

Meester J.W. DE HAAN*

Meester B. MULDER*

E. ARTIGAS PORTA**

B. MENCHÓN ORDUNA**

BALMES 76 - 1

08007 BARCELONA, SPAIN

TEL. (+34) 934 671 400

FAX (+34) 932 150 404

E-MAIL: INFO@DEHAANMULDER.COM

* ADVOCaat AND ABOGADO

MEMBER OF THE NETHERLANDS AND SPANISH BARS

** ABOGADO

MEMBER OF THE SPANISH BAR

FAX COVER PAGE

FOR THE ATTENTION OF:

DIRECTORATE-GENERAL FOR JUSTICE,
FREEDOM AND SECURITY

UNIT C1 – CIVIL JUSTICE

COMPANY:

EUROPEAN COMMISSION

FAX NUMBER:

0032 2 299 64 57

FROM:

Meester J.W. de Haan

DATE:

19 September 2008

REF:

DH&M/EU

Number of pages including cover:

26

Message follows.

THIS FACSIMILE TRANSMISSION CONTAINS CONFIDENTIAL AND/OR LEGALLY PRIVILEGED INFORMATION INTENDED ONLY FOR THE USE OF THE INDIVIDUAL(S) NAMED ON THE TRANSMISSION SHEET. IF YOU ARE NOT THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISCLOSURE, COPYING, DISTRIBUTION OR THE TAKING OF ANY ACTION IN RELIANCE ON THE CONTENTS OF THIS FACSIMILE TRANSMISSION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE CALL US COLLECT IMMEDIATELY SO THAT WE CAN ARRANGE FOR THE RETURN OF THE DOCUMENTS TO US AT NO COST TO YOU, THANK YOU.

DE HAAN & MULDER
ABOGADOS • ADVOCATEN • LAWYERS

Meester J.W. DE HAAN*

Meester B. MULDER*

E. ARTIGAS PORTA**

B. MENCHÓN ORDUNA**

BALMES 76 - 1

08007 BARCELONA, SPAIN

TEL. (+34) 934 671 400

FAX (+34) 932 150 404

E-MAIL: INFO@DEHAANMULDER.COM

* ADVOCaat AND ABOGADO

MEMBER OF THE NETHERLANDS AND SPANISH BARS

** ABOGADO

MEMBER OF THE SPANISH BAR

BY E-MAIL AND REGULAR MAIL

European Commission

Directorate-General for Justice,

Freedom and Security

Unit C1 – Civil Justice

B-1049 BRUSSELS

Belgium

Barcelona, 19 September 2008

Dear Sir / Madam,

Re: Answers to questions asked in the Green Paper for the Effective Enforcement of Judgments in the European Union / Transparency of Debtors' Assets published in Brussels on 6.3.2008 (128 final)

Kindly find enclosed my contribution to the aforementioned Green Paper and answers to the questions posed therein. The undersigned has been admitted as a lawyer in Spain for over 16 years and in the Netherlands for over 20 years, and has practised since 1992 in Barcelona, Spain, focusing mainly on intra-Community issues. The questions asked are accordingly answered from both a Spanish and Dutch perspective. I had intended to also send you an English translation, but shall not be able to do so before the end of September due to work pressure. If you are nevertheless interested in a translation, kindly advise me and I shall still consider doing it, however without being able to commit at present to a date by which the translation will be ready.

Yours faithfully,

[signature]

Jan Willem de Haan

Enclosure:

Meester J.W. DE HAAN*

Meester B. MULDER*

E. ARTIGAS PORTA**

B. MENCHÓN ORDUNA**

BALMES 76 - 1

08007 BARCELONA, SPAIN

TEL. (+34) 934 671 400

FAX (+34) 932 150 404

E-MAIL: INFO@DEHAANMULDER.COM

* ADVOCaat AND ABOGADO

MEMBER OF THE NETHERLANDS AND SPANISH BARS

** ABOGADO

MEMBER OF THE SPANISH BAR

GREEN PAPER

EFFECTIVE ENFORCEMENT OF JUDGMENTS IN THE EUROPEAN UNION / TRANSPARENCY OF DEBTORS' ASSETS

PUBLISHED IN BRUSSELS ON 6.3.2008

COM (2008) 128 FINAL

ANSWERS TO THE QUESTIONS

Meester JAN WILLEM DE HAAN

ADVOCAAT [LAWYER] (Amsterdam)

ABOGADO [LAWYER] (Madrid and Barcelona)

I. Introduction: Shortcomings of the current situation

Question 1

Do you consider that there is a need for measures at Community level to increase the transparency of debtors' assets?

Do you consider that the interface between enforcement of judgments and data protection or the role of non-public organisations in the enforcement of judgments need explicit attention in this context? If so, which elements do you consider important?

Distinction between a legal person and a natural person, trade receivables and normal receivables

1. The Green Paper does not make any distinction between legal persons and natural persons. Hardly any distinction is made between trade receivables and non-trade receivables. It may be clear that a substantial difference exists in practice with regard to the available information (commercial registers) and the type of information (legal persons and natural persons). Although this answer will not deal with that difference any further, it does refer mostly to trade receivables because the contracting parties of trade receivables are usually entered in the various commercial registers and more information is accordingly available. Furthermore, trade receivables are by far the claims that give rise to most intra-Community issues and are most relevant.

