, which have been emphasized in the work on this recommendation from the Council, are that the search and seizure of the debtors assets should be made as efficient as possible taking into account relevant human rights and data protection provisions. There should also be a fast and efficient collection of necessary information on the debtors assets achieved through access to relevant information in registers and other sources as well as the option of the debtor making a declaration of his assets.17

13 The variety and complexity in comparison between solutions in national law, sometimes providing more or less information to a private creditor, are evident. See Krings, Civil Procedure in Europe 1, pp. 18-20 where he makes a comparison between different solutions in some member states of the European union. Also see de Leval, The execution of court decisions in civil cases, pp. 49-51 in a comparison on the securing of information according to the legislation of some countries of the European union. Also see La Transparence patrimoniale; La localisation du débiteur; (Leroy, Belgique, pp. 27-30, Tamamidis, Grèce, pp. 30-31, Cuniberti, France, pp. 31-33, Kennett, Royaume-Uni, pp. 33-34); La localisation du patrimoine actifs par les tiers (Berglund, Suède, pp. 35-38, Tamamidis, Grèce, pp. 38-40, Ferrand, France, pp. 40-43, D’Agostino, Italie, pp. 43-45, Kennett, Royaume-Uni, pp. 45-47); La localisation du patrimoine actifs par le débiteur; (Hess, Allemagne, pp. 47-50, Leroy, Belgique, pp. 51-53, Tamamidis, Grèce, pp. 53-54, Correa Delcasso, Espagne, pp. 54-56, Verbeke, Pays-Bas, pp. 56-57, Kennett, Royaume-Uni, pp. 57-58); La détermination du patrimoine passif; (Ferrand, France, pp. 59-61, Berglund, Suède, pp. 61-62, D’Agostino, Italie, pp. 62-64, Tamamidis, Grèce, pp. 64-66, Kennett, Royaume-Uni, pp. 66-67); Le régime des créances spéciales (fiscales et alimentaires); (Ferrand, France, pp. 67-69, Hess, Allemagne, pp. 69-71, Berglund, Suède, p. 71, Correa Delcasso, Espagne, pp. 71-74, Leroy, Belgique, pp. 74-76). Also see Kennett, The Enforcement of Judgments in Europe, pp. 100-120 in a comparison between some states on information available at national level and on exchange of information between authorities.

14 See the Council of Europe’s work on a recommendation on enforcement and it’s explanatory memorandum cf with final activity report from the committee of experts on efficiency of justice (CJ-EJ), Strasbourg, 13-15 November 2002, website of the Council of Europe, www.coe.int.

15 See the Council of Europe’s work on a recommendation on the interoperability of information systems in the justice sector and it’s explanatory memorandum cf with final activity report from the committee of experts on efficiency of justice (CJ-EJ), Strasbourg, 13-15 November 2002, website of the Council of Europe, www.coe.int.


Annex to the Swedish national report on European transparency of assets in Study JAI/02/03/2002

The Council of Europe’s work on a recommendation on archiving of electronic documents in the legal sector, which deals with the preservation of electronic documents, will also have an impact on such preserved information in the enforcement area.

There exists at least two kinds of multilateral instruments in the civil law area, which include provisions of an international exchange of information, one including provisions of a more general nature, and the other one including provisions of a more specific nature, for recovery purposes.

The European Judicial Network in civil and commercial matters promotes, in a more general way, access to justice through an information system, which is accessible to the general public and specialists, based on the idea of providing information on national legislations and international and community instruments in certain law areas.

The Network provides an information exchange system for the national contact points of the Network and an internet-based information system and information sheets for the general public. It includes information on rules and procedures for the enforcement of judgments.

There exists a European community convention on the recovery of maintenance payments, even though it has not yet entered into force.

