

Commission communication to the Council and the European Parliament 'towards greater efficiency in obtaining and enforcing judgments in the European Union'

(98/C 33/03)

SUMMARY

This Communication has two functions.

1. Its chief aim is to facilitate the recognition and enforcement of judgments given in the European Union, a process which is currently governed by the Brussels Convention of 1968, extended to the EFTA States by the Lugano Convention of 1988.

The Brussels Convention has allowed substantial progress in the field of enforcement of foreign judgments passed in other Member States. Further steps can still be made to accelerate and simplify the procedure so as to mould it more to the needs of the citizen and the firm by providing an ever quicker system of exchange, in particular within the internal market.

To meet this objective, proposal COM(97) 609 final (*) contains several elements. It is proposed that checks by authorities empowered to make enforcement orders be confined to formal checks notably on the basis of a certificate issued by a court in the State of origin attesting in particular that the judgement to which it relates is enforceable. It is also proposed that the grounds for not recognizing a judgment be revised; those grounds will be reviewable only if pleaded by the defendant opposing enforcement, and the burden of proof will be on him. Proposals are also made for decisions authorizing enforcement to be provisionally enforceable and for easier provisional/protective measures. Finally, the system of provisional and protective measures has been reframed with the accent on the European dimension of those measures. All these proposals are incorporated in the proposal for a Convention destined to replace Brussels Convention.

This proposed Convention also incorporates provisions to take account of developments in economic relations and certain rulings of the Court of Justice since the signing of the Brussels Convention, notably as regards jurisdiction. There are two proposals for new Protocols to replace those annexed

to the Brussels Convention (Annexes 1 and 2) and suggestions for a parallel revision of the Lugano Convention (Annex 3). The Commission will take the necessary steps to adapt its work to the new framework brought in by the entry into force of the Amsterdam Treaty, in relation to civil judicial co-operation.

2. The communication has the added purpose of prompting comments from all legal practitioners and interested parties on a series of considerations going beyond the legislative proposal. The idea is to prompt debate on a common Union approach to certain aspects of national laws of procedure.

It is necessary to facilitate the free movement of judgements, but that is not enough to enable the citizen and firms to take full advantage of the rights conferred on them in the Union's area. The objective is indeed to ensure as globally as possible a swift, efficient and inexpensive access to justice.

Problems for access to justice within the internal market due to legal/judicial borders being maintained have already come to light, notably in consumer litigation⁽¹⁾. This is the area where, taking into account the generally small sums in play, obstacles to access to justice are most acutely felt⁽²⁾. These difficulties also affect commercial firms, particularly small and medium-sized companies, by acting as a brake on commercial activity⁽³⁾.

It is therefore timely to provide the consumer and commercial firm, along with all the European Union citizens, an improved procedural environment. It is proposed that to start with a step-by-step approach be

⁽¹⁾ Green Paper — Access of consumers to justice and the settlement of Consumer disputes in the single market — COM(93) 576; over a hundred contributions were sent to the Commission.

⁽²⁾ A Eurobarometre poll, carried out in 1991 revealed that difficulties in settling disputes form one of the biggest obstacles to the development of purchases of consumer goods in other Member States.

⁽³⁾ Commission Recommendation of 12 May 1995 on payment periods in commercial transactions. OJ L 127, 10.6.1995 and Commission Communication relating to that Recommendation, OJ C 144, 10.6.1995.

(*) See page 20 of this Official Journal.

followed and that attention be focused on essential questions. It is worth reflecting on the establishment in each Member State of a rapid procedure for the payment of money debts but also of high-performance instruments for effective enforcement of judgments (concentrating initially on seizures of bank accounts). The effectiveness of enforcement depends heavily on knowledge of the debtor's assets; consequently, thought also needs to be given to the various means of improving, transparency in this respect and to the development of cooperation between enforcement authorities.

These two aspects together contribute to greater efficiency in obtaining and enforcing judgments in the European Union.

Any person wishing to make comments on the second objective of this Communication is welcome to write before **30 April 1998** to:

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INTRODUCTION

Purpose of this Communication

1. The free movement of judgments in Europe is currently secured, in most civil and commercial matters⁽⁴⁾, by the Brussels Convention of 1968, drawn up on the basis of Article 220 (4) of the EC Treaty and subsequently acceded to by all the new Member States. It is a particularly complete Convention: it establishes rules governing the international jurisdiction of the courts of the Member States, which enables judgments given to be recognized downstream, together with strict rules for cases of non-recognition, and it provides for an enforcement procedure that is not only uniform but also unilateral, at least at the initial stages.

⁽⁴⁾ Some matters are excluded: But there is a draft Convention on jurisdiction and the recognition and enforcement of judgments in matrimonial causes (Brussels II), q.v.

2. The Brussels Convention is indelibly linked to the whole Community process and is designed to complement the liberties provided for in the EC Treaty with a more fluid system, for the circulation of judgments⁽⁵⁾. The Court's autonomous uniform interpretation of its provisions proceeds from the concept of non-discrimination and equal rights for all litigants in the Union. The Convention served as the basis for a similar Convention between the Member States and the EFTA States, signed at Lugano on 16 September 1988⁽⁶⁾.

3. The Brussel Convention is to date the only general instrument of judicial cooperation between the Member States. Community law has traditionally left it up to the Member States to determine how their authorities and courts operate, even though they are heavily involved in the process of applying Community law. There is no European law-enforcement area but rather a juxtaposition of national systems each configured as an autonomous body of civil procedure. Their respective bodies of law are the fruit of their respective historical backgrounds and vary widely in consequence.

In this context, this Communication serves two purposes:

- It presents a set of practical proposals to further facilitate the recognition and enforcement of judgments in the European Union. It contains a proposal for a Convention which takes into account recent developments in economic relations and certain rulings by the Court of Justice. It also contains proposals for new Protocols to the Convention (Annexes 1 and 2) and the Commission's suggestions regarding the parallel revision of the Lugano Convention (Annex 3). The proposals are based on Article K3 (c) of TEU: Following the entry into force of the Treaty of Amsterdam they will be adapted taking into account the new framework applicable to civil judicial cooperation.
- It has the added purpose of generating debate and prompting reactions and suggestions from all circles interested in possible Union action to secure

⁽⁵⁾ Case C-398/92, Mund and Fetner [1994] ECR I-474 (judgment given on 10 February 1994).