Verification prior to credit rating

2. Prevention is better than cure. All contracting parties and future creditors should ask themselves at the start of an agreement or obligation whether the debtor is able to meet its current and future obligations. That is a responsibility that rests on every economic agent.

Voluntary access to the financial position of a future debtor

3. A future creditor should ask a future debtor in advance to provide voluntary access to its financial position before entering into a contract and/or warranting its creditworthiness. Often, this does not happen because it is not accepted from a commercial point of view, or is experienced as unhelpful for the atmosphere of negotiations (unless one of the parties occupies a dominant position in relation to the other party, because it can then impose its own requirements). This does not alter the fact that most information loses its value over time. Lastly, the value of such information can be called into question anyway. It will seldom be an absolute guarantee.

Access to the commercial register and other registers

4. In addition, a future contracting party and creditor would also be well advised to gain an independent understanding of the financial position of the other future contracting party and debtor, regardless of the information that is obtained directly from the debtor, for instance by requesting public commercial and other register information, although the value of that information is usually limited.
5. One can request and examine filed annual reports and accounts, but these will always be at least six months old and therefore do not reflect current reality. Furthermore, the annual report and accounts are sometimes difficult to understand. It is also possible to perform searches on assets such as immovable property and vehicles. That usually produces minimal results because most companies lease rather than own fixed assets. It is sometimes possible to access a register of debtors against whom enforcement proceedings are ongoing, such as the RAI in Spain. However, access is limited and even though the information is very useful, information needs to be available at an earlier stage, well before enforcement proceedings are initiated.

Existing information is limited

6. Briefly put, even if information is requested, trade creditors still have a lack of specific data on which to base their decisions. Financial institutions, such as banks, sometimes have it easier because they can usually access databanks with credit information that is only accessible to them. That information should perhaps be made available to other trade creditors. This will be dealt with in more detail below.

Credit references

7. There are many agencies that provide credit references, such as Dun & Bradstreet. Usually, these agencies have no more access to information than the man on the street. Any banking information they may have is unofficial and therefore of limited value, or at least that is the case in a number of countries.

Guarantees from the future debtor

8. The creditor can demand additional guarantees, such as collateral security or personal guarantees. The drawback of this is that it is commercially hard to sell and not common. This issue also falls outside the scope of these questions. Bank reference letters are also requested at the start of a new business relationship, but the value thereof is also limited.

Proceedings on account of misrepresentation of facts

9. It may be possible to bring a civil or criminal action if a future debtor misrepresents the facts concerning its financial position. After all, if a contract is concluded whilst one knows or should have known that the obligation will never be fulfilled, that must in principle be sanctioned. However, that usually places the creditor in a tricky evidential position, particularly in criminal proceedings, and moreover does not offer any satisfactory solutions in practice.
10. Proceedings have to be initiated that just imply additional costs for the creditor, even though the outcome is uncertain. Criminal proceedings are often drawn out, even if they do have a certain deterrent effect. They also miss the purpose, which is about debt recovery and the performance of obligations, not criminal sanctions. Civil sanctions are financial and also miss the purpose, precisely because debtors often default as they have no more money.
11. Nonetheless, it seems worthwhile to consider this. A criminal sanction, or the threat of one, such as a custodial sentence for intentionally providing inaccurate information about one's financial position, will surely be effective. Providing inaccurate information – committing forgery – is punished in most Member States. Perhaps it should be examined whether heavier or more effective forms of punishment would be worthwhile in this regard.

Improved understanding of financial position

12. As stated above, it is advisable to make the effort beforehand and gain an understanding of a future debtor's financial position. Information existing at the time is limited and of relative value. Relying on additional guarantees is difficult in business, and these are not given quickly.
13. From the point of view of improving and having confidence in commercial transactions, in Europe and elsewhere, it would be desirable to gain a better understanding of an existing or future debtor by making more information public.
14. In this regard, the publication of the following information can be considered, insofar as this does not already happen:
 - a) VAT returns, as these reflect the continuity of business operations and the turnover volume;

- b) other taxes and social security contributions that must be paid in connection with the business operations because these also reflect the continuity of the business;
 - c) pending legal proceedings, whether or not only proceedings on the merits, enforcement proceedings or bankruptcy/winding-up petitions;
 - d) access to credit registers maintained by and accessible to banks.
15. Another question is whether making this information public must be compulsory. If it is on a voluntary basis, this means that businesses that do not participate may end up sidelining themselves and in that way again escape government control.

Retrospective monitoring

16. If parties have not carried out prior checks or continued monitoring whilst the relationship has been in place and functioning, the time may come that one wishes to have access to the contracting partner's financial position if problems arise in the relationship and one of the parties does not pay the other.
17. The creditor then has the following information at its disposal:
- a) annual reports and accounts – insofar as these are or must be filed, they provide a picture from the past. If there are problems, the debtor often stops filing these documents, but by then it is already too late;
 - b) fixed assets – one can check in registers whether the debtor has fixed assets such as immovable property, cars, etc., which may be attached or have already been attached;
 - c) current assets and cash – this information is normally not public and can only be tracked down with the help of specialised agencies. As this information is then unofficial, its value is limited.