Some other multilateral instruments in the civil law area, which include enforcement provisions, do not include any provisions for the exchange of information for enforcement purposes between the authorities of the concerned states or anybody else, e.g.; the Brussels I regulation, the Brussels- and Lugano conventions, the Nordic convention on recognition

---

19 See (6), (10), (11), (14) and (15) of the preamble of the Council decision (2001/470/EC) of 28 May 2001 establishing a European Judicial Network in civil and commercial matters regarding the objectives to provide certain information and articles 14 and 15 of the same decision regarding the content of information to be provided to the general public and specialists. The tasks and activities of the network is defined in article 3 of the same decision. Also see the website of the European Judicial Network in civil and commercial matters, http://europa.eu.int/comm/justice_home/ejn/.
21 See article 14 (e) cf with article 15 (e) of the Council decision (2001/470/EC) of 28 May 2001 establishing a European Judicial Network in civil and commercial matters.
22 See the Convention between the Member States of the European Communities on the simplification of procedures for the recovery of maintenance payments, done at Rome on 6 November 1990. The convention has not entered into force, even though it has been signed by some states (Belgium, Denmark, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal and the United Kingdom). Article 3, 2. of the convention i.a. reads: “On receipt of the application mentioned in Article 5 the Central Authority in the State addressed shall take or cause to be taken without delay all appropriate and useful measures to: (I) seek out and locate the debtor or his assets; (II) obtain, where appropriate, relevant information from Government Departments or agencies in relation to the debtor; --- ”. Applications to the central authorities made by the maintenance creditor, or body which has the right to represent him, shall, according to article 5, 3. of the convention, i.a. contain: “(III) the name, date of birth, nationality and description of the debtor and all other relevant information regarding his identity or whereabouts or the location of his assets; --- ”. Services rendered by the central authorities under the convention are, according to article 2, 2. of the convention, free of charge. Also see Leroy on the convention, La Transparence patrimoniale, pp. 144-145.
and the enforcement of judgments in civil matters\textsuperscript{25} and the New York convention on foreign arbitral awards\textsuperscript{26}.

At least two proposals, which cover the options of both the public and civil law areas, of an international exchange of information for enforcement/recovery purposes between enforcement agents/execution officers of the concerned states, related to the member states of the European union and the Nordic states have been presented, but are yet not realized\textsuperscript{27}.

The two proposals follow a similar concept and \textit{i.a.} treats; applicability, definitions, request for information, protection of persons, limitations on the duty to assist for enforcement, secrecy and final provisions.

The proposal related to the Nordic states can, in some senses, be considered as a further developed and more advanced proposal compared to the proposal related to the member states of the European union.

\textit{Public law}

National tax administrations often have, in comparison to the civil law area, a more far-reaching right of access to information in terms of right of inquiry and examination\textsuperscript{28}.

Besides some multilateral instruments in the tax recovery area, which will be dealt with here, there are also provisions of exchange of information existing both in the multilateral tax law area\textsuperscript{29} and in the social security law area\textsuperscript{30}.


\textsuperscript{25} See Convention between Sweden, Denmark, Finland, Iceland and Norway on recognition and the enforcement of judgments in civil matter, done at Copenhagen on 11 October 1977, UNTS, no. 16914, vol. 1102 (1978), (Nordic convention on recognition and the enforcement of judgments in civil matters).


\textsuperscript{27} See Berglund, draft proposal on an “International legal instrument on the mutual co-operation between European enforcement authorities in the European Union for the exchange of information for enforcement purposes related to private and public claims (a Euro- Information Assistance System for the exchange of information regarding the enforcement of claims), La Transparence patrimoniale, pp. 217-237. Also see draft of a Nordic agreement on the exchange of information in recovery matters, report to the Nordic Council of Ministers on Nordiskt samarbete om indrivningsfrågor (Nordic co-operation in recovery matters), pp. 25-30. The draft to the Nordic Council of Ministers has not been translated into English in the report, but the report includes an introduction and summary of the project in English, see enclosed copy from the report, \textit{i.b.}, pp. 21-24. The draft of a Nordic agreement on the exchange of information in recovery matters in the report to the Nordic Council of Ministers has, however, been translated and enclosed here.

\textsuperscript{28} Cf Verbeke, Execution Officers as a Balance Wheel in Insolvency Cases, p. 14. Also cf Hesslén, \textit{Asset transparency – finding information – measures to make enforcement more effective}, p. 30 where she concludes that, even though if in most countries foreign claims are treated in the same way as national claims in terms of access to information, public claims benefit from a more privileged position compared to private claims.

