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**Scottish Association
of Citizens Advice Bureaux**

European Commission
Directorate-General for Justice, Freedom and
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Dear Sir / Madam

Commission of the European Communities green paper on improving the efficiency of the enforcement of judgments in the European Union: the attachment of bank accounts. Com(2006) 618 final: A response by Citizens Advice Scotland

Thank you for consulting Citizens Advice Scotland on the Green Paper on improving efficiency of the European enforcement of civil judgments.

We support the introduction of a Community instrument for the attachment of bank accounts as a means of improving efficiency and Community-wide parity in debt recovery. We agree that the lack of cross-jurisdictional parity throughout Europe is far from ideal and that it can prevent a pursuer from enforcing a valid judgment. However, we are concerned that the design of any such system could undermine existing domestic protections and we would only support a scheme that ensures that these minimum protections are maintained.

In Scotland, following many years of campaigning, we are seeing major reform to the law on debt recovery. The Bankruptcy and Diligence etc. (Scotland) Act 2007 provides for new debtor protections in bank account attachments (arrestments). We would therefore seek to ensure that any scheme, whether structured as a stand alone system or through the process of a harmonisation Directive, does not erode the fundamental debtor protections afforded by Member State's domestic legislation. And while we understand that significant pan-European disparity in the protections afforded may require a harmonising Directive, we would argue that this should incorporate the highest level of protection afforded by each Member State whilst maintaining access for creditors who are individuals and / or consumers.



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We have outlined below, the key issues of concern to us. These answer most of the questions in your Green Paper. Those to which we have not provided a response we do not have a strong opinion on at this stage, but we may do in the future as the policy develops and we will be happy to respond further.

1. The need for a Community instrument and whether it should be protective or provide for release of funds

We do not agree that such a Community instrument should be limited to protective orders. Without a formal means to force the release of attached funds the effectiveness of the Europe-wide system would be undermined to the detriment of individual pursuers. Given that a Europe-wide system of attaching should serve to balance debtor protection with creditor rights, and bearing in mind that the creditor could be an individual consumer taking action against a corporate entity, we believe that a Community attachment instrument should also provide a reasonably straightforward mechanism for obtaining attached monies.

Currently, Scots Law only allows release of attached monies in a bank account following either the voluntary signing of a mandate, by the debtor, or the raising of a court action of furthcoming, by the creditor. The Bankruptcy and Diligence etc. (Scotland) Act 2007 changes this and will provide for automatic release of funds after 14 weeks from the date of attachment unless an application for recall or restriction of the attachment is lodged.

A European system could allow for automatic release of funds after a set period (we would argue no less than 14 weeks) or could allow for a sufficiently simple court application for the release of funds, within a reasonable period of time. The system should not allow for automatic release where a debtor has applied to the relevant court for the arrestment to be recalled or restricted (see point 3, below).

In any European system we would want to ensure that the following protections are safeguarded:

a) Protection of all State Social Security Benefits and Tax Credits

Current UK domestic legislation provides for the inalienability of social security benefits and tax credits, however, once these reach an individual account, it is argued that they lose their identity as alimentary funds. Citizens Advice Scotland has secured a commitment from the Scottish Executive to examine reserved legislation in this matter, as we believe that it is unlawful to arrest these alimentary funds where they are identifiable as such. We would strongly argue that any Community system must be clear about providing for the protection of state-determined minimum income when a bank account is arrested.

b) Minimum protected balance

We would also seek to secure the protection from attachment of a minimum balance in the bank account where the debtor is an individual and irrespective of the composition of the monies – reflecting the new provisions being introduced by the Bankruptcy and

Diligence etc. (Scotland) Act 2007. We would like to see any European attachment system provide this protection in addition to the automatic protection of basic state provided alimentary funds.

There is difficulty in applying a generic or even an index-linked Europe-wide figure to Member States with significantly disparate economic conditions. Furthermore, some Member States may already have legislation to stipulate a protected minimum balance and some may not. We would suggest that the protected amount be aligned to any existing domestic provisions in the Member State where the account is situated and that a Europe-wide figure only be applied in jurisdictions without such provision. This would avoid the undermining of any existing Member State protection.