⁽⁶⁾ OJ L 319, 25.11.1988, p. 9

equivalent access of litigants to efficient, swift and inexpensive justice. There are no operational proposals in this second part, which is directed solely to gathering reactions and suggestions from all interested circles on the avenues offered for exploration.

Background

4. Since it was signed in 1968, the Brussels Convention has undergone only limited changes. There has been no general review of its provisions, merely such adaptations as were necessitated by the accession of new Member States. Following accessions, certain provisions of the Lugano Convention have diverged from those of the Brussels Convention. Practical application of both has revealed the difficulties inherent in some of them.
5. Despite the progress achieved as a result of the Brussels Convention, the implementation of the recognition and enforcement procedures takes far too long and costs too much. The costs and delays are added on to those already inherent in the national procedures and are of such a nature as to influence the choice of forum in favour of the country where enforcement is to be sought so as to avoid the registration (exequatur) procedure. These further obstacles, especially in the event of a small claim, can be a disincentive to litigation where enforcement is to be sought against an adversary or assets in another country. Moreover, there is a risk that assets will escape the enforcement procedure if it is delayed. These barriers impede the free movement of judgments between Member States.
6. Apart from the question of free movement, private-law relations between individuals and economic operators, even where rules of Community law underpin them, are set in the context of an area where widely-divergent procedural systems coexist and render procedures less transparent than they might be, while procedures vary in cost and effectiveness.

The Procedures for lodging actions, the computation of time-limits, the rules of evidence, the burden of

proof, the impact of an appeal, the enforceability of the resultant order — these are matters that escape the comprehension of the uninitiated. Rules of procedure are already substantially arcane in the purely national context; they are even more so in the cross-border context. In an integrated area, however, all ought to have easy access to the rules of the game and ought to know, before deciding to embark on proceedings, what their rights and duties are, what formalities are to be complied with, what the effect of the resultant documents will be, what effect the judgment will have and what redress procedures are available, not to mention the rules governing enforcement of judgment.

On top of the non-transparency problem, there is the problem of varying costs⁽⁷⁾. In some Member States advocates charge high fees and expenses, and the costs of the registration (exequatur) procedure where they are chargeable are a further barrier to access to justice, often constituting a frank disincentive⁽⁸⁾.

National procedures, often opaque and costly to varying degrees, also vary in their degree of effectiveness. Certain Member States have established special quick and cheap procedures that more closely match the needs of consumers and businesses. Others, by contrast, continue to preserve more complex procedures which may overburden the courts and lengthen the time needed to obtain judgment. The duration of the procedures is often a blessing for 'bad debtors'.

Content of this Communication

7. The improvement of the free movement of judgments given by the courts of the Member States is currently under discussion in the Council in two parallel but distinct contexts — the revision

⁽⁷⁾ The Green paper on Access to Justice for Consumers highlighted that the average cost (court and counsel fees) of court settlement in EC litigations for a claim of around ECU 2 000, goes up to around ECU 2 500 for the plaintiff.

⁽⁸⁾ This much is clear from the replies to the Commission's questionnaire in the preparatory work for the European writ of execution and from its study on Cost of Judicial Barriers for Consumers in the Single Market, following up the Green Paper on Access to Justice for Consumers.

of the Brussels and Lugano Conventions and proceedings on a 'European enforcement order'.

8. Work on the re-examination of the Brussels and Lugano Conventions, now at the exploratory stage, originated in the fact that in the Convention of 29 November 1996 for the accession of Austria, Finland and Sweden to the Brussels Convention it was not possible to absorb the amendments (other than the purely technical ones) requested by the acceding States. Moreover, the Standing Committee of the Lugano Convention has repeatedly called, notably at its third and fourth meetings, for alignment of the two Conventions.

The Member States and the Commission share the view that the opportunity should be taken when this alignment process is conducted to review certain provisions of the two Conventions in the light of the growing complexity of human relations and business activity, trends in the relevant categories of litigation and the Court of Justice's case-law. There have already been discussions in the Council and the Lugano Standing Committee on the basis of written submissions from the Member States in order to identify the provisions that might be suitable for revision.

9. In 1995 the Commission began thinking about whether the Member States should preserve a procedure of registration of foreign judgments (exequatur) for enforcement and about the possible outlines of an enforcement order valid without restriction everywhere without special procedures in the Member States — the 'European enforcement order'. The freedom of movement of judgments, which ought to be the corollary of the other freedoms of movement, has no practical reality in positive law: to cross a border and be enforced in another Member States, any writ, be it judicial or not, needs a passport, so to speak, issued by the Member State of enforcement in the form of an endorsement for execution or the equivalent.

At the same several Member States have shown their interest in this topic, which was incorporated in the Council's multiannual work programme in the field of justice and home affairs cooperation⁽⁹⁾. Finland took the initiative of organizing a seminar on it at Helsinki in March 1997 at which a large number of experts from the the academic and professional worlds and from national government

departments came together⁽¹⁰⁾. Under the Dutch Presidency there have been several meetings in the Council.

The need for a uniform procedure for obtaining a writ in the State of origin as a precondition for the elimination of the registration (exequatur) procedures was a key point made in these various discussions, which explains the reference to a 'European enforcement order'. It has been ascertained, however, that establishing a uniform procedure in the State of origin and abolishing the registration (exequatur) procedure are two distinct questions, the solution to one not being dependent on the solution to the other. It has also emerged that full abolition of the registration (exequatur) procedure is inconceivable, if only because of the wide procedural divergences between Member States as regards enforcement. The object is therefore to simplify and lighten the registration procedure as far as possible rather than to abolish it.

10. The question of provisional and protective measures has also been raised in the preparatory work, The need for them to be put in place quickly is particularly acute in cross-border litigation, on account of the time inevitably taken by proceedings abroad, i.e. proceedings involving the registration (exequatur) procedure on top of national proceedings, but also of the very great variety of different legal instruments in use in the Member States. The Brussels Convention deals with these measures only as a marginal matter, and special rules are accordingly needed both as regards jurisdiction to order them and the conditions for giving effect to them.
11. The draft proposal included in this Communication does not set out to narrow the current wide divergences between national procedural laws.

Even, so the Commission believes that a supplementary step forward should be taken and that a debate should be launched on the substance of the problem of litigation in Europe, not just in terms of cooperation between courts but in much broader terms of equal access to rapid, efficient and

⁽⁹⁾ OJ C 319, 26.10.1996.