\textsuperscript{29} See article 26 of the OECD Model Tax Convention and comments to this article, \textit{Model Tax Convention on Income and on Capital}, pp. 287-294. The OECD Model Tax Convention has influenced a lot of bilateral tax treaties. \textit{Also see} general report and national reports (Germany, Austria, Belgium, Brazil, Canada, Denmark, Spain, United States, Finland, France, Hong-Kong, Israel, Luxemburg, Norway, Netherlands, Peru, Portugal, United Kingdom, Sweden and Switzerland) regarding international mutual assistance, \textit{International mutual assistance through exchange of information}. \textit{Also see} Leroy, \textit{L efficacité de la justice civile en Europe}, p. 330 on the mutual assistance in community law for the exchange of information between tax administrations and \textit{La
One of the earliest multilateral instruments, which included an exchange of documents and of information for recovery purposes between the contracting states in the cross-border tax recovery area, was the Benelux convention from 1952 on the mutual assistance for the recovery of tax claims.\(^{31}\)

Specific rather detailed provisions on the exchange of information for recovery purposes between the authorities of the concerned states have also been included in some other multilateral instruments mainly relating to the recovery of tax claims; the recovery directive and the implementing recovery directive\(^{32}\), the Council of Europe and OECD convention on mutual administrative assistance in tax matters\(^{33}\) and the Nordic agreement on assistance in tax matters\(^{34}\).

The recovery directive also includes other claims than taxes; customs- and other public claims\(^{35}\). Therefore these latter claims also fall under the information provisions of the recovery directive and the implementing recovery directive.

The exchange of information in matters of assistance between the member states of the European union for recovery purposes related to the recovery directive is supported by an intranet-system for the transmission “by electronic means” of information.\(^{36}\)

2. Conclusions

The European Judicial Network in civil and commercial matters is an important initiative and will no doubt play an important role in order to make access to information in national legislations and international and community instruments easier.

The Network does not, however, provide any substantial practical means or answers to the needs of a more developed access to information for enforcement purposes related to

---

\(^{30}\) See article 84, 1-3. of Council regulation (1408/71/EEC) of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community.

\(^{31}\) See article 6 of the Convention entre la Belgique, le Grand-Duche de Luxembourg et les Pays-Bas, relative a l’assistance reciproque en matiere de recouvrement de creances fiscales, de 5 septembre 1952.


\(^{34}\) See article 4, 1. cf with articles 11, 2. and 13, 3. of the Agreement between the Nordic countries for mutual administrative assistance in tax matters, done at Copenhagen on 7 December 1989, (Nordic agreement on assistance in tax matters).

\(^{35}\) See article 2 (a-d) of the recovery directive. Included under those provisions are \(^{33}\) e.g. some claims related to the agricultural sector and import and export duties. Also see Leroy, La Transparence patrimoniale, p. 145 regarding such claims.

\(^{36}\) See articles 2 and 21-24 of the implementing recovery directive.
provisional or ordinary titles of execution at the national and international levels in the daily operative work of enforcement agents/execution officers, *i.e.* related to such specific matters in the civil law area.

**National legislations**

Access to information for the purpose of recovery of claims in national legislations is better in the tax law area than in the civil law area.

The present unbalance, which seems to be a more or less evident feature in most national legislations in the European union, between the interests of efficiency and privacy in terms of access to information for the purpose of recovery and enforcement, is evident in comparison between the tax law area and the civil law area.

The balance seems to be more in favour of efficiency in the tax law area compared to the civil law area and more in favor of privacy in the civil law area compared to the tax law area.

This means at the present that those two categories of legitimate claims are treated on a non-equal basis in national legislations in terms of efficient access to information mainly for the same purpose, *i.e.* for the purposes of recovery and enforcement.

**International co-operation**

There are no multilateral instrument in force in the civil law area in the European union, which provide possibilities for an international exchange of information in enforcement matters of civil law claims by means of communication between the enforcement agents/execution officers in the member states of the European union.

A private creditor’s possibilities to obtain information in the international context, *i.e.* information to be used for enforcement purposes of his civil law claim in another state, is therefore at the present outside the scope of multilateral instruments and thus entirely governed and limited by access to non-identical national legislations.

When a foreign civil law claim is being enforced the creditor himself is totally in control of the process of search and supply of information, *i.e.* he has himself or by the help of others to obtain information from different sources from abroad and supply it to the various national enforcement agents/execution officers.

There are several multilateral instruments in force in the public law area for an international exchange of information. Among these instruments at least three cover the tax recovery area. They provide possibilities for enforcement agents/execution officers of the concerned states to exchange information for recovery purposes at the international level.