Preventing the disappearance of assets is difficult

18. It can be difficult to prevent the disappearance of current assets, particularly bank balances and certain property that is subject to registration, because this can happen very quickly in the current market.

19. This even applies in the Dutch system which, with its very efficient practice of prejudgment attachment, enables creditors like in no other EU Member State to act extremely quickly.
20. In comparison, it is possible in some countries to reverse certain payments within a specific period of time, but those periods are often limited.

Additional measures

21. In addition to increasing the transparency of the debtor's assets, as proposed above, it is also advisable to adopt the following measures:
 - a) increasing the speed with which prejudgment attachment can be levied. In comparison with the Netherlands, a country like Spain is a disaster. This point falls outside the scope of this Green Paper and is not dealt with any further here;
 - b) increasing the effectiveness of the attachment. This point does fall within the scope of this Green Paper and will be discussed below;
 - c) the possibility of reversing fraudulent transactions. This will be dealt with as an extension of the previous point.

Prejudgment attachment of bank balances

22. Bank balances are the most popular targets for attachment. Attaching bank balances and obtaining information about them should therefore be improved. It should be noted, however, that it would only be possible to obtain information after the Court grants leave for attachment. Preventive information without recourse to the courts goes too far as it violates privacy. At any rate, it is unnecessary because the situation is always changing.
23. In the Netherlands, levying attachment at banks is relatively simple because the country only has a few large institutions at which most people bank. If an order is given for an attachment to be levied at ING, Rabobank and Fortis, then one has most transfers of funds covered. That does not alter the fact that some **creditors (sic)**¹ may try to "stash away" their money at smaller banks. In that case, attachment must also be levied at the smaller banks.

¹ We considered that the source sentence was wrong. Should not it be "schuldenaar" instead of "schuldeisers"? We would therefore have in the ENGLISH version "debtors" instead of "creditors".

24. Attachment in the Netherlands is also effected swiftly due to the proper organisation of bailiffs, who just like lawyers and notaries are self-employed professionals whose duties are laid down by statute.
25. Levying attachment at banks in Spain is far more difficult. In comparison with the Netherlands, the enforcement authority is the court, which functions very slowly and inefficiently. At the request of the attachment creditor, the Spanish court must send notice to all banks and savings banks with the request to attach and/or to provide information on bank balances. Spain has hundreds of banks and savings banks and practice shows that this works slowly and inefficiently.

Central point for effecting the attachment of bank balances

26. It follows from the foregoing that an attachment of bank balances cannot be effected centrally in either the Netherlands or Spain, even though the information regarding those bank balances does exist centrally, i.e. at the central banks. These could be designated as the central authority for notifying the banks concerned of levied attachments.
27. At the same time, the creditor must be given the opportunity to verify whether funds disappeared prior to the attachment. After leave from the Court has been obtained, the central bank concerned would then instruct the credit institutions in question to provide information on the debtor's transfers of funds from a specific date.
28. Insofar as it does not already exist, such a central point could also be provided for other assets, such as vehicles, immovable property, etc. That is the case in the Netherlands and Spain.
29. Another important point is VAT records. VAT refunds are always popular targets for attachment. In addition, they provide insight into the state of the debtor's business. It perhaps goes too far to make the disclosure of VAT returns compulsory in the absence of a dispute, even though that possibility has been suggested above. If leave to attach is given, that information should certainly be accessible via a central point, such as the tax authorities.

Debtor's declaration and access to registers

30. The existence of two systems in the Member States is discussed under question 1, namely:
 - a) a system in which debtors make a declaration about their assets;

b) a system in which the aforementioned declaration is not compulsory and creditors have access to registers to verify the debtor's position.

31. Spain and the Netherlands do not have a compulsory declaration of assets system. It is highly debatable whether such a system is worthwhile. A debtor that does not want to or cannot pay will make a false declaration, not provide access to its assets or simply say that it has nothing. A criminal sanction for making a false declaration seems appropriate but is ineffective in practice, as has been argued above. After all, the creditor will have to initiate such proceedings, and criminal proceedings are usually drawn out, certainly in Spain. In addition, it means that the creditor incurs further costs with lawyers.

Different legal systems and information structures

32. It is further stated under question 1 that the cross-border recovery of debts is hampered by the different legal systems and insufficient knowledge about information structures in other Member States. That is undoubtedly true, yet not so easy to resolve. Centralising and standardising access to information, as described above, would certainly improve this because each Member State would then acquire a central information point in the other Member State.
33. Insofar as it has not already happened, Member States must standardise their commercial register information, make it accessible via the Internet (as is the case in the Netherlands and Spain) and in English, and if other data is or becomes accessible also include such data in that information.
34. On the other hand, the impression may not be created that all cross-border hurdles are being removed. A creditor that sues a debtor in another Member State will always have to rely on the local expertise of lawyers (lead counsel and/or local counsel) and bailiffs.