For the avoidance of doubt, any attachment under a European system should attach only the sums the debtor is being sued for and should not freeze the whole account where it contains funds in excess of the sum pursued. This is the principle under the Bankruptcy and Diligence (Scotland) Act 2007.

c) Mechanism for recall or restriction of attachment

Finally, we would expect a Community attachment system to provide for a reasonably straightforward and accessible system to enable an attachment of monies in a bank account to be restricted or recalled (revoked) entirely where the debtor is an individual and can establish that the attachment is unduly harsh. This could be a system of application to, and determination by, the civil court in the jurisdiction of the debtor's domicile. Factors to be considered in drafting this debtor protection should include ease of access to the application process, the costs that may be incurred and the inclusion of fair and just criteria to which the court should refer in making a decision on whether to recall or restrict. Such criteria should include the potential detrimental effect of the attachment on the debtor or his / her spouse, partner and any children of the debtor.

2. Attachment prior to initiation of action

We would not, under any circumstance, support a system which allowed an attachment of funds prior to the initiation of legal action as this could create a situation where a defender may be left without access to vital funds for an unnecessarily long time. Such a provision does not exist in Scotland and we would strongly argue against any system that provided for a lower level of debtor protection than that which is currently provided by our domestic laws.

3. Attachment prior to conclusion of the action

Currently under Scots Law, an attachment of monies in a bank account is competent at the point at which an action is raised. However, this provision (arrestment on the dependence) has been amended by s.169 of the Bankruptcy and Diligence etc. (Scotland) Act 2007 (this provision being scheduled to come into force towards the end of 2007) and a creditor will no longer be able to execute an arrestment on the dependence without a court order unless the court is satisfied:

- a) That there is a *prima facie* case on the merits of the action; and
 - b) That there is a real and substantial risk of insolvency or removal / disposal of assets; and
 - c) That to grant the order would be reasonable in all the circumstances.
- The onus is on the creditor to establish the case for award of an order.

We would argue that a European attachment system must not, under any circumstance, undermine these domestic protections. However, we understand the importance of the need to secure assets upon initiation of an action particularly where the pursuer is an individual who may be at risk of a net loss, should assets be moved or disposed of. Creditors using a European system may be individuals or consumers and while we would argue that the above facts must be established prior to the granting of an award before the conclusion of an action, the process for doing so should not be unduly onerous. A possible solution would be to submit the argument in writing in a standard, prescribed form at the point of raising the action. This way the relevant court can decide whether a hearing is required, on the basis of the criteria set out above rather than on the basis of urgency as a stand-alone factor. Thus, debtors would be protected from unfair attachments prior to conclusion of the action but individual consumer actions would not be deterred through excessive cost and practical difficulties.

4. Attachment subsequent to conclusion of an action

Where an attachment is pursuant to a concluded action, we would present that the protections afforded by domestic legislation be set as an absolute minimum. In Scotland, the Bankruptcy and Diligence etc. (Scotland) Act 2007, provides that such an attachment (arrestment) will only be competent after the granting of a court judgment and the service of a charge for payment – a formal demand for the sums due under the judgment.

5. Creditor caution

Careful consideration should be given to the question around court discretion to require the creditor to provide caution should the measure be set aside in the main proceedings. This provision could prevent or deter a valid individual / consumer application for attachment prior to the conclusion of the principle action, where the individual is unable to provide caution. Conversely, where an application is one against an individual consumer by a commercial entity, and the individual suffers a loss or damage that is harder to absorb, there is a much greater argument for such a requirement, to deter arbitrary and automatic attachments.

6. Account information

Again, we would want to ensure that the Community system would not disadvantage individual pursuers and therefore we would suggest that account numbers are not required to be provided in order to secure an attachment order. Provided the protections we have outlined above are incorporated, the non-requirement to provide account details will not unfairly disadvantage the debtor.

Finally, we are happy to have our comments published on the Commission's website.
We look forward to hearing about the results of your consultation.

Yours faithfully

A handwritten signature in black ink, appearing to be 'Beccy Reilly', with a stylized flourish at the end.

Beccy Reilly
Money Advice Co-ordinator