The recovery directive and the implementing recovery directive, also supported by an intranet-system for the transmission “by electronic means” of information in matters of assistance, are in this context of a particular interest.

In the multilateral context, a comparison between the civil law area and the tax recovery law area shows that access by enforcement agents to an international exchange system for information for the purpose of recovery and enforcement of the creditors claims is far more
developed in the tax recovery law area than the non-existence of such a system in the civil law area.

There is a broad understanding of the needs and of the importance to further develop access to information in the civil law area for enforcement purposes in order to make the enforcement of judgments more effective. This is apparent by; the Council of Europe’s work on a recommendation on enforcement, the initiative of the European union, based on the Council’s draft programme of measures for implementation of the principle of mutual recognition, including the objectives to establish and further develop ancillary measures in terms of access to information for enforcement purposes both at national and international levels, the work on the draft of a Nordic agreement on the exchange of information in recovery matters to the Nordic Council of Ministers and several authors in literature.

3. Recommendations

In order to meet the objectives of the Council’s draft programme of measures for implementation of the principle of mutual recognition, and also taking into account; issues of data protection, the Council of Europe’s work on a recommendation on enforcement and the work on the draft of a Nordic agreement on the exchange of information in recovery matters to the Nordic Council of Ministers, I propose that my following recommendations should be taken into consideration as guidelines for the continuous work in the civil enforcement law area of the European union.

Those recommendations may be considered in order to further develop the possibilities of better access by enforcement agents/execution officers to information for enforcement purposes, including matters of provisional and protective measures, in the civil law area in a national and international context.

In order to meet and satisfy the needs of proportionality and protection of the debtor and of efficiency, I recommend the use of a balanced combination of the two different kind of principal techniques of access to information for enforcement purposes, the system of declaration of the entire patrimony by the debtor and the more individually adopted system.

Harmonization of national legislations

I recommend that national legislations should be harmonized, in order to provide more efficient and up-to-date access to information, achieved and preferably by “electronic means”, through access to relevant information in registers and other sources of information, on the debtor’s;

1. address or place of location,
2. employer or business, e.g. through corporate registers, or other sources of income, e.g. private- or social insurance institutions,
3. incomes and other assets in his possession to the extent such information is available in the records of enforcement agents/execution officers, e.g. through debtor’s registers kept by such officials,

---

37 See Council draft programme (2001/C 12/01) of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters, section B. Measures ancillary to mutual recognition, 2. Efficiency of measures providing for improved enforcement of decisions cf with section E. Ancillary measures.
4. assets held in the possession by any third parties, including any financial institution, e.g. bank accounts, which holds an account or a deposit in the name of the debtor,
5. declaration of his assets made to the enforcement agents/execution officers or in court,
6. the status of indebtedness or insolvency, e.g. bankruptcy or other collective insolvency proceedings.

I recommend that the use of a debtor’s declaration of his entire patrimony to the enforcement agents/execution officers or in court should, as far as possible be limited to and used as a last resort, also supported by proportionate sanctions, i.e. normally used when all available means and possibilities in a more individually adopted system have been completely exhausted.

A community system for the exchange of information in civil enforcement matters

I recommend that an international co-operation for exchange of information for enforcement purposes, preferably based on a more equal and direct access of information as in national legislations, should be set up in the European union as a mutual operative support of civil enforcement matters between national regulated enforcement agents/execution officers.

There are several reasons to establish an European community information assistance system for the exchange of information regarding the enforcement of civil law claims between enforcement agents/execution officers, which entrust to them on a national basis the task to provide information, instead of providing direct access to all states to various national data bases.

The main reasons are that information often has to be understood, interpreted and completed with additional research in a national context and often also requires knowledge of relevant national legislation and legal usage. In addition skills in national languages are required.

This means that the services of the national professionals, the enforcement agents/execution officers, are needed on a state by state basis in order to fulfil the task of international co-operation and to guarantee a high quality.

I recommend that the work of elaborating a European community co-operation in the civil law area should benefit from some already existing models of international co-operation, mainly from; the recovery directive and the implementing recovery directive, the draft proposal for a co-operation between the member states of the European union from 199938 and the draft of a co-operation between the Nordic states in the report to the Nordic Council of Ministers39.