Interface and non-public organisations

35. The second part of question 1 refers to non-public organisations, more specifically to the interface among i) the enforcement of judgments, ii) debtor protection and iii) the role of non-public organisations.
36. As far as the interface between i) and ii) is concerned, a comment was made above about extending the information that is accessible to everyone, such as VAT records, pending legal proceedings or databanks with credit registration and access to information for the purpose of effecting attachment. With regard to the last

situation, it is argued that court approval will always be necessary for debtor protection.

37. As far as the interface of non-public organisations with points i) and ii) is concerned, it is firstly unclear what is meant by non-public organisations.
38. The starting point must be that non-public organisations will only have access to information that is not public or accessible to citizens if they have a statutory framework and are supervised.

Information agencies

39. If non-public organisations mean organisations that facilitate and improve access to information from public commercial and other registers, for instance via the Internet, that is welcome support for current and future creditors. Spain has Axesor (www.axesor.es), for instance, which makes that information completely accessible, although the official Spanish registers have also improved significantly.
40. In the Netherlands, access to the commercial register via the Internet has always worked well and there is accordingly less of a demand for non-public organisations to do that. There will however always be a market for organisations that provide added value. It appears that countries such as Belgium and Germany still have very archaic and inaccessible registers, and these organisations would offer a solution there.
41. Other non-public organisations, such as detective agencies, always have added value but are specialised to such an extent that they fall outside the scope hereof.

Dutch bailiffs

42. Insofar as non-public organisations refer to bailiffs, one must stand up for these professionals in this case. In the Netherlands, these professionals are highly efficient and facilitate enforcement. They moreover have a statutory framework by which they are bound so that supervision remains guaranteed.
43. The only criticism that one can levy against Dutch bailiffs is that they are increasingly engaging in collection activities, which in fact are not their job. The problem is that they accordingly focus on duties other than those that justify their existence and these latter duties may be neglected. That could be remedied by prohibiting them on the one hand from engaging in activities other than their statutory ones and, on the other hand, by ensuring they earn an adequate income.

Spanish situation

44. In a country such as Spain, where there are no independent bailiffs, this is a major weak point. After all, people are usually dependent on poorly paid and unmotivated officials who work carelessly. In practice, that results in long delays and creates problems.

Choice between professionals and officials

45. The choice is between statutory service providers or professionals such as bailiffs, who are more effective but also more expensive, and officers of the court, who are cheaper but work more slowly and carelessly. Undoubtedly, most creditors prefer efficiency (i.e. bailiffs).
46. It was already stated above that harmonising legislation and improving the cross-border acquisition of information are both helpful measures, but that cultural and language differences will continue to make it difficult to gain a good understanding of those other systems.
47. Accordingly, we must on the one hand strive towards harmonisation and transparency by creating standardised databanks that are accessible via the Internet with a uniform layout and in a widely understood language such as English. On the other hand, the fact that a local adviser such as a lawyer (lead counsel or local counsel) will continue to be necessary must also be taken into account. In other words, we must not pretend that local expertise will no longer be necessary.

Conclusion: Question 1

48. Contracting parties must gather information about each other in advance. That is the duty of care that rests on everyone that participates in commercial transactions. They bear the responsibility if they fail to do so. Even if one is reluctant about doing this in business, the future debtor should at least be asked to voluntarily provide information about its financial position.
49. As a rule, commercial registers provide very little information and, if that is insufficient, parties must request information from each other about their respective financial positions, as stated above. However, more information could be made accessible, such as VAT records, social security contributions, pending legal proceedings, etc. Businesses could be asked to provide this voluntarily.
50. A different situation comes into play if monitoring takes place after the problem arises. The creditor must know which assets can be attached and whether it is worthwhile at all to levy attachment.

51. To this end, attachment procedures must be speeded up and relaxed, obtaining information about assets must be simplified, for instance through centralisation, and more information must be obtained about transactions that took place prior to the attachment.
52. The central banks could play a role in providing quick and central access to information about bank balances and in effecting speedy attachments. The same applies to the tax authorities with regard to VAT refunds.
53. Recourse to the courts is required. Judicial review must be built into the process to prevent private information too easily becoming part of the public domain.
54. A central point for accessing information about and attaching immovable property, VAT and vehicles would also be desirable, insofar as it does not already exist in the Member States.
55. It is not understood what added value a debtor's declaration could provide. This will be detailed further in the questions below.
56. There appears to be no role for non-public organisations, or at least organisations that do not have statutory duties, unless they already facilitate access to existing public information.
57. It is up to governments and bodies regulated by law (bailiffs, lawyers, etc.) to make certain non-accessible information public and accessible by obtaining that information in accordance with statutory rules. Insofar as non-public organisations could provide added value in this regard, this must be considered. However, their status must always be legally defined.
58. Information must be made available, particularly via the Internet and in English.
59. Attachments must be levied by professionals, such as bailiffs, who are regulated by law and not by officials.
60. The improvement of cross-border information systems should be recommended, without creating the impression that local advisers will no longer be necessary.