⁽¹⁰⁾ To feed its own reflections and enrich these debates, the Commission widely circulated a questionnaire in preparation for the Helsinki seminar; this went to European associations representing professional circles (notaries/solicitors, advocates, the judiciary, bailiffs and court registrars). The replies were collated for the seminar.

inexpensive justice. The Commission intends to have legal practitioners and all other interested circles closely associated with its work on this.

Security as to the law and trust in judicial institutions are important conditions for the development and sound operation of the Community's frontier-free area. Hence the need to explore how that security and that trust can be enhanced in a more horizontal perspective for the benefit of all citizens and businesses, subject always, of course, to compliance with the principles of subsidiarity and proportionality.

12. This Communication accordingly contains a second part describing the difficulties generated by divergent national procedural legislation and opening the debate on a number of additional questions which the Commission would like to see dealt with in greater depth.

— The first is the procedure for obtaining an enforcement order in the State of origin (II.1). The principle of equality of armaments, the speed with which the business world operates and the consequent risk that the debtor's assets, on which the creditor's action is targeted, will disappear, all militate in favour of litigants' having access to procedures that have comparable results in terms of time-consumption, cost and effectiveness. The Commission has concluded, therefore, that special attention must initially be paid to the possibility in all Member States of a rapid procedure for money claims.

— This Communication also goes into the question of enforcement proper (II.2). A gradual approach is required. It is therefore proposed that reflections be confined initially to the practice of seizure of bank accounts so that the principles underlying the procedure can be ascertained and common guidelines for a European principle can be devised.

— Closely linked to enforcement procedures is the important topic of transparency of assets (II.3). The Commission considers that litigants in the Union ought to have comparable facilities at their disposal in this respect and proposes that thought be given to a possible generalized application of the 'assets declaration' principle in use in some Member States.

— Lastly, claims have increasingly to be recovered abroad. International cooperation should make recovery easier. The Commission therefore suggests enhancing such cooperation, possibly via a information exchange scheme between enforcement authorities in the Member States, subject to compliance with their legislation and practice, particularly with regard to data-protection (II.4).

The prospects

13. A major objective of the new treaty is to develop and maintain the Union as an 'area of freedom, security and justice'. In order to create such an area, civil judicial cooperation has been transferred to a new chapter of the EC Treaty relating to policies pursuant to this objective and now appears in Article 73M. This article allows notably for measures to be taken to eliminate obstacles to the smooth working of civil rulings by favouring compatibility between the rules of civil procedure applicable in Member States. These measures are linked to the situations of trans-border incidents and the necessity for the smooth working of the internal market. The Amsterdam Treaty thus bears witness to the Member States' awareness of the extreme importance of this field for European integration and for the efficiency of the internal market in particular.

It will offer European citizens and businesses the environment they need on a procedural level, for actions in national courts.

The Brussels Convention and the rules relating to civil procedure are of ever increasing importance in relations between citizens and businesses in an increasingly integrated internal market, to which the rapid development of electronic transactions will add a new dimension in the years to come. It seems essential to amplify the functional character of rules in the future, particularly those regarding the enforcement of judicial rulings on civil and commercial matters. This need comes in part from an increasingly narrow integration process in the internal market and partly, from the implications raised by the prospective future enlargement of the Community.

It is in the light of this double prospect of tighter integration and enlargement, that the Commission

would like to stimulate a debate on cooperation in civil matters. The Commission feels that it is most appropriate to present its initiatives in stages. It proposes, firstly, to improve the circulation of judgments in the framework of the existing judicial system and to initiate reflection on other aspects of the problem as from now. While waiting for the new Treaty to enter into force, the proposals made are based on the current judicial system, while reflecting thoroughly on the fields covered by this initiative. It should be noted that the Amsterdam Treaty will allow the Convention instrument to be replaced by Community instruments with the institutional effects this entails, without requiring a ratification process on the part of the Member States and potential candidates for enlargement. The Commission reserves its position to take new, complementary initiatives on the subjects reflected upon, or to present, at the appropriate time, a proposal within the framework of the new Treaty, consistent with transforming the Convention into a Community instrument, taking care, where possible, to maintain the parallel between the future Community instrument and the Lugano Convention which extends the Brussels Convention rules to the Member States of the AELE.

possible, notably following the changes made by the most recent accession Conventions⁽¹⁾. It is also agreed that certain provisions may be re-assessed in the light of practical experience and of interpretations put on them by the Court of Justice. After well-nigh thirty years' practical operation, it has been found that Title II (jurisdiction) has been the most difficult to interpret and apply. In this context, the Commission proposes a rearrangement of these jurisdictions. The point is to enhance certainty as to the mechanisms and effectiveness by providing for autonomous definitions of certain concepts in place of a general renvoi to the concepts of national law (e.g. the definition of 'court first seised' in relation to *lis pendens* and the concept of 'provisional, including protective, measures' (cf. Chapter II)). Finally, the new Convention, like the Brussels Convention, is part of the *acquis* of Community legislation, it must therefore be in the Act of Accession of new Member States and enter into force by the appropriate procedure. It is therefore proposed to include provisions to this effect.

I. FREE MOVEMENT OF JUDGMENTS

14. Any new efforts to improve the free movement of judgments in civil and commercial matters in the European Union will have a direct impact on the Brussels and Lugano Conventions. The Commission considers that the aim of facilitating the Union-wide recognition and enforcement of judgments given in any Member State should be pursued by means of a general revision of the Conventions.

I.1. REVISION OF THE BRUSSELS AND LUGANO CONVENTIONS

15. The Commission shares the Member States' view that the current revision exercise cannot be allowed to generate a major upheaval in the conventions or modify the general structure and the underlying principles that have proved their worth.