---

38 See Berglund, draft proposal on an “International legal instrument on the mutual co-operation between European enforcement authorities in the European Union for the exchange of information for enforcement purposes related to private and public claims (a Euro- Information Assistance System for the exchange of information regarding the enforcement of claims), La Transparence patrimoniale, pp. 217-237.
39 See draft of a Nordic agreement on the exchange of information in recovery matters, report to the Nordic Council of Ministers on Nordiskt samarbete om indrivningsfrågor (Nordic co-operation in recovery matters), pp. 25-30. The draft to the Nordic Council of Ministers has not been translated into English in the report, but the report includes an introduction and summary of the project in English, see enclosed copy from the report, i.e., pp. 21-24. The draft of a Nordic agreement on the exchange of information in recovery matters in the report to the Nordic Council of Ministers has, however, been translated and enclosed here.
I recommend that a community system for the exchange of information in civil enforcement matters should provide:

1. a co-operation within the European community on mutual assistance for the exchange of information for enforcement purposes in matters regarding the enforcement of private claims, including provisional measures, on the debtor’s state of the affairs, e.g. a status on his assets and debts, including a complete investigation pertaining to the enforcement of debts according to domestic law, and the possible status of insolvency. Information received through the co-operation should, besides the debtor, be limited for use of the persons and authorities with a duty to enforce the claims and judicial authorities handling cases regarding the enforcement of claims, e.g. enforcement agents/execution officers and courts, but should also include trustees and official receivers in bankruptcy.40

2. information on domestic law on enforcement of debts and insolvency.

3. general information on how the enforcement of debts is organized and carried out domestically.

4. a similar community intranet-system for the transmission “by electronic means”, as already provided by the implementing recovery directive, of information in matters of assistance between the member states of the European union for enforcement purposes, elaborated in support of and adapted to the needs in the civil law enforcement area.

The preferably parallel work, in the civil law area, to elaborate a sufficient harmonized level of access to information for enforcement purposes in order to be implemented in national legislations and to create a more detailed proposal of a community system for the exchange of information for enforcement purposes between member states of the European union, should be entrusted to the commission and take place in co-operation with the ministries of the member states.

Such work will also have to involve, and benefit from, consultations with organisations/associations of national and international (UIHJ) enforcement agents/execution officers and experts in the union.

Stockholm May 28, 2003

Mikael Berglund

40 Cf Berglund, article 3, 10. a)-c) of draft proposal on an “International legal instrument on the mutual co-operation between European enforcement authorities in the European Union for the exchange of information for enforcement purposes related to private and public claims (a Euro- Information Assistance System for the exchange of information regarding the enforcement of claims), La Transparence patrimoniale, pp. 231-232. Trustees and official receivers in bankruptcy should be included in this context as they should be able to benefit from information related to claims obtained before the bankruptcy, which later have been included into the bankruptcy, and by those means make the work of the trustee in bankruptcy, in the interest of all creditors, more efficient. This should also contribute to strengthen the efficiency of the Council regulation (EC)/No 1346/2000 of 29 May 2000 on insolvency proceedings, (insolvency regulation).
Annex to the Swedish national report on European transparency of assets in Study JAI/02/03/2002

Enclosure: Copy of introduction and summary, report Nordiskt samarbete om indrivningsfrågor (Nordic co-operation in recovery matters) to the Nordic Council of Ministers, pp. 21-24 and translation from Swedish of a draft of a Nordic agreement on the exchange of information in recovery matters, i.b., pp. 25-30.

4. Bibliography

Multilateral instruments

1950 Convention for the protection of human rights and fundamental freedoms, Council of Europe, done at Rome on 4 November 1950, as amended by protocol no. 11, ETS no. 45 and UNTS no. 2889, vol. 213 (1955)

1952 Convention entre la Belgique, le Grand-Duche de Luxembourg et les Pays-Bas, relative a l’assistance reciproque en matiere de recouvrement de creances fiscales, de 5 septembre 1952


1971 Council regulation (1408/71/EEC) of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, OJ 1971 L 149


1977 Convention between Sweden, Denmark, Finland, Iceland and Norway on recognition and the enforcement of judgments in civil matter, done at Copenhagen on 11 October 1977, UNTS, no. 16914, vol. 1102 (1978)


Annex to the Swedish national report on European transparency of assets in Study JAI/02/03/2002