1. Drawing up of a manual of national enforcement laws and practices

Question 2

In what ways do you consider that a manual containing all information about the enforcement systems of the Member States would be helpful?

Useful manual

61. A manual containing information about the enforcement systems is always useful. It is also a precondition to making those systems more uniform.
62. It will prove impossible to record all information but a lot can be achieved with a practical approach. In many countries, including Spain, there are many unwritten rules that will be difficult to describe.
63. Nevertheless, such a manual is useful and also necessary. It is the first step towards gaining a better understanding and that may in turn lead to an improvement of the information systems.
64. Lastly, it must be pointed out that this manual can never provide sufficient information. The creditor will always have to be warned that it will have to rely on a local legal expert or lawyer in addition to this information.

Conclusion: Question 2

65. Drawing up the manual is useful but one must be prepared for the fact that it can never be exhaustive and is continually subject to change.

2. Increasing the information available in registers and improving access to them

a. Commercial registers

Question 3

Should information available in and access to commercial registers be increased? If so, how and to what extent?

Importance of commercial registers

66. The importance of commercial registers has already been discussed in detail above. Commercial registers are extremely important. From the description of this question in the Green Paper, it seems that the Directives on commercial registers are very outdated and give Member States a large degree of freedom, so that a lot

of information is either not centralised or not at all provided. Germany is cited as an example in the description, whilst it is known that Belgium has a very archaic and inaccessible system. Improvement must take place for more effective information gathering. This moreover applies both to trading companies and sole traders.

Measures to be taken with regard to commercial register information

67. The following measures need to be taken: all companies, partnerships and sole traders that do business must be entered in a commercial register. There must be uniformity with regard to the information to be entered in the register, such as articles of association, directors/managers, powers, address, capital and annual accounts. The annual accounts must be filed within six months. Most commercial registers publish this information. If it becomes compulsory to publish even more information, it must then be considered whether the measure does not exceed its purpose. Businesses must not be compelled to provide too much information in view of the competition among them.
68. In order to have more up-to-date information, it could be considered making VAT returns public via the commercial register as well, or otherwise via the tax authorities. These returns would only reflect figures and would not include any names or concepts. No confidential information would therefore be given away. Access to social security contributions could also be considered so that one would know whether payment obligations were being met.
69. Information must be centralised, accessible online and available in English in addition to the local language.
70. It has also been suggested above that pending legal proceedings against the debtor must be publicised, via the commercial register or otherwise.
71. It is noted again that online information is essential. This works well in Spain, particularly because there are companies that provide and classify the information via the Internet. In this regard, I refer to Axesor (www.axesor.es), through which all the relevant commercial register information of a company can be quickly requested in a structured way.
72. In fact, the same applies in the Netherlands where direct information can also be obtained via the commercial register website.
73. The Spanish commercial registers also have a website through which information can be obtained, but this is not as effective as Axesor. As already stated above, and

mentioned in the Green Paper, some Member States do not have a centralised system (or an easily accessible commercial register, such as Belgium). That must change.

Conclusion: Question 3

74. In Spain and the Netherlands, the most important information is available and can be accessed relatively easily (online), directly via the commercial registers or otherwise. It was suggested above that VAT returns, social security contributions and pending legal procedures should also be made available. A situation in which businesses have to disclose too much information must be prevented, so as not to give their competitors an unfair advantage.

75. Commercial registers must be standardised at EU level, whilst information must be centralised and available online in both the local language and English. That works reasonably well in the Netherlands, as in Spain, although English is still lacking there. There are countries (e.g. Belgium and Germany) where essential improvements must be made.

b. Population Registers

Question 4

Should access to existing population registers be improved? If so, how?

First things first: organisation of the population registers

76. The question that must first be addressed relates to the uniformity of the population register. Some countries do not have any population register at all. The following may be noted with regard to the Netherlands and Spain. The Netherlands has an effective population register. Registration at the correct address is important for exercising certain rights. As a result, most people make sure that their correct address is entered in the register. In Spain, registration at the correct address is also becoming increasingly important. However, Spain is not yet centrally organised. The population registers are kept up to date by the municipality, which furthermore has no central database.

Accessibility of population registers

77. Population registers in the Netherlands are accessible to authorised professionals (lawyers and bailiffs) for the purpose of finding the address of a debtor and that is effective. In addition, these registers are kept properly up to date.

78. In Spain, only judges have access and that is ineffective for a number of reasons. Judges often do not wish to request the information. In addition, Spanish judges are

particularly reluctant to serve legal documents publicly if the debtor cannot be found (even in the population register) and they are not convinced that he cannot be found. As a result, proceedings often cannot be initiated. Lastly, the Spanish population registers are not kept properly up to date and the information is accordingly unreliable.

Sanction for untraceable debtors

79. The problem is however not only confined to improving access to existing population registers. Debtors who do not wish to be found will never provide their correct address to the population register. As the creditor may not be the victim of this, it should be considered sanctioning a debtor if he does not register his current address in the population register. One way could be to make the registered address the valid address for the service of documents in legal proceedings and, if service cannot be effected there, to allow a creditor to immediately serve publicly. More responsibility must be placed on the debtor to ensure that he is traceable.