The object of the exercise is rather to align the provisions of the two Conventions as closely as

I.2. SIMPLIFIED RECOGNITION AND ENFORCEMENT PROCEDURE

16. The most radical solution, and the most compatible with the concept of a frontier-free law-enforcement area, would be to abolish the registration (*exequatur*) procedure purely and simply. National courts being European courts, judgments given in other Member States would enjoy the same status as judgments given 'at home' and be enforceable in the same way, with no special review procedures and formalities attaching to the foreign judgment.
17. But the vast majority of those consulted felt this was premature. To be enforceable, a foreign judgment needs some kind of 'passport' so that it can be given the same treatment as a judgment given at home. One of the most commonly cited arguments is the concept of *imperium*, the power of governance, underlying the enforcement of a judgment. This is a privileged expression of national sovereignty. The other argument proceeds from the substantial divergences between the Member States' procedural systems as regards the definition of an enforcement order, the procedures for enforcing judgments and, above all, the status, powers and responsibilities of enforcement officials. The general view is that there will have to be approximations of these definitions,

⁽¹⁾ Portugal and Spain in 1989, Austria, Finland and Sweden in 1996.

statuses and procedures before radical change can be introduced.

18. On the other hand, even if there are major barriers to a European enforcement order circulating uncontrolled between Member States, the Union has the possibility of other, more immediately accessible facilities. Considerable progress towards the free movement of enforcement orders could be made by simplifying the recognition and enforcement procedures.

In the Council the question arose whether the changes should be made by amendment of the relevant provisions of the Brussels Convention or whether it might be preferable to establish a separate instrument applying only to money judgments. The Commission believes that re-examination of the Brussels Convention offers the best context in the present situation. For one thing, the new recognition and enforcement scheme is to apply to all judgments in civil and commercial matters, and not just to judgments ordering payment of a sum of money. There is no legal reason why the new arrangements should be specifically linked to the pecuniary or non-pecuniary nature of the claim.

Moreover, the creation of a separate instrument would have serious disadvantages and this solution may well turn out to generate more problems than are to be solved. The immediate impact of a new instrument would be to deprive the mechanism of the Convention of the bulk of its potential scope despite the intention declared in the revision exercise of not fundamentally calling into question the context of an instrument that is a central pillar of the free movement of judgments in Europe. Superimposing two competing schemes would have obvious disadvantages in practice, primarily for users (the judiciary, advocates, etc.), who are already reasonably familiar on the whole with the general scheme of the Brussels Convention and would face acute problems of interpretation in relation to hybrid judgments.

19. The proposed approach proceeds from the generally accepted fact that the involvement of the authorities of the State of enforcement could be simplified and that the endorsement for enforcement or the registration of a judgment could be reduced to little more than a formality. The frequency of appeals from

enforcement decisions given under the Brussels Convention's recognition and enforcement procedures is negligible. The question is therefore whether, given the endemic overload of the courts in all the Member States, the current registration procedure, even at the early stages, should retain its 'judicial' character. There is no wish to interfere with the responsibilities of the Member States for designating the authorities responsible for the formality, but it would be most helpful if the Member states designated in pursuance of the grant of enforcement other authorities than the courts themselves (public officials, registrars, etc.), although any appeals against the granting of enforcement should still be of a judicial nature. The immediate advantage of this would be that it would relieve the already overloaded courts of the burden and bear clear witness to the changed nature of the enforcement order (or whatever other formality is chosen), in the initial stages of the procedure. On the other hand it may well be worth designating a court in those Member States where the actual enforcement of judgments requires the prior authorization of a court. This would not express any form of distrust *vis-à-vis* foreign courts but merely the wish to pool the power to declare foreign judgments enforceable and order their enforcement in a single pair of hands.

Regarding enforcement proper, the Commission's proposals proceed from the principle that the formality should be virtually automatic and involve no more than a formal check on the judgment, with no review of the grounds for opposing enforcement. It would be facilitated if the judgment to be enforced were accompanied by a uniform multilingual certificate issued by the authorities of the State of origin unequivocally establishing the conditions required for registration for enforcement (Annex to the Convention). The onus would be on the person against whom the judgment has been registered for enforcement to contest it and furnish evidence that one of the Convention's remaining grounds for opposing enforcement was available.

20. The changes to the procedure would have to be accompanied by revision of the grounds on which recognition of a foreign judgment may currently be opposed (Article 37a), and in particular the public policy ground, which does not sit well with the European integration process or the civil and commercial matters concerned here. There is also the question of the defendant being duly served and given sufficient time to prepare his defence, where the current wording gives the 'bad payer' a valuable means of escaping enforcement. Finally, in the current state of the legislation in the Member States,

there is no obvious need to preserve the right to oppose enforcement where the Member State violates the rules of private international law relating to personal status and capacity, matrimonial property schemes and succession.

To avoid purely dilatory appeals, the Commission considers that the judgment authorizing enforcement in another Member State should be declared provisionally enforceable, just as the original judgment is enforceable. But safety nets are needed to ensure that there are no irreparable consequences of provisional enforcement (Article 36).

21. The Commission proposes substantial changes to the mechanism currently governed by the Convention along these lines, but does not exclude the possibility that this might be but a step along the road towards the pure and simple abolition of the registration (*exequatur*) procedure in due course.

1.3. PROVISIONAL AND PROTECTIVE MEASURES

22. Provisional and protective measures are of vital importance in the context of recognition and enforcement of foreign judgments. The negative consequences of inherent procedural delays can be alleviated or offset if the State applied to takes a favourable attitude to such measures. But, while throughout the Union there has recently been a considerable expansion in such measures, reflecting the need for quick action in the business world and thus for palliatives for the excessive slowness of the justice system, this has occurred on an autonomous and divergent basis. The Brussels Convention contains only two provisions relating to provisional measures, Articles 24 and 39, and they merely refer to the domestic laws of the Member States for their application.

23. A comparative survey of national legislation reveals that there are virtually no definitions of provisional/

protective measures and that the legal situations vary widely. The only convergence that can be ascertained is between the function of such measures, which is to secure the subsequent enforcement of judgments on the substance of a case (or their anticipated enforcement), organize factual situations or the parties' rights *pro tem* and safeguard all interests affected pending settlement of the dispute.

But the gap between Member States widens when it comes to measures anticipating the final judgment on the substance, with the risk that proceedings on the substance will become futile and that it promotes a bending of the usually applicable rules of jurisdiction (e.g. the *référé-provision* in french law and the *Befriedigungsverfügung* in German law). The recourse to interlocutory proceedings for such anticipatory measures is unevenly distributed, as certain Member States refuse to allow the courts in interlocutory proceedings any power to anticipate the final outcome.