1989 Agreement between the Nordic countries for mutual administrative assistance in tax matters, done at Copenhagen on 7 December 1989

1990 Convention between the Member States of the European Communities on the simplification of procedures for the recovery of maintenance payments, done at Rome on 6 November 1990


2000 Council regulation (EC)/No 1346/2000 of 29 May 2000 on insolvency proceedings


2001 Council regulation (44/2001/EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

2001 Council draft programme (2001/C 12/01) of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters, OJ 2001 C 12


Information and publications from the European Union and other international organisations

Council of Europe’s work on a recommendation on enforcement and it’s explanatory memorandum cf with final activity report from the committee of experts on efficiency of justice (CJ-EJ), Strasbourg, 13-15 November 2002, website of the Council of Europe, www.coe.int

Annex to the Swedish national report on European transparency of assets in Study JAI/02/03/2002


The execution of court decisions in civil cases, Multilateral seminar organized by the council of Europe in conjunction with the Japan foundation, Strasbourg, Palais de l’Europe 15-17 October 1997, Council of Europe publishing 1998


Model Tax Convention on Income and on Capital, OECD Committee on Fiscal Affaires, condensed version of January 2003


Literature

Most works have been quoted by a reference to the author’s name and sometimes also with additional information on the title of the work. Some titles of work comprising contributions from several authors, which have been published as editorial works (ed.), have been quoted by the title. The chosen form of quotation in such and in some other situations can be seen from the use of text in italics.

D’Agostino, Galileo, La Transparence patrimoniale, pp. 43-45 and 62-64

Berglund, Mikael

La Transparence patrimoniale, pp. 35-38, 61-62, 71, including enclosure by Hans Marken (pp. 199-204), and annex, pp. 217-237 of a draft proposal on an “International legal instrument on the mutual co-operation between European enforcement
Annex to the Swedish national report on European transparency of assets in Study JAI/02/03/2002

authorities in the European Union for the exchange of information for enforcement purposes related to private and public claims, a Euro- Information Assistance System for the exchange of information regarding the enforcement of claims


Bertaux, Jacques, Les dérives de l’exécution forcée: vers un régime d’exécution privé, Le droit processuel et le droit de l’exécution, pp. 279 and 283


Correa Delcasso, Juan Pablo, La Transparence patrimoniale, pp. 54-56 and 71-74

Cuniberti, Gilles,

- La Transparence patrimoniale, pp. 31-33

Danelius, Hans, Mänskliga rättigheter i europeisk praxis, 2 uppl., Norstedts 2002, pp. 143-144 and 225

L’efficacité de la justice civile en Europe, Caupain, M-T and de Leval, G (ed.), De Boeck & Larcier s.a., Bruxelles 2000

Ferrand, Frédérique, La Transparence patrimoniale, pp. 40-43, 59-61 and 67-69

Fricero, Natalie, Le droit européen à l’exécution des judgments, Droit et Procedures (La Revue des Huissiers de Justice) 2001, pp. 6-8

Hess, Burkhard, La Transparence patrimoniale, pp. 47-50 and 69-71

Hesslén, Nicola, Asset transparency – finding information – measures to make enforcement more effective, Globalisation of law in an area of universal justice/“Is the creation of a World Area of Justice a utopic vision ?”, publication/work of the congress committee from the XVIII Congres of the UIHJ in Tunis on the 6-9 May 2003, pp. 28-31 and 41

Jeuland, Emmanuel, Les garanties de la saisie européenne de créances bancaires, Le droit processuel et le droit de l’exécution, p. 404

Kennett, Wendy

- Aperçus comparatifs des différents modes d’exécution forcée des obligations pécuniaires dans l’Union Européenne, Le droit processuel et le droit de l’exécution, p. 264
- The Enforcement of Judgments in Europe, Oxford monographs in private international law, Oxford University Press 2000, pp. 100-120 and 123
- La Transparence patrimoniale, pp. 33-34, 45-47, 57-58 and 66-67
Annex to the Swedish national report on European transparency of assets in Study JAI/02/03/2002

Krings, Ernest, Civil Procedure in Europe 1, pp. 18-20

Leroy, Étienne

- L’efficacité des procédures judiciaires au sein de l’union Européenne et les garanties des droits de la défense. Transparence patrimoniale, L’efficacité de la justice civile en Europe, pp. 330 and 379
- La Transparence patrimoniale, pp. 27-30, 51-53, 74-76 and 144-147

de Leval, Georges

- Civil Procedure in Europe 1, pp. 613-614
- The execution of court decisions in civil cases, pp. 48-52