Limiting access to population registers

80. Limiting access to population registers seems obvious for reasons of privacy. For this reason, it is possible to have a system in which only professionals with a statutory framework, as exists in the Netherlands (i.e. bailiffs), have access to the population register.
81. That restriction in favour of the debtor may result in the judiciary accepting that the registered address is also the address at which a debtor can be summoned.
82. Of further importance here is that the contracting parties have the responsibility in the case of a consumer and/or private person to arrange these things well in advance. In a contract, for instance, it could be agreed that the address provided by the debtor will serve as the address for all communication and for the service of documents in connection with that contract.

Conclusion: Question 4

83. Population registers must be uniform and centrally accessible. The debtor is entitled to his privacy but may not use that to be untraceable. The debtor must ensure that he is registered at the correct address. The creditor may not be prejudiced if this is not the case, even though he obtained lawful access to the population register. In principle, the address found in the register should then serve as a valid address. Access for service providers with a statutory framework must be possible.

c. Social security and tax registers

Question 5

Should access to social security and tax registers by enforcement authorities be increased? If so, how and to what extent?

Information and access to social security and tax registers

84. These registers can provide important information about a number of matters, such as:
 - a) taxes: VAT refunds and information with regard to past income;
 - b) social security: the existence of any labour relationship that generates income or possible payments.
85. These registers would not have to serve as the first point of reference for finding addresses and bank accounts. Insofar as it is not already the case, that would mostly need to be or could be the role of the aforementioned population registers and central banks.
86. The Green Paper describes the situation with access to the aforementioned registers in the different EU Member States.
87. It is clear that such access must always be available with the help of the judicial authorities.
88. It is also clear that access may only be obtained after judicial review. The Court must weigh up the interests between the creditor recovering its debt on the one hand, and access not being frivolously provided to the debtor's personal data on the other.
89. In practice, this will not lead to problems. By the time a creditor requests access to these registers, it will be clear, or at least should be clear, that the debtor is evading payment of his debts. Access will then be justified. This does not affect the fact that the creditor may also be obliged to treat that information confidentially.
90. The problem that arises in Spain is that enforcement is carried out by the judicial authorities and not, for instance, by an independent bailiff. This results in enormous delays. Enforcement works far more efficiently in the Netherlands. It was already noted under Question 1 above that having independent bailiffs in Spain would

drastically speed up enforcement. Access would therefore be improved in Spain if independent bailiffs were to be appointed.

91. The description in the Green Paper deals briefly with the situation in Sweden, where creditors have access to better means of information than the debtor's declaration. That confirms what has already been stated above, namely that a debtor's declaration will not be of much added value. This will be discussed in more detail below.
92. The question of whether the debtor must be given the opportunity of making a declaration himself will also be discussed below. It is noted at this stage that once leave for enforcement or attachment has been obtained, attachment must take place immediately so as not to lose the element of surprise. If no assets are found, the debtor could then be given the opportunity to make a declaration himself, before a compulsory and costly enquiry is ordered.

Conclusion: Question 5

93. By definition, the tax and social security registers include relevant information for creditors. That information may only be accessible after a judicial review. That review may not make access impossible. Gradual access can also be given. If the debtor does not tender sufficient assets to satisfy his debt, access will firstly be obtained to the VAT returns. Personal income must withstand a more stringent test. If the VAT returns do not produce anything, access to the income tax return could be obtained.
94. As far as the social security registers are concerned, the existence of a labour relationship or receipt of a payment can be easily verified. Lastly, on the general issue of enforcement, and although indeed under judicial supervision, enforcement by bailiffs is preferable to enforcement by the judicial authorities themselves.

3. The exchange of information between enforcement authorities

Question 6

Should the exchange of information between enforcement authorities be improved? If so, how?

Suggestions made in the Green Paper

95. The Green Paper describes how enforcement bodies are currently unable to access the non-public registers of other Member States and how there are no instruments dealing with the exchange of information between enforcement authorities, in contrast to other areas such as tax authorities and the European Agriculture Guarantee Fund.

96. According to the Green Paper, one solution could be to enhance the direct exchange of information between enforcement authorities. The Internal Market Information (IMI) system could be used for this purpose.
97. To this end a Community instrument could be drawn up providing a list of which authorities are entitled to request information from other Member States, subject to privacy legislation. According to the Green Paper, it will be necessary to consider how to deal with the considerable differences in the available information.
98. The following comments can be made on these suggestions in the Green Paper. It is not worthwhile providing enforcement authorities with direct access to non-public registers in other Member States, as long as the differences between those registers are so (or too) considerable (not only because of language differences). It is far more practical for enforcement authorities to request the enforcement authorities of the other Member States to assist them. It would only make sense to bring about direct access once the information systems are harmonised.
99. The benefit of these measures must also not be overestimated. If a creditor (sic)² wishes to keep his money concealed and take it over the border, he will take it to countries with banking secrecy laws or where it is otherwise difficult to obtain information. This issue will continue to play a role, and the EU must also continue to try and facilitate access outside the EU, even if that is not a reason to stop this trend within the EU. That must also take place. Attachment throughout the EU must also be simplified.
100. In connection with the above, a study could be made into how often information is exchanged among tax authorities or the European Agriculture Guarantee Fund and what problems are encountered.
101. Regardless of the above, a Community system which facilitates requests for information from one enforcement authority throughout the EU is a good thing.
102. A list of the enforcement authorities of each EU Member State would firstly have to be drawn up. It would then have to be established which information could be exchanged, following which a protocol must be reached on how this information will be requested and obtained.