24. There are quite considerable differences in the terms on which such measures, which are normally directly enforceable, may be ordered. Although the legislation of the Member States generally makes this conditional on the probability of the alleged claim (*fumus boni juris*) and of the risk of non-recovery (*periculum in mora*), the urgency factor is more and more often interpreted loosely. There are also substantial differences as to the kind of assets that may be affected, the type of measures that may be taken and the relationship between the proceedings in an interlocutory action and the proceedings on the substance.

Formal aspects are also divergent. Many Member States subject protective measures to prior authorization by the court, in some cases a special court and in some not, whereas in others this is sometimes not necessary. Moreover the unilateral nature of the action (heard *ex parte*) is the rule in a good number of Member States, whereas in others the adversary procedure is mandatory from the outset, in the absence of specific considerations of urgency, so that nobody can be taken by surprise.

25. The Brussels Convention does nothing to solve this fragmentation. Article 24 merely establishes the principle of jurisdiction by way of derogation from the general rules on jurisdiction as to substance, without specifying those for whose benefit this juris-

diction is conferred and above without defining provisional/protective measures. To fill in the gap, the Court of Justice has had to interpret the provisions in question. In *Reichert II*⁽¹²⁾, it laid the foundations for a uniform autonomous definition and specified how freedom of movement of such judgments was to be secured. As for article 39, the Court of Justice usefully held in *Capelloni and Aquilini v. Pelkmans*⁽¹³⁾ that the party applying for and obtaining authorization for enforcement may, under the Article and during the period allowed, have protective measures executed without needing specific authorization to do so.

26. The Commission considers it necessary to continue along the path mapped out by the Court of Justice and to launch debate in the Union on ways and means of securing equivalent protection for litigants everywhere. Given the variety of legal systems and of measures available in them, the debate will have to focus on the functions served by provisional/protective measures, the minimum conditions to be satisfied, the adversary procedure requirement, the enforceability of the measures and possible redress procedures.

27. The Commission proposes that 'provisional and protective measures' be given a uniform definition. It is suggested that the guiding principles posited by the Court of Justice in *Reichert II* be taken as inspiration⁽¹⁴⁾.

28. The Commission further proposes that there be a clear rule conferring jurisdiction to order provisional/protective measures on the courts of the Member State in whose territory they may effectively be executed, even if the courts of another Member State have jurisdiction to determine the substance of the case (Article 18a). The basis for this new rule of jurisdiction is the urgency of provisional measures, which is not compatible with a registration (exequatur) procedure. This rule would, of course,

be without prejudice to the natural jurisdiction of the court hearing the substance of the case to order provisional measures also⁽¹⁵⁾.

Where a non-enforceable judgment has been given on the substance or an enforceable judgment has been given but not yet declared enforceable in the Member State applied to, such judgment must permit protective measures to be taken in the State in which they may be executed⁽¹⁶⁾. The judgment on the substance is automatically recognizable under Article 26 of the Brussels Convention, on the basis of an international presumption of regularity, and must have the status of 'European provisional enforcement order' (cf. Article 27).

Lastly, where the enforceable judgment on the substance is declared enforceable in the State applied to, then, without prejudice to provisional enforcement of the judgment authorizing enforcement, this judgment automatically entails full authorization to take the provisional/protective measures allowed by the law of that State. This does not presuppose that the judgment authorizing execution has been first served on the defendant, and the measures remain in force until expiry of the period allowed for appeal or until judgment has been given on the appeal (cf. Article 36).

29. All the suggested amendments are incorporated in the draft convention at Annex 1. For convenience, this proposed convention follows, as far as possible, the structure and numbering of the Brussels Convention and only includes the provisions in which a change with regard to the Brussels Convention is envisaged.

II. AVENUES TO BE EXPLORED FOR AN IMPROVEMENT IN THE ADMINISTRATION OF JUSTICE IN THE EUROPEAN UNION

30. Because of the heterogeneity of national procedural systems, litigants in the European Union are not on

⁽¹²⁾ Case C-261/90 [1992] ECR I-2149.

⁽¹³⁾ Case 119/84 [1985] ECR 3147.

⁽¹⁴⁾ It will be for the Court to determine whether measures that anticipate the final outcome are within the definition. Question for preliminary ruling No C-46/7 of 1996, Case C-391/95 *Van Uden Maritime BV v. Firma Deco-Line, Peter Determann KG*.

⁽¹⁵⁾ But there are limits to the recognition of such measures: see Case 125/79 *Denilauler v. Couchet* [1980] ECR 1553. The measure will not be recognized if taken *ex parte*.

⁽¹⁶⁾ E.g. Article 68 of the French Civil Procedure (Enforcement) Act (9.7.1991) and Article 1414 of the Belgian Judiciary Code.

an equal footing. They do not have access to instruments of equal performance levels whereas equality of citizens and business partners in an integrated area presupposes equal access to the weapons of the law. Attention has focused on this divergence between law and reality that flows from the preservation of judicial frontiers in the Union for several years, and the Community institutions have expressed awareness of it⁽¹⁷⁾. The Court of Justice itself has repeatedly had occasion to declare that the availability of redress procedures where rights are violated by an infringement of Community law is a fundamental obligation of the Member States, flowing *inter alia* from Article 5 of the EC Treaty⁽¹⁸⁾.

31. The institutions' awareness has been echoed in a number of pieces of Community legislation. The council has enacted several instruments under Articles 66, 100 and 100a of the EC Treaty, some of them containing special rules, rules on conflict of jurisdiction or, more rarely, rules on conflict of laws, and the harmonization of substantial rules of procedure has not been excluded in specific cases⁽¹⁹⁾. This technique is limited, however, by the very purpose it is supposed to serve. The work launched thus far on the harmonization of national conflict rules or substantial procedural rules has suffered from being developed in a sectoral context.
32. Without prejudice to possible new proposals in specific areas where they are needed, the Commission wishes to pay special attention to establishing as horizontal an approach as possible for the future which will be adopted following the entry into force of the Treaty of Amsterdam taking into account the new provisions relating to civil judicial cooperation (Article 73M). The complexity of the problems that arise, and the deep-rooted situation of procedural law in national traditions, suggest that measures should be taken on a progressive, prudent and proportionate basis. Particular attention must be given to maintaining a balance of the respective parties' interests, especially with regard to the rights of the defence. The Commission accordingly wishes attention to focus on those points of divergence whose maintenance it considers to be prejudicial to

the harmonious administration of justice in the Union. These have already been looked into in the course of Council work on the 'European enforcement order', which is evidence of the need for and an awareness of a possible common Union approach.