Rapprochement du Droit Judiciaire de l’Union européenne, Storme, Marcel (ed.), Kluwer/Nijhoff 1994, pp. 63 and 210-211

Tamamidis, Anastasios, La Transparence patrimoniale, pp. 30-31, 38-40, 53-54 and 64-66

Tarzia, Giuseppe, Vers un concept européen du droit de l’exécution ?, Le droit processuel et le droit de l’exécution, p. 165

Verbeke, Alain,

- Execution Officers as a Balance Wheel in Insolvency Cases, Tilburg Foreign Law Review 2001, volume 9 Nr. 1, pp. 8-18
- Quel Huissier de Justice pour l’Europe ?, Le droit processuel et le droit de l’exécution, pp. 309-313
- La Transparence patrimoniale, pp. 56-57

Yessiou Faltsi, Pelayia, Le droit de l’exécution selon la cour Européenne des droits de l’homme: analyse et prospective, Le droit processuel et le droit de l’exécution, pp. 198-199 and 205-206

The European court of human rights

Hornsby v. Greece of 19 March 1997, paragraph 40, on www.echr.coe.int

Miscellaneous


Website of the Council of Europe, www.coe.int

### 5. Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brussels convention</td>
<td>Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, done at Brussels on 27 September 1968</td>
</tr>
<tr>
<td>Brussels I regulation</td>
<td>Council regulation (44/2001/EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters</td>
</tr>
<tr>
<td>Council of Europe and OECD convention on mutual administrative assistance in tax matters</td>
<td>Convention on mutual administrative assistance in tax matters, done at Strasbourg on 25 January 1988, Council of Europe and OECD</td>
</tr>
<tr>
<td>Council’s programme of measures for implementation of the principle of mutual recognition</td>
<td>Council draft programme (2001/C 12/01) of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters</td>
</tr>
<tr>
<td>EC</td>
<td>European communities</td>
</tr>
<tr>
<td>ETS</td>
<td>European treaty series</td>
</tr>
<tr>
<td>European convention for the protection of human rights and fundamental freedoms</td>
<td>Convention for the protection of human rights and fundamental freedoms, Council of Europe, done at Rome on 4 November 1950, as amended by protocol no. 11</td>
</tr>
<tr>
<td>Insolvency regulation</td>
<td>Council regulation (EC)/No 1346/2000 of 29 May 2000 on insolvency proceedings</td>
</tr>
<tr>
<td>Lugano convention</td>
<td>Convention on jurisdiction and the enforcement of judgments in civil and commercial matters</td>
</tr>
</tbody>
</table>
### Annex to the Swedish national report on European transparency of assets in Study JAI/02/03/2002

<table>
<thead>
<tr>
<th>Treaty/Government Agreement</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>New York convention on foreign arbitral awards</strong></td>
<td>Convention on the recognition and enforcement of foreign arbitral awards, done at New York on 10 June 1958</td>
</tr>
<tr>
<td><strong>Nordic agreement on assistance in tax matters</strong></td>
<td>Agreement between the Nordic countries for mutual administrative assistance in tax matters, done at Copenhagen on 7 December 1989</td>
</tr>
<tr>
<td><strong>Nordic convention on recognition and the enforcement of judgments in civil matters</strong></td>
<td>Convention between Sweden, Denmark, Finland, Iceland and Norway on recognition and the enforcement of judgments in civil matters, done at Copenhagen on 11 October 1977</td>
</tr>
<tr>
<td><strong>OECD</strong></td>
<td>Organization for Economic Co-operation and Development</td>
</tr>
<tr>
<td><strong>Recovery directive</strong></td>
<td>Council Directive (2001/44/EC) of 15 June 2001 amending Directive 76/308/EEC on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of agricultural levies and customs duties and in respect of value added tax and certain excise duties</td>
</tr>
<tr>
<td><strong>UIHJ</strong></td>
<td>Union Internationale des Huissiers de Justice et Officiers Judiciaires</td>
</tr>
<tr>
<td><strong>UNTS</strong></td>
<td>United nations treaty series</td>
</tr>
</tbody>
</table>

**Dok410.doc**