² We considered that the source sentence was wrong. Should not it be “schuldenaar” instead of “schuldeisers”? We would therefore have in the ENGLISH version “debtors” instead of “creditors”.

103. Lastly, an effective penalty for the failure to deliver or late delivery of information would be helpful, but politically difficult to attain. This remains the weak point of most EU schemes.
104. The information systems manual has already been discussed above under Question 2. This could be expanded on further.

Conclusion: Question 6

105. Direct access by enforcement authorities to registers in other EU Member States does not appear worthwhile without first harmonising the systems. As long as that has not taken place, national enforcement authorities must exchange information. How meaningful these measures are, remains to be seen. Debtors can hide their assets in countries with banking secrecy law, even if that is not a reason to stop this trend. The manual discussed under Question 2 can be used to develop a Community instrument with a protocol for exchanging information.

4. The debtor's declaration

Question 7

Do you consider that a European Assets Declaration should be introduced?

Question 8

If so, under what conditions should it be possible to obtain it? Should there be sanctions for incorrect information contained in the declaration? If so, which?

Question 9

What degree of harmonisation do you consider appropriate for the European Assets Declaration? What should be the precise content of the European Assets Declaration?

General considerations with regard to these questions

106. The description in the Green Paper does not properly reflect the situation in Spain. The situation in Spain is not as it is described therein.
107. In the case of executory attachment, the debtor is not heard in Spain and is therefore also not given the opportunity to make a declaration. In the case of prejudgment attachment, the judge may hear the debtor before deciding on the creditor's application for attachment. Contrary to what is stated, no declaration is made in Spain by filling out mandatory forms.
108. It is likewise incorrect that debtors can be imprisoned if they do not cooperate in disclosing their assets. Spain does not have any system of detention for contempt for reluctant debtors. The Green Paper states that enforcement authorities in most

Romanic countries are clearly separate from the court system, but that is definitely not the case in Spain.

109. The Green Paper suggests two solutions for an assets declaration.
110. The first solution would be a Community instrument setting out the obligation of Member States to introduce a procedure for the taking of a debtor's declaration, but leaving them discretion as to the conditions under which such a declaration would have to be made. The Green Paper states one of the disadvantages of this idea is that differences would remain. In addition, the principle of proportionality must not be disregarded, and the debtor must not be obliged to disclose all his assets in advance. He would be obliged to provide information on a number of assets if specific conditions were met.
111. The second solution would be the introduction of a uniform "European Assets Declaration" in which the debtor would disclose all his assets within the EU. Reference is made to the concept of "information shopping", although it is not clarified what that is. It is stated that the debtor could avoid the obligation of making the declaration by identifying assets. Lastly, it is stated that the instrument could provide for sanctions.

Answer: Question 7

112. I am of the opinion that a European Assets Declaration should not be introduced. The answer is therefore: no. The reasons for this are as follows. It creates problems and the added value is unclear. When would such a declaration have to be made? It can hardly be made or requested before leave for prejudgment attachment or executory attachment is granted. It makes no sense once leave for attachment is granted because then the element of surprise would be gone.
113. The debtor must obviously be given the opportunity to identify assets for attachment to prevent unlimited attachment. However, that is only after attachment is levied and the declaration is not needed for that purpose. The only purpose that the declaration could serve is to place pressure on the debtor to identify assets if these cannot be found. According to this system, attachment takes place first and it is then up to the debtor to prove that the value of the attached goods or the amount in the attached bank accounts exceeds the amount for which attachment may be levied.
114. As stated in the previous paragraph, it would be better to only have the debtor make a declaration regarding his assets if no assets can be found. If he then declares that

he possesses nothing and it later turns out that he in fact does possess assets, a criminal sanction would have to be imposed. That would have to be very effective.

Conclusion: Question 7

115. A European Assets Declaration as such or in itself is meaningless. It serves no purpose before obtaining leave for attachment because it is not necessary at that stage. It also serves no purpose after leave for attachment has been granted because that would take away the element of surprise. An attachment must be levied without warning.
116. The effectiveness of attachment must be enhanced. That makes sense. No advance declarations should therefore be made. A subsequent declaration may serve a purpose if no assets can be found. The debtor could then be forced to give evidence. A hearing at which the debtor is questioned by a judge in the presence of the creditor's lawyer, who may also cross-examine him, under penalty of a custodial sentence (detention for contempt) for providing false information or failing to cooperate often has the desired effect.
117. Another issue is that a debtor may request to limit an attachment to those goods needed to cover the amount of the claim. That possibility must always exist.