II.1. PROCEDURE FOR OBTAINING A WRIT OF EXECUTION IN THE STATE OF ORIGIN

33. In view of the growing needs of both ordinary citizens and economic operators, the general introduction and approximation of rapid procedures for the payment of sums of money merits consideration as a matter of priority.
34. In 1994 a study⁽²⁰⁾ was made at the Commission's request as part of the Community strategy for promoting enterprise and improving the business environment. It found that operators feel the legal framework in the Member States is uneven in its deterrent effect on bad debtors and may even work to their financial benefit in many Member States by affording them a certain degree of impunity. It also revealed that some SMEs are reluctant to engage in international trade because they know that it will be much more difficult to recover debts abroad than at home in the event of non-payment.
35. The Commission already highlighted the lack of a suitable legal framework in connection with the proper functioning of the single market in its recommendation of 12 May 1995 on payment periods in commercial transactions⁽²¹⁾. Believing that creditors affected by late payments should have access to rapid, efficient and inexpensive redress procedures, the Commission requested the Member States to improve the effectiveness of legal procedures for the settlement of claims for payment and to simplify methods for recovering uncontested cross-border debts. But in its report of 9 July 1997 on an evaluation of the effects of the 1995 Recommendation⁽²²⁾, it felt bound to conclude that the situation had developed very little in the Member States and that small businesses remained reluctant to engage in export trade.

⁽¹⁷⁾ Notably in the Green Paper on Access to Justice for Consumers and the settlement of consumer disputes (COM(93) 576) and in the Strategic Programme for the Internal Market (COM(93) 256).

⁽¹⁸⁾ Cases . . .

⁽¹⁹⁾ Examples are Directive 84/450/EEC on misleading advertising, Directive 93/13/EEC on unfair terms in consumer contracts, Directives 88/357/EEC, 90/619/EEC, 92/49/EEC and 92/96/EEC on insurance, Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.

⁽²⁰⁾ 'European Late Payment Survey' — *Intrum Justitia*.

⁽²¹⁾ OJ L 127, 10.6.1995; cf. Communication on the Commission Recommendation on payment periods in commercial transactions: OJ C 144, 10.6.1995, p. 3.

⁽²²⁾ OJ C 216, 17.7.1997, p. 10.

36. The Commission's approach, which won broad support in Parliament⁽²³⁾, rests on the fact that a comparison of national systems shows considerable disparities. The last twenty years have seen the emergence, in varying degrees, of a range of specific or summary procedures in the Member States. Their proliferation reflects not only the Member States' desire to tackle the chronic backlog of court cases and prevent the courts from becoming clogged up but also their differing priorities on effective judicial protection for particular categories of rights of litigants.

37. Besides procedures for small claims or more specifically for consumer debts, several Member States have already introduced — or are in the process of introducing — procedures making the recovery of sums of money simpler, faster and less expensive. However, this kind of procedure⁽²⁴⁾ does not exist in all the Member States⁽²⁵⁾. Where they do exist, the substantive and formal conditions governing their application differ quite markedly. The differences concern such fundamental aspects as the maximum amount of debt that can be dealt with under the procedure, whether the proceedings are adversarial or *ex parte*, the rules of evidence, costs and charges, and whether the services of a lawyer are required. In addition, the degree of formality of the procedure varies from one Member State to another, to the point where it may be completely removed from the judicial sphere⁽²⁶⁾.

38. This widening disparity does tend to weight the scales in favour of litigants who have access to a very efficient recovery procedure and against those at the other extreme who have no such option and have to rely on the 'normal' procedures — which are generally synonymous with much higher costs and lengthy delays. Furthermore, in some Member States the use of a simple payment order procedure is flatly prohibited in the case of cross-border disputes⁽²⁷⁾. In

this case the disparity between national legislative provisions may significantly affect the choice of jurisdiction ('forum shopping'). In the Commission's view, the Union should seek to counter these differences which could influence debtors' behaviour. It has been demonstrated⁽²⁸⁾, in the context of the follow-up to the Recommendation of payment periods as between firms, that payments are delayed far less in those Member States where judgments can be obtained and enforced more quickly, more cheaply and more efficiently. There, the proportion of all payment delays that are intentional is substantially below the average, which is 35%. To benefit fully from the advantages of the dismantling of national frontiers, both economic operators and ordinary citizens should have access to a rapid, efficient and inexpensive procedure meeting certain substantive and formal conditions that offers them equivalent protection. And that protection should not be confined to firms but available to all citizens (consumers, alimony creditors etc.) faced with unpaid claims.

39. The general introduction of a payment order procedure in the Member States⁽²⁹⁾ would, as the competent authorities became more familiar with it, also help facilitate the recognition and enforcement procedures⁽³⁰⁾ provided for in the Brussels Convention. It should also be noted that a number of academic papers on the 'European enforcement order' have started from the premise that a uniform procedure for the payment of sums of money could lead to the complete disappearance of the recognition and enforcement procedure (registration/exequatur) provided for in the Brussels Convention.

40. The fundamental principle is that litigation for the payment of a sum of money should be avoided where there is no real disputed claim and where the debtor does not contest the debt. Under this principle the responsibility for action is reversed and the initiative for starting proceedings rests not with the applicant but with the defendant. Having been served with an order for payment issued at the creditor's request, the debtor must take the initiative of going to court. The major feature of the procedure is the legal effects it produces if the debtor knowingly fails to act. Special care must therefore be taken to ensure that the debtor's

⁽²³⁾ OJ C 211, 22.7.1996.

⁽²⁴⁾ Known as *procédure d'injonction de payer* in France, *Mahnverfahren* in Germany, *decreto ingiuntivo* in Italy, and *betalningsföreläggande* in Sweden, *Sammiere rechtspleging om betaling te bekomen* in the Netherlands.

⁽²⁵⁾ Spain and Portugal have no such procedure. The United Kingdom and Ireland have a summary procedure that is very similar.

⁽²⁶⁾ For example, the *kronofogdemydighet* in Sweden.

⁽²⁷⁾ There is some uncertainty as to whether this restriction is compatible with the Court of Justice's reading of the Brussels Convention, and in particular of Article 6, which prohibits discrimination (Case C-398/92 *Mund & Festner v Hatrex Internationaal Transport* [1994] ECR I-467).

⁽²⁸⁾ European Payment Habits Survey, April 1997, Intrum Justitia.

⁽²⁹⁾ Cf. Communication mentioned above, p. 9.

⁽³⁰⁾ In its judgment in *Kloms v Michel* (Case 166/80 [1981] ECR 1593) the Court of Justice agreed that an order for payment constituted a 'judgment' within the meaning of the Brussels Convention.

interests are properly protected. Service or notification of the enforcement instrument at the creditor's request is a matter of considerable importance here, since this is when the time limit starts to run for the debtor to lodge an objection and start adversary proceedings.

41. Having set out these general principles, which underlie all the existing systems, a number of issues still have to be settled. First the ways of maintaining a balance between the parties (whether consumers, in which case the existing position of inferiority in the market⁽³¹⁾ should not be reinforced, or other categories of persons) must be examined. Then it is necessary to define what roles the judicial authority, the process server and the lawyer should play. The material scope, the potential maximum amount of the debt, application procedures, rules of evidence, methods of serving orders, what courses are open for appeals and the time limits for lodging them — these are all factors that have to be borne in mind when considering the possible shape of a European procedure for payment orders. This process of reflection will be guided by the desire not to undermine existing systems which have proved to be effective.

II.2. ENFORCEMENT OF JUDGMENTS

42. A prompt and efficient system for enforcing court judgments is vital for justice to be accessible. A free circulation of court judgments would be illusory if enforcement instruments were not equally effective in all the Member States.

43. It is not clear that at present, national legal systems are up to the task of fulfilling this goal. As with interim and provisional measures means of enforcement are organized in very different ways and subject to widely differing conditions from one Member State to another. Although all the Member States have different enforcement rules depending on the nature of the claim against the debtor and enforced execution in almost all of them is conditional on service of the instrument on which it is based or an serving formal notice to the debtor, there are still considerable differences as regards

the nature of the instruments by which enforcement can be obtained⁽³²⁾, since *res judicata* is not the only decisive factor. Exceptions to the generally accepted principle that all the debtor's effects are liable to seizure are numerous and also vary widely from one country to another. The same is true as regards appeals, the role of the courts in enforcement proceedings, the cost of enforcement and publication of enforcement measures.

44. The Brussels Convention seeks solely to facilitate the free movement of judgments by making the registration (*exequatur*) procedure more flexible. Enforcement proper remains subject to the procedural rules of the State where it is effected. The enforceability of an instrument, then, is not to be confused with its actual enforcement, and there is still a long way to go before the conditions for enforcement of judgments and the risks attaching to the difficulties which they pose are the same in all the Member States⁽³³⁾.

45. The diversity and complexity of the rules highlighted by the Court has to do with the specific nature of the law on enforcement, which is deeply rooted in the national culture and also affects individual rights, contract law, matrimonial law and the law of succession, tax law and the law on securities. The multidisciplinary nature of the law on enforcement, plus the traditional principle of territoriality as regards seizure, makes it necessary to take a cautious and very gradual approach to the subject.

46. It is proposed to confine reflection initially to the problem of banking seizures, which exist in practically all the Member States and are a powerful weapon against bad debtors. Their effectiveness is somewhat lessened by the territoriality principle and the substantial differences between legislation in the Member States. But above all, the extreme volatility of the contents of bank accounts is a major obstacle to the seizure and attachment of funds. Thought therefore needs to be given to the various ways of neutralizing the obstacles and volatility and to define a common approach for the European Union.

47. Several questions merit special attention. Deciding what is the place of seizure is one of these key questions. The answer will have to take account

⁽³¹⁾ Green Paper on access to justice of consumers.

⁽³²⁾ Some Member States make a distinction between the writ and the endorsement for enforcement.

⁽³³⁾ *Mund & Festner, supra*, note 24.

of the massive growth in electronic funds transfer. The traditional principle whereby the place of seizure is where the funds held by the banker are intercepted or where payment is made by the bank (generally its head office) will have to be reviewed.

The scope of seizure as regards funds held by a foreign branch or subsidiary of the bank seized, also poses a particular problem in connection with the principle of territoriality. The subsidiary or the branch is very often treated as a separate establishment from that where the seizure is effected, at any rate as far as release from seizure of the latter is concerned.

The date when a third party subject to seizure is required to produce information about the debtor's account and what becomes of debts due that are immune from seizure and paid into a bank account are questions that need to be examined carefully. The same applies to the priority treatment afforded to the execution creditor in some Member States, which also carries a risk of discrimination against more 'distant' creditors.

II.3. TRANSPARENCY REGARDING ASSETS

48. Making it easier to ensure prompt enforcement of foreign judgments through a simpler recognition and enforcement procedure is essential in order to safeguard the rights of the creditor effectively. Progress on this front can, however, be rendered worthless if the debtor turns out to be insolvent or conceals assets. The creditor must therefore be able to place an accurate valuation on the debtor's actual realizable fortune in terms of assets and liabilities before deciding whether it is worth pursuing enforcement.
49. Yet transparency regarding a debtor's assets, which constitute the creditor's general security, has largely disappeared. Once they would have consisted mainly of easily identifiable — and hence seizable — immovable property, but now the make-up has changed substantially. By and large such assets no longer take material form but tend to comprise mostly bank accounts, miscellaneous payments, company shares, securities or founders' shares in companies scattered across Europe, usually under arrangements that ensure complete anonymity for the holder. There is far less clarity about a debtor's

assets and, with advances in information technology and the Internet ⁽³⁴⁾, much greater volatility.

50. National legislators have not ignored these developments and have gradually introduced measures to tackle this lack of transparency, at least to some extent. Nevertheless the mechanisms currently available in the Member States to uncover and locate the various elements of a debtor's assets are extremely varied and do not afford all creditors equal protection.
51. One method is to oblige the debtor to disclose the details of his assets on application by the creditor or by order of the court responsible for enforcement. In one group of Member States no such legal rule exists. Here, it is up to the creditor to make the necessary effort to identify and locate the assets, more often than not to the debtor's advantage since he is forewarned or more than adequately advised. Indeed, in some Member States there are no provisions making it punishable for a debtor to contrive his own insolvency.