Answer: Question 8

118. As stated above, it is my opinion that having a debtor make an assets declaration in advance makes little sense. The debtor is tipped off and has the opportunity to hide his assets. Tracing his assets, if he denies having them, will not be simple and will also mean having to rely once again on the overworked and normally inefficient judicial authorities if it turns out that the debtor gave false information.
119. Obviously, sanctions must be imposed for providing false information if one is obliged to provide correct information. Those sanctions must be effective and applied. Once again, this means turning to the judicial authorities and practice shows that these types of sanctions are either not applied or are ineffective.
120. The most effective sanction for providing incorrect information or for failing to cooperate if no assets are found could be detention for contempt. Detention for contempt is a measure in the event someone fails to cooperate. There must therefore be some indication that assets exist and the debtor must refuse to provide this information. A fine would serve no purpose. After all, the debtor has no assets. Accordingly, a temporary custodial sentence (i.e. detention for contempt) is the only effective option.

121. The declaration must be made before a judge. In this way, legal evidence is obtained and questions can be asked whenever certain points are unclear. The pressure that a judge can exert, together with the threat of detention or a custodial sentence, has the desired effect on debtors.

Conclusion: Question 8

122. The declaration must only be obtained if no assets can be found, otherwise the element of surprise with attachment is lost. Sanctions must be imposed for providing incorrect information or failing to cooperate and these sanctions must be effective. Detention for contempt or a custodial sentence is the best option in this regard. The declaration must be made before a judge and not simply involve the completion of a form.

Answer: Question 9

123. The description in the Green Paper with regard to this question states that the declaration must serve to oblige debtors to disclose all assets in the EU. In my opinion, debtors should be required to disclose their assets worldwide. Another question is whether and how that can be controlled.
124. If a declaration is subsequently introduced – I refer to the answers to the previous questions – it would appear obvious to introduce the same declaration for all Member States. That will not come up against objections because of the differences in legal systems. Such a declaration can be simple.
125. Assuming, according to that which is noted above, that the declaration is only required if insufficient assets are found or identified, the debtor must always have the opportunity to avoid the obligation of making a declaration if assets are subsequently found or identified. However, the debtor must be punished for this "belated repentance" with an order to pay costs or a fine.
126. The debtor must be sanctioned if he provides false or incorrect information. There must be a deterrent effect. Fines serve no purpose. After all, no assets have been found. Detention for contempt or custodial sentences are meaningful. However, not all Member States recognise detention for contempt as a measure. Spain is an example in this regard. That would mean far-reaching legislative amendments which probably fall outside the scope of this Green Paper project.
127. Harmonisation is always good but far-reaching amendments perhaps make it too complicated and, from that perspective, some scope for differences between the

Member States must be tolerated. That would have to be studied in further detail. I furthermore propose that the declaration must be made before a judge, who has the necessary discretion to determine the content of that declaration by posing additional questions.

128. The precise content of the declaration is therefore not determinable. The debtor must declare whether he has or had assets, where these assets are and what happened to them. He must identify sources of current and past income as well as his pattern of expenditure.

Conclusion: Question 9

129. The declaration will only serve a purpose if no assets are found. The declaration must be harmonised, where necessary. In other words:

- a) no far-reaching amendments for this purpose in the legal systems;
- b) no detailed content, so that scope exists with regard to differences between Member States;
- c) the procedure for the declaration must be harmonised, where possible, particularly so that the debtor must always make the declaration before a judge, who can ask questions together with the creditor and threaten detention for contempt in the event of incorrect or false declarations. The harmonisation of procedures will again imply far-reaching amendments. As such, it must be considered whether this can be resolved because a country such as Spain, for instance, does not have the measure of detention for contempt.

5. Other measures

Question 10

Which other measures at EU level do you propose to increase the transparency of debtors' assets?

130. Some suggestions have been made under Question 1 above, such as VAT records, information concerning whether the debtor complies with his tax obligations and whether there are legal proceedings pending against the debtor. The registers that keep credit ratings up to date and that are accessible to financial institutions could also be made accessible to creditors under certain conditions.
131. One point that has not yet been elaborated on is the explanatory notes to balance sheets that are filed at the commercial registers. On many balance sheets, there is too little specification or explanation about the actual composition of assets and

DE HAAN & MULDER
ABOGADOS • ADVOCATEN • LAWYERS

liabilities. An item such as liabilities provides too little information if one does not know what these relate to. Likewise, it is not always clear with regard to many other obligations, such as leases, whether these have a value and what that value then is. On the other hand, one cannot force a debtor to disclose too much information if he is complying with his obligations. However, what is necessary is stricter legislation that obliges a debtor not to incur further debt if he is not sufficiently certain that he can pay it. For the rest, reference is made to the introductory comments under Question 1.

Barcelona, 15 September 2008

[signature]

Meester Jan Willem de Haan

Admitted as an *advocaat* [lawyer] in Amsterdam and *abogado* [lawyer] in Madrid and Barcelona

De Haan & Mulder

Abogados – Advocaten – Lawyers

Balmes 76

08007 BARCELONA