In a second group of Member States there is a definite obligation to declare one's assets, in writing or orally, either to a court, possibly under oath, or to a clerk or court officer, or to the authorities specially charged with enforcing judgments. Debtors who refuse to give a declaration make themselves liable to penalties or even imprisonment. As a rule, the obligation to declare assets covers all types of movable and immovable property.

The effectiveness of this kind of declaration depends largely on the use made of it and the publicity it is given. In some Member States the information obtained in this way is disclosed only to the court and the parties concerned. On the other hand, the deterrent effect of the obligation to declare is much greater where the information can be made known to anyone interested via the court records. Thus the obligation to declare assets can be a very effective means of bringing pressure to bear on bad debtors.

⁽³⁴⁾ See the Commission's Green Paper on electronic commerce (COM(97) 157).

52. Making information available through the public records can constitute a useful extra source of information or even an alternative solution in Member States where there is no declaration. Once again, the extent of the information available in this way varies considerably from one Member State to another.
53. In some Member States the courts or the enforcement authorities also have the power to require third parties, in particular banks and other financial institutions, to disclose information about debtor's bank accounts. In others, this option is completely ruled out, banking secrecy being the reason most commonly cited.
54. Fairly substantial differences exist in the European Union over the way in which the concept of transparency regarding assets is viewed. Firstly the discretion observed by some Member States tends to encourage bad debtors to move their assets there in order to escape seizure. In addition creditors in the Union are not all on an equal footing. It depends on the country where they are seeking to obtain payment. In the Commission's view the present situation is unsatisfactory, effective enforcement in the European Union calls for coordinated action. Taking into account the interest of such a system, thought should be given to the possibility of bringing in a general obligation across the Union to declare assets in order to be able to locate them.

This approach was broadly welcomed by those in the profession following consultation by the Commission in the run-up to the Helsinki seminar in March 1997 on the 'European enforcement order'. The Commission believes that it is essential to reconcile the effectiveness of such a procedure with the rules on immunity from seizure and also with the need to protect debtors and third parties against inappropriate, inadequate or excessive investigation. Particular attention will be given to data protection. The Commission will proceed with protected consultation in order to obtain specific points of views from the interested parties.

II.4. EXCHANGE OF INFORMATION BETWEEN ENFORCEMENT AUTHORITIES

55. A further dimension which reflection on improving the effectiveness of judgments will have to cover is cooperation between the authorities responsible for enforcement in the Member States. This issue is inseparable from the problem of identifying the property subject to enforcement action and is a natural complement to it. The more progress made towards greater transparency regarding assets, the greater the scope for future cooperation. At present the fact is that, although judicial cooperation on civil matters is one of the Union's objectives, the European Union has no general multilateral instrument aimed at speeding up the settlement of disputes and the enforcement of judgments through a system of mutual assistance.
56. This was also one of the topics discussed at the seminar on the European enforcement order held in Helsinki in March 1997 as a factor that could help to make court judgments more effective. The Member States were also consulted on the possibility of introducing a system for exchanging information in this area in the context of work on the 'European enforcement order'(see I.2). The reception given to the proposal was a sign that the Member States are growing increasingly aware of the difficulties caused by the absence of a formal framework for cooperation between courts with regard to making judgments effective.
57. The Commission takes the view that improving legislative mechanisms for recognition and enforcement is a matter of priority, but that the positive results expected from the work done in this area could be further enhanced by active cooperation between the national authorities involved in these mechanisms. Cooperation here would help to overcome the drawbacks of the principle of territoriality as regards means of enforcement, a principle that is firmly anchored in the Member States' legal traditions. On the other hand, the difficulty, or even impossibility in some cases, of locating assets easily and inexpensively in order to satisfy a creditor tends to undermine the free movement and effectiveness of judgments and, more generally, the ability of the Member States' judicial systems to meet the concerns of litigants. It would therefore be wise to begin considering possible appropriate forms and

arrangements for an information exchange system between enforcement authorities in the Member States.

58. To be effective, a system of this kind should not be confined solely to exchanging information on the legislation applicable in the Member State applied to. The main goal of such cooperation should be to help the creditor obtain the information available in the Member State applied to on the debtor himself and on the nature of his property, what it comprises in terms of assets (including debts due to third parties) and liabilities, and their location.
59. A comparison of existing instruments in other matters will make the definition of a possible system easier. There are a series of instruments, in particular at the level of the European Union, the purpose of which is to allow or facilitate reciprocal information and cooperation between authorities.

In this connection the machinery provided for by the Convention signed on 6 November 1990 in the context of European Political Cooperation concerning the recovery of maintenance is of particular interest⁽³⁵⁾. Under Article 3 of the Convention, the designated authorities undertake to cooperate with a view to making judgments effective and to take the necessary enforcement measures, but also to seek out and locate the debtor's assets and to obtain from the State authorities all necessary information regarding the debtor.

Community law also offers several models for a system of information exchange and mutual assistance between authorities with the aim of ensuring the proper application of Community

rules. Such systems are especially well developed in the fields of customs, agriculture and taxation⁽³⁶⁾.

60. In the forthcoming reflections, the differences of culture between the Member States as regards responsibility for the conduct of proceedings and the enforcement of judgments, the disparities or similarities in terms of the information available within each Member State, and the wide differences in the status and responsibilities of enforcement officers will occupy a major place in the discussions and a number of factors will have to be taken into account.

In particular there needs to be a precise definition of who may have access to information. It would probably be preferable to limit access to official authorities rather than extending it to private individuals. In this case it will have to be decided which authorities are likely to be receiving information and which ones will be supplying it. A system of this kind will probably have to be open to all administrative and judicial authorities and those independent professional authorities that are authorized by the State to effect the enforced execution of judgments. A related question will be the degree of decentralization which any such system should lead to.

The material scope of the system and the conditions which applications for assistance would have to satisfy will need to be clearly defined. Besides cases where assistance may validly be refused, it will be necessary to identify what limits may need to be placed on the system in order to take account of legitimate concerns for the protection of privacy and personal data and of national rules on the confidentiality of information and banking secrecy in the State applied to.

⁽³⁵⁾ The Convention has been ratified by only four Member States. A review of the Convention now under way in the Council, in particular as to the reasons for its non-ratification, should provide some useful information.

⁽³⁶⁾ See in particular Council Directive 76/308/EEC on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the EAGGF and of the agricultural levies and customs duties: OJ L 73, 19.3.1976, p. 18.